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THE

LAWS OF ENGLAND.

VOLUME XIX.

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THE LAWS OF ENGLAND

BEING

A COMPLETE STATEMENT OF THE WHOLE LAW OF ENGLAND.

BY

THE RIGHT HONOURABLE THE

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LORD HIGH CHANCELLOR OF GREAT BRITAIN,
1885-86, 1886-92, and 1895—1905.

AND OTHER LAWYERS.

VOLUME XIX.

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LIMITATION OF ACTIONS.
LITERARY AND SCIENTIFIC INSTITUTIONS.
LOAN SOCIETIES.
LOCAL GOVERNMENT.
LUNATICS AND PERSONS OF UNSOUND MIND.
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TITLE.	CONTRIBUTED BY.
LIEN . . .	S. A. SAMPSON, Esq., and HUBERT F. F. GREENLAND, Esq., B.A., Barristers-at-Law.
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LUNATICS AND PERSONS OF UNSOUND MIND.	R. C. ROMER, Esq., of the Lunacy Office, Royal Courts of Justice, assisted by N. ARTHUR HEYWOOD, Esq., and ARNOLD STUART MASSEY, Esq., M.A., Solicitors of the Supreme Court; revised by J. H. BOOME, Esq., and G. E. TIMINS, Esq., LL.M., Barristers-at-Law.
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MALICIOUS PROSECUTION AND PROCEDURE.	RICHARD RINGWOOD, Esq., M.A., Barrister-at-Law.

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Burial of Inmates of Lunatic Asylums - - - - ,, BURIAL AND CREMATION.
Coroner's Inquest - - - ,, CORONERS.
Criminal Lunatics - - - ,, CRIMINAL LAW AND PROCEDURE.
Divorce - - - - - - ,, HUSBAND AND WIFE.
Domicil of Lunatic - - - ,, CONFLICT OF LAWS.
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Education - - - - - ,, EDUCATION.
Insanity as a Defence in Criminal Procedure - - ,, CRIMINAL LAW AND PROCEDURE.
Limitation of Actions - - ,, LIMITATION OF ACTIONS.
Medical Practitioners - - ,, MEDICINE AND PHARMACY.
Satisfaction of Claims of Creditors against Insolvent Estates - ,, BANKRUPTCY AND INSOLVENCY.
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Coroners' Courts - -	,,	CORONERS.
County Council - - -	,,	LOCAL GOVERNMENT.
County Courts - - -	,,	COUNTY COURTS.
Courts-Martial - - -	,,	COURTS; ROYAL FORCES.
Distress; Distress Warrants	,,	DISTRESS.
Evidence - - - -	,,	EVIDENCE.
Extradition - - -	,,	EXTRADITION.
False Imprisonment - -	,,	TRESPASS.
Guardians of the Poor -	,,	POOR LAW.
Highways - - -	,,	HIGHWAYS, STREETS, AND BRIDGES.
Hundred Courts - -	,,	COURTS.
Industrial Schools - -	,,	EDUCATION.
Inebriate Reformatories -	,,	INTOXICATING LIQUORS.
Juries - - - -	,,	JURIES.
Justices' Protection - -	,,	PUBLIC AUTHORITIES AND PUBLIC OFFICERS.
Licensing Authorities; Licensing - - -	,,	INTOXICATING LIQUORS; INNS AND INNKEEPERS; LOCAL GOVERNMENT; THEATRES, AND OTHER PLACES OF ENTERTAINMENT.
Limitation of Actions -	,,	LIMITATION OF ACTIONS.
Local Courts - - -	,,	COURTS.
Local Government - -	,,	LOCAL GOVERNMENT.
Lunatics; Pauper Lunatics	,,	LUNATICS AND PERSONS OF UNSOUND MIND.
Malicious Prosecution -	,,	MALICIOUS PROSECUTION AND PROCEDURE.
Pauper Settlements; Removal	,,	POOR LAW.
Police - - - -	,,	POLICE.
Poor Law - - -	,,	POOR LAW.
Prisons - - - -	,,	PRISONS.
Rating - - - -	,,	RATES AND RATING.
Reformatories - - -	,,	EDUCATION.
Revenue Authorities - -	,,	REVENUE.
School Attendance etc. Orders	,,	EDUCATION.
Seamen - - - -	,,	ADMIRALTY; SHIPPING AND NAVIGATION.
Search Warrants - -	,,	CRIMINAL LAW AND PROCEDURE.
Separation Order - -	,,	HUSBAND AND WIFE.
Sheriffs - - - -	,,	SHERIFFS AND BAILIFFS.

NOTE.—For Criminal Law generally and the procedure upon inquiry into indictable offences, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 229 *et seq.*. For particular offences triable summarily, reference is directed to the titles throughout the work which deal with the subject-matter of the offences.—EDS.

MAIN ROADS.

See HIGHWAYS, STREETS, AND BRIDGES.

MAINTENANCE.

See BASTARDY; HUSBAND AND WIFE; INFANTS AND CHILDREN; LUNATICS AND PERSONS OF UNSOUND MIND; POOR LAW; SETTLEMENTS; WILLS.

MAINTENANCE AND CHAMPERTY.

See ACTION.

MALICIOUS DAMAGE.

See AGRICULTURE; CRIMINAL LAW AND PROCEDURE; DAMAGES; TORT.

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For Action - - - -	*See title*	ACTION; LIMITATION OF ACTIONS.
Bailiffs - - - -	,,	COUNTY COURTS; SHERIFFS AND BAILIFFS.
Conspiracy - - - -	,,	CRIMINAL LAW AND PROCEDURE; TORT; TRADE AND TRADE UNIONS.
Contempt of Court - -	,,	CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL.
Criminal Law and Procedure	,,	CRIMINAL LAW AND PROCEDURE.
Damages - - - -	,,	DAMAGES.
Debtors Act - - -	,,	BANKRUPTCY AND INSOLVENCY.
Distress - - - -	,,	DISTRESS.
Evidence - - - -	,,	EVIDENCE.
Execution - - - -	,,	EXECUTION.
False Imprisonment - -	,,	TRESPASS.
Injunction - - - -	,,	INJUNCTION.
Juries - - - -	,,	JURIES.
Jurisdiction - - -	,,	COUNTY COURTS; COURTS; PRACTICE AND PROCEDURE.
Justices - - - -	,,	MAGISTRATES.
Libel - - - - -	,,	LIBEL AND SLANDER.
Magistrates - - -	,,	MAGISTRATES.
Malice - - - -	,,	DAMAGES; LIBEL AND SLANDER; TORT.
Malicious Injury to Property	,,	CRIMINAL LAW AND PROCEDURE.
Mandamus - - - -	,,	CROWN PRACTICE.
Misrepresentation - -	,,	MISREPRESENTATION AND FRAUD.
Mistake - - - -	,,	EQUITY; MISTAKE.
Negligence - - - -	,,	NEGLIGENCE.
Practice - - - -	,,	ADMIRALTY; COUNTY COURTS; EXECUTORS AND ADMINISTRATORS; HUSBAND AND WIFE; PRACTICE AND PROCEDURE.
Public Authorities and Public Officers - - - -	,,	PUBLIC AUTHORITIES AND PUBLIC OFFICERS.
Search Warrants - - -	,,	CRIMINAL LAW AND PROCEDURE.
Sheriffs - - - -	,,	SHERIFFS AND BAILIFFS.
Slander - - - -	,,	LIBEL AND SLANDER.
Tort, Principles of - -	,,	TORT.
Trespass - - - -	,,	TRESPASS.
Trustee in Bankruptcy - -	,,	BANKRUPTCY AND INSOLVENCY.

MALTA.

See DEPENDENCIES AND COLONIES.

MANDAMUS.

See CROWN PRACTICE; MAGISTRATES.

MANOR.

See COPYHOLDS; REAL PROPERTY AND CHATTELS REAL.

MANORIAL COURTS.

See COPYHOLDS; COURTS.

MANSLAUGHTER.

See CRIMINAL LAW AND PROCEDURE.

MAP.

See EVIDENCE.

MARGARINE.

See FOOD AND DRUGS.

MARINE INSURANCE.

See INSURANCE; SHIPPING AND NAVIGATION.

MARINE STORES.

See CRIMINAL LAW AND PROCEDURE; TRADE AND TRADE UNIONS.

MARINERS.

See CRIMINAL LAW AND PROCEDURE; FISHERIES; MASTER AND SERVANT; SHIPPING AND NAVIGATION.

MARITIME COURTS.

See ADMIRALTY; COURTS; SHIPPING AND NAVIGATION.

MARITIME LIEN.

See LIEN; SHIPPING AND NAVIGATION.

MARKET GARDEN.

See AGRICULTURE.

MARKET OVERT.

See CRIMINAL LAW AND PROCEDURE; MARKETS AND FAIRS; SALE OF GOODS.

ABBREVIATIONS

USED IN THIS WORK.

A. C. (preceded by date) ..	Law Reports, Appeal Cases, House of Lords, since 1890 (*e.g.* [1891] A. C.)
A.-G.	Attorney-General
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1811
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826
Adv.-Gen. .. .	Advocate-General
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649
Amb.	Ambler's Reports, Chancery, 2 vols., 1725—1783
And.	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740
Anon.	Anonymous
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)
Ashb.	Ashburner's Principles of Equity, 1902
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani
B. & Ad...	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870
Bac. Abr.	Bacon's Abridgment
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854
Baild.	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814
Bankr. & Ins. R. ..	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855

Bar. & Arn.	Barron & Arnold's Election Cases, 1 vol., 1843—1846
Bar. & Aust.	Barron & Austin's Election Cases, 1 vol., 1842
Barn. (CH.)	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741
Barn. (K. B.)	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734
Barnes	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760
Batt.	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826
Beat.	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830
Beav.	Beavan's Reports, Rolls Court, 36 vols., 1838—1866
Beav. & Wal.	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846
Beaw.	Beawes's Lex Mercatoria
Bellewe	Bellewe's Cases *temp.* Richard II., King's Bench, 1 vol.
Bell, C. C.	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860
Bell, Ct. of Sess. ..	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792
Bell, Ct. of Sess. fol. ..	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795
Bell, Dict. Dec. ..	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833
Bell, Sc. App.	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850
Belt's Sup.	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756
Benl.	Benloe's (or Bendloe's) Reports, King's Bench and Common Pleas, fol., 1 vol., 1515—1627
Ben. & D.	Benloe and Dalison's Reports, Common Pleas, fol., 1 vol., 1357—1579
Bing.	Bingham's Reports, Common Pleas, 10 vols., 1822—1834
Bing. (N. C.)	Bingham's New Cases Common Pleas, 6 vols., 1834—1840
Bitt. Prac. Cas.	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876
Bitt. Rep. in Ch. ..	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884
Bl. Com...	Blackstone's Commentaries
Bl. D. & Osb.	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848
Bli.	Bligh's Reports, House of Lords, 4 vols., 1819—1821
Bli. (N. S.)	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837
Bos. & P.	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804
Bos. & P. (N. R.) ..	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807
Bract.	Bracton De Legibus et Consuetudinibus Angliæ
Bro. Abr.	Sir J. Brooke's Abridgment
Bro. C. C.	W. Brown's Chancery Reports, 4 vols., 1778—1794
Bro. Ecc. Rep.	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872
Bro. (N. C.)	Sir R. Brooke's New Cases, 1 vol., 1515—1558
Bro. Parl. Cas.	J. Brown's Cases in Parliament, 8 vols., 1702—1800
Bro. Supp. to Mor. ..	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.
Bro. Synop.	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827
Brod. & Bing.	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822

Brod. & F.	Brodrick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864
Broun	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845
Brown. & Lush. ..	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866
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Buchan.	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813
Buck	Buck's Cases in Bankruptcy, 1 vol., 1816—1820
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Burr. S. C.	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776
Burrell	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840
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C. B.	Common Bench Reports, 18 vols., 1845—1856
C. B. (N. S.)	Common Bench Reports, New Series, 20 vols., 1856—1865
C. C. A.	Court of Criminal Appeal
C. C. Ct. Cas.	Central Criminal Court Cases (Sessions Papers), 1834—(current)
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Cab. & El.	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885
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Solicitors - - - - -	,,	SOLICITORS.
Stockbrokers - - - -	,,	STOCK EXCHANGE.
Stoppage in Transitu - -	,,	SALE OF GOODS.
Suretyship - - - - -	,,	GUARANTEE.
Trustees - - - - -	,,	TRUSTS AND TRUSTEES.
Vendors of Goods - - -	,,	SALE OF GOODS.
Work and Labour - - -	,,	WORK AND LABOUR.

Part I.—Definition and Nature.

Lien.

Primary sense.

Possession as a rule essential.

1. Lien in its primary sense is a right in one man to retain that which is in his possession belonging to another until certain demands of the person in possession are satisfied (*a*). In this primary sense it is given by law and not by contract; for contract supersedes lien and limits the rights of the person claiming under contract to those contracted for (*b*). Such a lien does not as a rule arise until possession of the property is obtained (*c*), but in exceptional cases possession is not essential to constitute a common law lien, as for instance in the cases of liens for seamen's wages and bottomry bonds (*d*).

(*a*) *Hammonds* v. *Barclay* (1802), 2 East, 227, 235; *Re Holmes, Ex parte Heywood* (1815), 2 Rose, 355; *Lickbarrow* v. *Mason* (1793), 6 East, 20, n., 27, H. L. As regards common law liens, this title deals only with the general principles applicable to such liens; for the law relating to the liens which arise in particular trades and professions, reference should be made to the titles (see the cross references, *supra*) dealing with such trades and professions.

(*b*) *Walker* v. *Birch* (1795), 6 Term Rep. 258; *Re Leith's Estate, Chambers* v. *Davidson* (1866), L. R. 1 P. C. 296, 305; *Fisher* v. *Smith* (1878), 4 App. Cas. 1. Lien is sometimes spoken of as arising by contract, but such a lien is in the nature of a pledge (*Gladstone* v. *Birley* (1817), 2 Mer. 401, 404; see p. 9, *post*, and title PAWNS AND PLEDGES). As to how far a written agreement to give a lien is a bill of sale, see *Great Eastern Railway* v. *Lord's Trustee*, [1909] A. C. 109; and see title BILLS OF SALE, Vol. III., p. 7. As regards possessory liens, the rules in courts of law and courts of equity under the old practice were the same (*Gladstone* v. *Birley, supra; Oxenham* v. *Esdaile* (1828), 2 Y. & J. 493; see *Heywood* v. *Waring* (1815), 4 Camp. 291).

(*c*) *Kinloch* v. *Craig* (1789), 3 Term Rep. 119; and see *Shaw* v. *Neale* (1858), 6 H. L. Cas. 581, 601.

(*d*) Cross, Law of Lien, 4. Equitable liens, in which is included the lien of consignees in England for supplies furnished for West Indian estates (see p. 22, *post*), arise independently of possession (see p. 14, *post*). As to maritime liens, see p. 23, *post*, and title ADMIRALTY, Vol. I., pp. 61, 67, 69, 72 *et seq.*; and see title SHIPPING AND NAVIGATION.

Classification.

Possessory liens are divided into general liens (*e*) and particular liens (*f*).

Nature of lien.

2. A lien is a right of defence, not a right of action, and consequently can be claimed in respect of a statute-barred debt (*g*). But a lien does not, except in special circumstances, give any right to sell the thing retained (*h*), nor can the lien itself be assigned (*i*). Accordingly, a lien, being merely a personal right, which continues during possession of the goods, cannot be taken in execution (*k*). In the case of a perishable article, such as a horse, the party claiming the lien is bound to take reasonable care of such article (*l*), but, generally, a person having a lien on a chattel who keeps it for the purpose of enforcing his lien cannot make any claim against the owner for so keeping (*m*).

Essential incidents.

3. The possession must be rightful (*n*), it must not be for a particular purpose (*o*), and it must be continuous (*p*).

The debt in respect of which a lien is claimed must be due, not accruing (*q*). Therefore a contract for a particular mode of future payment which precludes any implied contract for immediate payment does not give rise to a lien even in the case of labour

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(*e*) See p. 7, *post*.

(*f*) See p. 10, *post*.

(*g*) See title LIMITATION OF ACTIONS, p. 41, *post*; and see *Higgins* v. *Scott* (1831), 2 B. & Ad. 413, in which case possession was not necessary; a sheriff had levied execution for costs under a judgment and realised a sum of cash; the lien was claimed by the attorney in respect of his costs against his own client, the party at whose instance execution had been levied, and was allowed, though the attorney could not have sued the client because his claim would have been statute-barred.

(*h*) See p. 25, *post*.

(*i*) *Wilkins* v. *Carmichael* (1779), 1 Doug. (K. B.) 101. But a purchaser of an article which is subject to a lien having called upon his vendor to pay off the sum claimed can himself pay off that sum in order to obtain possession of what he has purchased and sue the vendor for any sum properly so paid (*Bevan* v. *Waters* (1828), 3 C. & P. 520). As to delivery of goods by a person who has a lien thereon to another person so as to preserve his lien, see *M'Combie* v. *Davies* (1805), 7 East, 5. The statutory right to pledge conferred on factors (see title AGENCY, Vol. I., pp. 205 *et seq.*) arises entirely by statute, and is an exception to the general rule (*Cole* v. *North Western Bank* (1875), L. R. 10 C. P. 354, Ex. Ch.).

(*k*) *Legg* v. *Evans* (1840), 6 M. & W. 36. As to what can be seized in execution, see title EXECUTION, Vol. XIV., pp. 44 *et seq.*

(*l*) *Scarfe* v. *Morgan* (1838), 4 M. & W. 270. It must be kept in a reasonable place and with reasonable care (*Great Western Rail. Co.* v. *Crouch* (1858), 3 H. & N. 183, Ex. Ch.). Possibly a railway company having a horse in its possession, for the care of which it has to incur charges, may have a lien for such charges (*Great Northern Rail. Co.* v. *Swaffield* (1874), L. R. 9 Exch. 132). As to a railway company's lien for food supplied to animals, see title CARRIERS, Vol. IV., p. 40.

(*m*) *Somes* v. *British Empire Shipping Co.* (1860), 8 H. L. Cas. 338. As to enforcement of lien, see p. 25, *post*.

(*n*) See p. 4, *post*.

(*o*) See p. 5, *post*.

(*p*) *Forth* v. *Simpson* (1849), 13 Q. B. 680; *Kruger* v. *Wilcox* (1755), Amb. 252; *Sweet* v. *Pym* (1800), 1 East, 4; see p. 6, *post*.

(*q*) *Crawshay* v. *Homfray* (1820), 4 B. & Ald. 50; *Wehner* v. *Dene Steam Shipping Co.*, [1905] 2 K. B. 92, 101.

PART I. Definition and Nature.

expended on a chattel (*r*). It is immaterial whether the contract for future payment is an express contract or is implied from usage of trade (*s*).

Effect of void agreement.

An agreement which is void from the beginning for want of legal formalities cannot give rise to a right of lien (*t*), but an agreement to do something which is illegal, as, for instance, to do certain work on Sunday, can give rise to a lien if the work is done (*a*).

Secondary sense.

Non-possessory lien.

4. A lien in its secondary sense, where the person claiming the lien has not got possession of the thing in respect of which the lien is claimed, is either judicial or equitable (*b*). Judicial liens are obligations established by judgments or orders of courts of justice binding the property, but giving no right of possession (*c*). Equitable liens are founded upon the consideration of a duty or implied intention on the part of the owner to make property answerable for a specific claim (*d*).

Part II.—Possession Requisite for Existence.

SECT. 1.—*Wrongful Possession.*

Possession wrongfully obtained.

5. No lien can be obtained by wrongful possession (*e*); thus a person who has obtained possession of the property of another by misrepresentation cannot set up a lien to which he might otherwise have been entitled (*f*); and a person paying freight duty or other charges in respect of goods of which he has obtained possession wrongfully cannot retain the goods pending repayment of such freight duty or charges (*g*). So a person cannot have a lien over property which he has acquired in an assumed character (*h*). Agents who have been employed by a person who subsequently

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(*r*) *Chase* v. *Westmore* (1816), 5 M. & S. 180; *Crawshay* v. *Homfray* (1820), 4 B. & Ald. 50; and see titles BAILMENT, Vol. I., p. 561; WORK AND LABOUR; and p. 13, *post*.

(*s*) *Raitt* v. *Mitchell* (1815), 4 Camp. 146. As to such a usage, see title CUSTOM AND USAGES, Vol. X., p. 280. No lien is created on a fund the subject of litigation by an agreement to share the proceeds of such litigation (*Alexander* v. *Hammond* (1854), 3 W. R. 145).

(*t*) *Fergusson* v. *Norman* (1838), 5 Bing. (N. C.) 76.

(*a*) *Scarfe* v. *Morgan* (1838), 4 M. & W. 270, 282; and, generally, as to work done on Sundays, see titles FACTORIES AND SHOPS, Vol. XIV., pp. 490, 508; TIME.

(*b*) Fisher, Law of Mortgage, 6th ed., para. 466; and see p. 14, *post*.

(*c*) Fisher, Law of Mortgage, 6th ed., para. 467; and see, generally, titles ESTOPPEL, Vol. XIII., pp. 328 *et seq.*; JUDGMENTS AND ORDERS, Vol. XVIII., pp. 175 *et seq.*

(*d*) Fisher, Law of Mortgage, 6th ed., para. 504. As to equitable lien, see pp. 14 *et seq.*, *post*.

(*e*) *Griffiths* v. *Hyde* (1809), 2 Selwyn, Law of Nisi Prius, 1320; *Bernal* v. *Pim* (1835), 1 Gale, 17, 20.

(*f*) *Madden* v. *Kempster* (1807), 1 Camp. 12.

(*g*) *Lempriere* v. *Pasley* (1788), 2 Term Rep. 485; *Stone* v. *Lingwood* (1725), 1 Stra. 651. The latter case was doubted by Lord MANSFIELD, C.J., in *Green* v. *Farmer* (1768), 4 Burr. 2214, 2218, but is believed to be good law.

(*h*) *Wickens* v. *Townshend* (1830), 1 Russ. & M. 361, *per* Lord LYNDHURST, L.C., at p. 363.

SECT. 1. Wrongful Possession.

becomes bankrupt cannot by obtaining possession, after the bankruptcy, of goods which belonged to the bankrupt, either through an act of the bankrupt (*i*) or of their own (*j*), retain the goods, as against the bankrupt's trustee, until moneys due to them from the bankrupt are paid.

Wrongful act of third party.

It is immaterial, subject to certain exceptions (*k*), that the wrongful act is done by some third party, for at common law a person in possession of goods cannot, either by sale or pledge, confer a better title than he himself has (*l*). But this rule does not apply where the article on which the lien is claimed is a negotiable instrument, in which case the person who has obtained possession without notice of any wrong-doing can retain it (*m*), or where the party who wrongfully handed over the goods is acting under the Factors Act, 1889 (*n*).

SECT. 2.—*Possession obtained for a Particular Purpose.*

Possession obtained for a particular purpose only.

6. Although a person may by law be entitled to a general lien on property of another coming to his hands, yet such general lien may be excluded if by the contract between the parties the property is placed in his hands only for a particular purpose (*o*). Such particular purpose may be shown by a document signed by the person receiving the property (*p*), or by letters written by the owner at the time of the deposit directing what is to be done with it (*q*), or by verbal conversation duly proved (*r*), or by correspondence between

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(*i*) *Nichols* v. *Clent* (1817), 3 Price, 547.

(*j*) *Taylor* v. *Robinson* (1818), 2 Moore (C. P.), 730. As to the effect of bankruptcy on lien, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 117, 224.

(*k*) See the text, *infra*, and p. 24, *post*.

(*l*) *Buxton* v. *Baughan* (1834), 6 C. & P. 674; *Cole* v. *North Western Bank* (1875), L. R. 10 C. P. 354, 362; but a wharfinger having in his possession goods bearing a fraudulent trade-mark is not thereby deprived of his lien for his charges (*Moet* v. *Pickering* (1878), 8 Ch. D. 372, C. A.). As to the rights of the true owner of a chattel against an innocent holder, see *Hartop* v. *Hoare* (1743), 3 Atk. 44.

(*m*) *Brandao* v. *Barnett* (1846), 12 Cl. & Fin. 787, 805, H. L.; Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 27 (3); see title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 498.

(*n*) 52 & 53 Vict. c. 45, s. 2. As to the power of a factor to pledge goods of his principal, see titles AGENCY, Vol. I., p. 205; BANKRUPTCY AND INSOLVENCY, Vol. II., p. 169. As to the course of legislation by which the Factors Acts were passed, see *Cole* v. *North Western Bank*, *supra*. Although factors have a general lien for all moneys due to them (see p. 7, *post*), the lien obtained on goods of which possession is obtained from them is, in the absence of an agreement, only a particular lien against the true owner (*Kaltenbach* v. *Lewis* (1885), 10 App. Cas. 617).

(*o*) *Walker* v. *Birch* (1795), 6 Term Rep. 258; *Brandao* v. *Barnett*, *supra*; and see title BANKERS AND BANKING, Vol. I., p. 621.

(*p*) *Walker* v. *Birch*, *supra* (receipt by cotton brokers for cotton, undertaking to account for proceeds of sale).

(*q*) *Buchanan* v. *Findlay* (1829), 9 B. & C. 738 (bills remitted and directions given how the proceeds were to be applied); see also *Snaith* v. *Burridge* (1812), 4 Taunt. 684 (letter with bill of lading of ship's stores directing such stores to be handed over to Government).

(*r*) *Key* v. *Flint* (1817), 8 Taunt. 21 (bill deposited for purpose of raising money); *Burn* v. *Brown* (1817), 2 Stark. 272 (ship's certificate deposited by master of the ship with factors to enable them to pay duties); *Humphries*

SECT. 2. Possession obtained for a Particular Purpose.

the parties (*s*). But the correspondence or evidence may only be sufficient to give the particular purpose priority over the general lien, which may be valid subject to such purpose (*t*). If it be the intention that deeds or papers deposited for a particular purpose are not to be subject to a general lien arising by custom, such deposit should be accompanied by a special agreement (*u*). Where the particular purpose is at an end and the documents are allowed to remain in the hands of a person, *e.g.*, a solicitor who is entitled by custom to a general lien, such general lien is good (*v*).

SECT. 3.—*Possession must be Continuous.*

Continuity of possession.

7. It is essential to a possessory lien that the person claiming it should have the right of continued possession of the article in respect of which the lien is claimed, even where the care and skill exercised by such person would, on general principles, give rise to a right of lien (*w*). Thus a trainer of a racehorse, who would on general principles have a lien because of his care and skill in improving the horse, has no lien if the owner can remove the horse to send him to run in races (*x*); and a livery stable keeper taking in a horse which is to be removed from time to time and ridden by the owner (*y*), and a person taking in cows on agistment, to feed on his grass, which are to be removed to be milked by the owner, have no lien (*a*).

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v. *Wilson* (1819), 2 Stark. 566 (bill deposited for purpose of being discounted, and after payment of particular debt balance to be paid to depositor); *Brandao* v. *Barnett* (1846), 12 Cl. & Fin. 787, H. L. (Exchequer bills handed to banker to be exchanged at maturity for new bills). Of course the facts of the case may be sufficient to show the purpose of the deposit; for instance, deeds relating to property proposed to be mortgaged which are delivered to a solicitor for the purpose of drawing the mortgage cannot be retained against the mortgagee until a debt due by the mortgagor is paid (*Lawson* v. *Dickenson* (1724), 8 Mod. Rep. 306). As to a solicitor's lien, see p. 23, *post*, and title SOLICITORS.

(*s*) *Bock* v. *Gorrissen* (1860), 2 De G. F. & J. 434 (bonds purchased by merchants in London on account of merchants in Hamburg to be retained in London for safe custody).

(*t*) *Frith* v. *Forbes* (1862), 4 De G. F. & J. 409, C. A.

(*u*) *Ex parte Sterling* (1809), 16 Ves. 258.

(*v*) *Ex parte Sterling, supra; Ex parte Pemberton* (1810), 18 Ves. 282.

(*w*) *Forth* v. *Simpson* (1849), 13 Q. B. 680; see *Great Eastern Railway* v. *Lord's Trustee*, [1909] A. C. 109.

(*x*) *Forth* v. *Simpson, supra.* It had been held in *Bevan* v. *Waters* (1828), 3 C. & P. 520, and apparently in *Jacobs* v. *Latour* (1828), 5 Bing. 130, that a trainer had a lien, but it is pointed out in *Jackson* v. *Cummins* (1839), 5 M. & W. 342, that the judge had overlooked the usage that an owner may remove a racehorse to run races. At the same time, when a horse is delivered to a trainer to be trained for a particular race, the trainer may set up a lien until he delivers the horse over to be run in that particular race (*Jackson* v. *Cummins, supra; Forth* v. *Simpson, supra*).

(*y*) *Scarfe* v. *Morgan* (1838), 4 M. & W. 270, 283. A livery stable keeper is unable to claim a lien in the absence of agreement on two grounds: (1) that his possession is not exclusive, and (2) that he does nothing to improve the horse (*Wallace* v. *Woodgate* (1824), Ry. & M. 193; *Judson* v. *Etheridge* (1833), 1 Cr. & M. 743); see also *Donatty* v. *Crowther & Kelly* (1826), 11 Moore (C. P.), 479; *Orchard* v. *Rackstraw* (1854), 9 C. B. 698; compare *Re Sillence, Ex parte Roy* (1877), 7 Ch. D. 70. As to an innkeeper's lien on the horse of his guest, see title INNS AND INNKEEPERS, Vol. XVII., p. 325.

(*a*) *Jackson* v. *Cummins, supra; Chapman* v. *Allen* (1632), Cro. Car. 271. In

Whether there is a right of continuous possession or not depends on the nature of the particular contract or the custom applicable to the subject-matter (*b*). SECT 3. Possession must be Continuous.

Part III.—General Lien.

8. A general lien entitles a person in possession of chattels to retain them until all claims or accounts of the person in possession against the owner of the chattel are satisfied (*c*). It can only exist (1) by virtue of the course of dealing between the parties in a particular case; (2) as a common law right arising from continuous and well-recognised usage; or (3) by express agreement (*d*). Nature.

General liens are discouraged (*e*), but where the usage has been frequently recognised the right of lien becomes part of the common law, and is accepted by the courts without further evidence (*f*). Discouraged in law.

Such a general lien has been established (*g*) in the case of solicitors (*h*), bankers (*i*), factors (*j*), stockbrokers (*k*), warehouse-keepers (*l*), and insurance brokers (*m*). Instances.

Richards v. *Symons* (1845), 8 Q. B. 90, a lien given to an agister by agreement was not lost by the removal of the agisted animal; and see title ANIMALS, Vol. I., p. 387. For form of agreement for agistment of cattle, see Encyclopædia of Forms and Precedents, Vol. I., p. 425.

(*b*) *Forth* v. *Simpson* (1849), 13 Q. B. 680, *per* PATTESON, J., at p. 685.

(*c*) 2 Selwyn, Law of Nisi Prius, 1312. In *R.* v. *Humphery* (1825), M'Cle. & Yo. 173, a wharfinger's general lien was held to prevail against an extent by the Crown.

(*d*) *Green* v. *Farmer* (1768), 4 Burr. 2214, 2221; *Houghton* v. *Matthews* (1803), 3 Bos. & P. 485, 494; *Kirchner* v. *Venus* (1859), 12 Moo. P. C. C. 361; *Bock* v. *Gorrissen* (1860), 2 De G. F. & J. 434, 443.

(*e*) "General liens are a great inconvenience to the bulk of the generality of traders because they give a particular advantage to certain individuals who claim to themselves a special privilege against the body of creditors at large instead of coming in with them for an equal share of the insolvent estate. All these general liens infringe upon the system of the bankrupt laws, the object of which is to distribute the debtor's estate proportionately among all the creditors, and they ought not to be encouraged" (*Rushforth* v. *Hadfield* (1805), 6 East, 519, *per* LE BLANC, J., at p. 528). "Growing liens are an encroachment upon the Common Law" (*Rushforth* v. *Hadfield* (1806), 7 East, 224, *per* Lord ELLENBOROUGH, C.J., at p. 229). As to effect of bankruptcy on a creditor's lien, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 117, 224; and p. 10, *post*.

(*f*) *Brandao* v. *Barnett* (1846), 12 Cl. & Fin. 787, 805, H. L.; and see title CUSTOM AND USAGES, Vol. X., pp. 272, 273.

(*g*) 2 Selwyn, Law of Nisi Prius, 1314, referring to PARKE, B., in *Turner* v. *Deane* (1849), 3 Exch. 836, states that attorneys, bankers, and factors are the only persons having such a general lien, but PARKE, B., merely instances these persons as having a general lien.

(*h*) As to the lien of attorneys originally recognised by Lord MANSFIELD, C.J., in *Wilkins* v. *Carmichael* (1779), 1 Doug. (K. B.) 101, see *Cowell* v. *Simpson* (1809), 16 Ves. 275; and title SOLICITORS.

(*i*) As to the lien of bankers, see *Davis* v. *Bowsher* (1794), 5 Term Rep. 488; *Brandao* v. *Barnett* (1846), 12 Cl. & Fin. 787, H. L.; and title BANKERS AND BANKING, Vol. I., pp. 620 *et seq.* As to a banker's right to set off a debit balance on a private account against a credit balance on an office account, see *Teale* v. *Brown & Co.* (1894), 11 T. L. R. 56. The general lien of a

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(*j*), (*k*), (*l*), (*m*) For notes (*j*), (*k*), (*l*), and (*m*), see next page.

PART III. General Lien.

General lien by course of dealing.

9. Where there is a general course of dealing between a merchant and a factor, the latter may retain the goods of the former for the general balance due to him (*n*). In order to obtain a general lien as a factor an agent must be entrusted with possession of the goods for the purpose of a sale, though a limit may be placed on the price, and though the factor may not sell in his own name, but an agent who has not possession of the goods is not entitled to a general lien as a factor (*o*). The lien extends to the price of the goods sold by the factor on behalf of the merchant (*p*), which price may be received after the bankruptcy of the merchant (*q*), and the lien is good, notwithstanding the bankruptcy of the factor, with the result that a purchaser of goods, from a factor indebted to him, can set off the price against his own debt not only against the factor, but also against the real vendor of the goods (*r*). As in all other cases of general lien, the lien is excluded where the goods are deposited for a specific purpose (*a*), or where the transaction in

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banker does not extend to securities of the customer known by the banker to be affected by a trust (*Cuthbert* v. *Robarts, Lubbock & Co.*, [1909] 2 Ch. 226, C. A.).

(*j*) As to the lien of factors, see also title AGENCY, Vol. I., pp. 197 *et seq.* But this lien is confined to factors strictly, and does not extend to all cases of principal and agent (*Bock* v. *Gorrissen* (1860), 2 De G. F. & J. 434; see also *Bowman* v. *Malcolm* (1843), 11 M. & W. 833; *Harrison* v. *Scott* (1846), 5 Moo. P. C. C. 357). In *Naylor* v. *Mangles* (1794), 1 Esp. 109, and *Spears* v. *Hartly* (1800), 3 Esp. 81, wharfingers were stated to have a general lien, and see *R.* v. *Humphery* (1825), M'Cle. & Yo. 173; but this is not the case everywhere, at all events not in Hull; see title CUSTOM AND USAGES, Vol. X., p. 283. Packers, being in the nature of factors, have a general lien (*Green* v. *Farmer* (1768), 4 Burr. 2214, 2222; *Re Witt, Ex parte Shubrook* (1876), 2 Ch. D. 489, C. A.; *Ex parte Deeze* (1748), 1 Atk. 228). Calico printers appear to have a general lien for work done in their business, but not for money lent or in respect of any other matter (*Weldon* v. *Gould* (1801), 3 Esp. 268), but this is an exceptional case of a tradesman having more than a particular lien for work done; and see p. 12, *post.*

(*k*) *Jones* v. *Peppercorne* (1858), John. 430; *Re London and Globe Finance Corporation*, [1902] 2 Ch. 416; *Hope (John D.) & Co.* v. *Glendinning*, [1911] A. C. 419. See, further, title STOCK EXCHANGE.

(*l*) *Hill & Sons* v. *London Central Markets Cold Storage Co., Ltd.* (1910), 102 L. T. 715; but see *Leuckhart* v. *Cooper* (1836), 3 Bing. (N. C.) 99. The conduct of the parties in any particular case may show that no general lien was intended (*Hill & Sons* v. *London Central Markets Cold Storage Co., Ltd., supra*).

(*m*) *Hewison* v. *Guthrie* (1836), 2 Bing. (N. C.) 755; *Mann* v. *Forrester* (1814), 4 Camp. 60; and see *Hunter* v. *Leathley* (1830), 10 B. & C. 858; *Fisher* v. *Smith* (1878), 4 App. Cas. 1. As to an insurance broker's statutory lien on a policy of marine insurance, see title INSURANCE, Vol. XVII., pp. 351, 352.

(*n*) *Kruger* v. *Wilcox* (1755), Amb. 252. The balance may include any moneys which will become due on bills accepted by the factor on behalf of the merchant (*Re Fawcus, Ex parte Buck* (1876), 3 Ch. D. 795). This rule applies only to goods dealt with in the ordinary course of business (*Compston* v. *Haigh* (1836), 5 L. J. (C. P.) 99). For form of agreement for lien on goods between merchant or manufacturer and factor, see Encyclopædia of Forms and Precedents, Vol. I., p. 296.

(*o*) *Stevens* v. *Biller* (1883), 25 Ch. D. 31, C. A.

(*p*) *Kruger* v. *Wilcox, supra; Drinkwater* v. *Goodwin* (1775), 1 Cowp. 251.

(*q*) *Robson* v. *Kemp* (1803), 4 Esp. 233. The lien exists until all debts of the bankrupt for which the factor is liable are paid (*Foxcraft* v. *Wood* (1828), 4 Russ. 487).

(*r*) *Hudson* v. *Granger* (1821), 5 B. & Ald. 27. As to the extension of the lien to a policy of marine insurance, see title INSURANCE, Vol. XVII., pp. 351, 352.

(*a*) *Walker* v. *Birch* (1795), 6 Term Rep. 258; see p. 5, *ante.*

respect of which the claim arises was not one in which the factor was acting as such on behalf of the person against whom he claims the lien (*b*).

General lien by usage.

10. To establish a general lien in a particular case, for instance, in a particular locality arising by usage, the usage must be certain and reasonable and so universally acquiesced in that everyone in the trade knew of or on inquiry could have ascertained its existence (*c*). To establish a general lien of this nature there must be satisfactory evidence of ancient, numerous, and important instances of its exercise; if the evidence is sufficient to establish the usage, the parties are presumed to be aware of, and are bound by, the usage (*d*). The question whether the lien exists is one of fact (*e*).

A particular lien arising by agreement on property deposited overrides the general lien of the depositee on such property arising by virtue of usage (*f*).

General lien by contract.

11. Lien in its proper sense is a right which the law gives. But it is usual to speak of lien by contract, though such lien is more in the nature of an agreement for a pledge (*g*). If a mercantile relation which might involve a lien is created by a written contract and security is given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security excludes lien, and limits their rights by the extent of the express contract made by them (*h*). Evidence of usage of a particular place, to add to or affect the construction of a written contract, may, however, be admitted, on the principle that the parties who made the contract were both cognisant of the usage and are presumed to have made their agreement with reference to it, but there can be no such presumption if either party is ignorant of the usage (*i*).

Lien arising from notice.

An express agreement for a general lien may be made not only between individuals, but by articles of association of a limited

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(*b*) *Houghton* v. *Matthews* (1803), 3 Bos. & P. 485; see *Compston* v. *Haigh* (1836), 5 L. J. (C. P.) 99.

(*c*) *Plaice* v. *Allcock* (1866), 4 F. & F. 1074; *Re Spotten & Co., Ex parte Provincial Bank* (1877), 11 I. R. Eq. 412. That the usage must be reasonable, see also *Leuckhart* v. *Cooper* (1836), 3 Bing. (N. C.) 99, and title CUSTOM AND USAGES, Vol. X., p. 269.

(*d*) Cross, Law of Lien, 15; approved in *Re Spotten & Co., Ex parte Provincial Bank, supra.*

(*e*) *Bleaden* v. *Hancock* (1829), 4 C. & P. 152; and see title CUSTOM AND USAGES, Vol. X., p. 254.

(*f*) *Inman* v. *Clare* (1858), John. 769; see *Frith* v. *Forbes* (1862), 4 De G. F. & J. 409, C. A. As to particular liens, see p. 10, *post.*

(*g*) *Gladstone* v. *Birley* (1817), 2 Mer. 401. See, further, title PAWNS AND PLEDGES. To constitute a lien by agreement there must be a specific appropriation of the property (*Jones* v. *Starkey* (1852), 16 Jur. 510).

(*h*) *Re Leith's Estate, Chambers* v. *Davidson* (1866), L. R. 1 P. C. 296, 305. Factors have a general lien by custom as a general rule, but where they hold on an express agreement they only have the rights given by the agreement and general lien is excluded (*Walker* v. *Birch* (1795), 6 Term Rep. 258). Where there is an express antecedent contract a lien which might otherwise be implied does not arise (*Stevenson* v. *Blakelock* (1813), 1 M. & S. 535, 543).

(*i*) *Kirchner* v. *Venus* (1859), 12 Moo. P. C. C. 361, 399; and see title CUSTOM AND USAGES, Vol. X., pp. 260, 261, 264 *et seq.*

PART III. General Lien.

company (*j*), or even by public notice given by bodies of traders that they will only do work on terms of having a general lien, but such notice must have come to the knowledge of the persons against whom the lien is claimed (*k*).

Effect of liquidation and bankruptcy.

12. The effect of an order to wind up a limited company which has entered into an agreement with some other person with whom it has dealings giving a general lien, depends, apparently, upon the wording of the agreement, but the principle appears to be that if, after the order to wind up, goods upon which the lien is claimed come into the possession of the person claiming the lien by the direction of the liquidator, with knowledge, on the part of the person claiming the lien, of the liquidation and the title of the liquidator, the general lien cannot be claimed (*l*). The same principle applies in the case of the bankruptcy of an owner who has entered into an agreement giving a general lien (*m*).

Extension of particular to general lien.

13. A particular lien cannot be extended by agreement so as to become a general lien against the goods of strangers (*n*).

Part IV.—Particular Lien.

SECT. 1.—*In General.*

Nature.

14. A particular lien is the right to retain goods until all charges incurred in respect of those goods have been paid: if the owner of the goods is willing to satisfy such charges, the goods cannot be retained until payment of the general balance due to the person having the particular lien (*o*).

(*j*) See title COMPANIES, Vol. V., pp. 168—170.

(*k*) *Kirkman* v. *Shawcross* (1794), 6 Term Rep. 14. In ascertaining the extent of the lien, the notice will be construed strictly (*Cumpston* v. *Haigh* (1836), 2 Bing. (N. C.) 449).

(*l*) *Wiltshire Iron Co.* v. *Great Western Rail. Co.* (1871), L. R. 6 Q. B. 101, 776, Ex. Ch.; but see *Re Northfield Iron and Steel Co., Ltd.* (1866), 14 L. T. 695, and *Re Llangennech Coal Co.* (1887), 56 L. T. 475, in both of which cases the lien was upheld. Where a trading company had usually shipped goods abroad under bills of lading which gave the shipowners a general lien for freight etc., and, after an order in a debenture-holders' action appointing a receiver and manager of the trading company, such receiver and manager had shipped goods under a similar bill of lading, it was held that the shipping company had no general lien which would extend to freight due before the appointment of the receiver, because he was a different person from the trading company, being an agent for the debenture-holders, and because no leave to give such lien had been granted by the court (*Whinney* v. *Moss Steamship Co., Ltd.*, [1910] 2 K. B. 813, C. A.); see also *Re Pavy's Patent Felted Fabric Co.* (1876), 1 Ch. D. 631.

(*m*) *Re Bushell, Ex parte Great Western Rail. Co.* (1882), 22 Ch. D. 470, C. A.; but see *Hawthorn* v. *Newcastle-upon-Tyne and North Shields Rail. Co.* (1840), 3 Q. B. 734, n.

(*n*) *Oppenheim* v. *Russell* (1802), 3 Bos. & P. 42; *Wright* v. *Snell* (1822), 5 B. & Ald. 350; *Leuckhart* v. *Cooper* (1836), 3 Bing. (N. C.) 99, 107; and see titles BAILMENT, Vol. I., p. 548; CARRIERS, Vol. IV., p. 93.

(*o*) *Jones* v. *Tarleton* (1842), 9 M. & W. 675.

SECT. 1. In General.

15. Particular liens have always been allowed by the common law where a party was obliged by law to receive goods; in such cases as the law imposed the burden it also gave the power of retaining for the indemnity of the party so receiving (*p*). The right of particular lien was subsequently extended to all cases where a person has expended labour and skill in the improvement of a chattel bailed to him (*q*).

Cases in which allowed.

Where a particular lien is claimed by a person who is obliged to receive the goods it is immaterial to whom they belong (*r*), unless the person receiving them knows that the person from whom he received them was a wrongdoer (*a*).

Goods of stranger.

Particular liens, being consistent with the principle of natural equity, are favoured by the law, which is construed liberally in such cases (*b*).

Favoured by law.

As general liens may arise on an established course of dealing between the parties or by express contract, it follows, *a fortiori*, that particular liens may arise in the same manner (*c*).

Established course of dealing.

SECT. 2.—*Persons under Legal Obligation to do Services.*

16. A common carrier (*d*) is under a legal obligation to carry goods (*e*), and, by way of compensation for such obligation, is entitled to retain the goods until the charge for carriage is paid (*f*).

Common carriers.

(*p*) *Naylor* v. *Mangles* (1794), 1 Esp. 109; *Robins & Co.* v. *Gray*, [1895] 2 Q. B. 501, C. A.; *Rushforth* v. *Hadfield* (1805), 6 East, 519, 525; *Yorke* v. *Grenaugh* (1703), 2 Ld. Raym. 866.

(*q*) *Jackson* v. *Cummins* (1839), 5 M. & W. 342, *per* PARKE, B., at p. 349, quoting *Bevan* v. *Waters* (1828), Mood. & M. 235 (training of a racehorse), and *Scarfe* v. *Morgan* (1838), 4 M. & W. 270 (a mare covered by a stallion). Labour must be expended to give this lien; see p. 12, *post*, and title BAILMENT, Vol. I., p. 561. Thus persons putting out a fire on a ship have a particular lien on goods saved (*Hartford* v. *Jones* (1698), 1 Ld. Raym. 393); but the mere finding and taking care of an article gives no right to a lien on it (*Nicholson* v. *Chapman* (1793), 2 Hy. Bl. 254).

(*r*) *Robins & Co.* v. *Gray, supra;* see titles CARRIERS, Vol. IV., p. 6; INNS AND INNKEEPERS, Vol. XVII., pp. 306 *et seq.*; otherwise, where a particular lien is claimed, the work must be done at the request of the owner of the goods; see p. 12, *post*.

(*a*) *Johnson* v. *Hill* (1822), 3 Stark. 172.

(*b*) *Jackson* v. *Cummins, supra; Scarfe* v. *Morgan, supra, per* PARKE, B., at p. 283.

(*c*) Cross, Law of Lien, 27. The express contract for a lien must be shown with sufficient certainty (*Robertson* v. *Showler* (1845), 13 M. & W. 609).

(*d*) As to what persons are common carriers, see title CARRIERS, Vol. IV., p. 2.

(*e*) As to the extent of a common carrier's obligations, see title CARRIERS, Vol. IV., pp. 6 *et seq.*

(*f*) See title CARRIERS, Vol. IV., pp. 92—94. The lien is not enjoyed by carmen or furniture removers who are not common carriers; see *Electric Supply Stores* v. *Gaywood* (1909), 100 L. T. 855; *Hirst* v. *Page & Co.* (1891), 7 T. L. R. 537. The right may be enlarged by agreement (*Kinnear* v. *Midland Rail. Co.* (1868), 19 L. T. 387, which case is also an authority for the application of the *ejusdem generis* doctrine to lien). For form of agreement, see Encyclopædia of Forms and Precedents, Vol. III., pp. 169, 201. As to the right of a master of a ship to a lien for freight, see *Anon.* (1701), 12 Mod. Rep. 447, 511; *Artaza* v. *Smallpiece* (1793), 1 Esp. 23; and on luggage for passage money, see *Wolf* v. *Summers* (1811), 2 Camp. 631; and as to the general rights of a master of a ship, see title SHIPPING AND NAVIGATION.

SECT. 2. Persons under Legal Obligation to do Services.

Innkeepers.

So a person who keeps a common inn, inasmuch as he is under obligation to receive and afford proper entertainment to everyone who offers himself as a guest, and safely and securely to keep the goods brought by the guest, has a lien upon such goods until the expenses of the guest's food and lodging are discharged (*g*).

SECT. 3.—*Persons who have done Work on Particular Chattels.*

Lien for work done.

17. It is a common law principle that if a man has an article delivered to him on the improvement of which he has to bestow trouble or expense he has a right to retain it until his charge is paid (*h*). Thus the artificer to whom goods are delivered for the purpose of being worked up, the farrier by whose skill an animal is cured of disease, and the horse-breaker by whose skill an animal is rendered manageable, have liens on the chattels in respect of their charges (*i*). The lien only applies to the chattel produced or on which the work is done (*k*); but where the article upon which the work is to be done is sent in different parcels and at different times, there is a lien upon the whole if it is all done under one contract (*l*).

Work must be completed.

18. The work must be done by the order or at the request of the owner or of some person authorised by him (*m*); and must be completed (*n*), but if completion is prevented by the owner the lien arises for the work actually done (*o*). Work must be done or skill expended in improving the chattel (*p*).

(*g*) See title INNS AND INNKEEPERS, Vol. XVII., pp. 323 *et seq.*

(*h*) *Bevan* v. *Waters* (1828), 3 C. & P. 520. As to a workman's lien, see title BAILMENT, Vol. I., p. 561.

(*i*) *Scarfe* v. *Morgan* (1838), 4 M. & W. 270, *per* PARKE, B., at p. 283.

(*k*) *Hollis* v. *Claridge* (1813), 4 Taunt. 807 (a conveyancer has a lien on a draft, not on all papers); *Bleaden* v. *Hancock* (1829), 4 C. & P. 152 (a printer has a lien on engravings, not on the plates from which engravings are made); and see *Marks* v. *Laheè* (1837), 3 Bing. (N. C.) 408. As to the lien of a solicitor on property recovered or preserved, see title SOLICITORS.

(*l*) *Blake* v. *Nicholson* (1814), 3 M. & S. 167.

(*m*) *Hollis* v. *Claridge*, *supra*; *Hiscox* v. *Greenwood* (1802), 4 Esp. 174; *Hussey* v. *Christie* (1808), 9 East, 426; *Buxton* v. *Baughan* (1834), 6 C. & P. 674; *Castellain* v. *Thompson* (1862), 13 C. B. (N. S.) 105. A sub-contractor gets such a lien through a contractor against the real employer who approves of the sub-contract (*Bellamy* v. *Davey*, [1891] 3 Ch. 540), and, where a person, hiring a chattel and undertaking to keep it in repair, sends it to be repaired, the repairer has a particular lien on the chattel for his charges against the owner (*Keene* v. *Thomas*, [1905] 1 K. B. 136). See also *Re Union Cement and Brick Co., Ex parte Pulbrook* (1869), 4 Ch. App. 627 (no lien for costs in favour of solicitor, on documents used in winding up of a company, as against a liquidator who is not the owner of them), and *Re Lawrance, Bowker* v. *Austin*, [1894] 1 Ch. 556 (no lien, in favour of solicitors employed by a husband, on marriage settlement as against the trustees). Where a servant, in the ordinary course of his employment (see title MASTER AND SERVANT), delivers his master's goods to a person for the purpose of doing work thereon, such person has a lien for his charges, but cannot transfer it to the servant, even though the servant pay his charges (*Hussey* v. *Christie*, *supra*).

(*n*) *Pinnock* v. *Harrison* (1838), 3 M. & W. 532, *per* PARKE, B., at p. 535.

(*o*) *Lilley* v. *Barnsley* (1844), 1 Car. & Kir. 344.

(*p*) *Bevan* v. *Waters* (1828), 3 C. & P. 520; *Judson* v. *Etheridge* (1833), 1 Cr.

SECT. 3.
Persons who have done Work on Particular Chattels.

There is no distinction between an agreement to do the work for a stipulated sum and the implied contract to pay a reasonable sum, but, if there is a stipulated price to be paid at a particular time or in a particular manner, the workman cannot set up a lien inconsistent with his contract (*q*).

Sum payable.

Instances of particular liens.

19. The following persons have been held to be entitled to particular liens for labour or expenditure upon chattels entrusted to them:—an accountant, upon the books of account, for work done before the bankruptcy of the owner (*r*); an arbitrator, upon the award, for his fees (*s*); an architect, upon plans prepared by him, for his charges (*t*); an auctioneer, upon the goods sold, for the price and for the charges of sale and commission (*a*); a calico printer, upon goods in his possession, for printing (*b*); a coachmaker, upon a carriage, for the cost of repairs (*c*); commissioners for taking acknowledgments (*d*), upon the deed acknowledged, the certificate of execution, and the affidavit of verification for their fees (*e*); a conveyancer upon a draft settled, or opinion written, by him (*f*); a dyer, upon goods dyed by him (*g*); engineers, upon a barge, for putting in the machinery (*h*); a farrier, upon a horse cured of disease (*i*); a fuller, on cloth dressed by him (*j*); a horse-breaker,

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& M. 743; *Forth* v. *Simpson* (1849), 13 Q. B. 680; see *Donatty* v. *Crowther and Kelly* (1826), 11 Moore (C. P.), 479; *Orchard* v. *Rackstraw* (1854), 9 C. B. 698. An auctioneer to whom a mortgage deed was delivered to enable him to demand the money due was held to have no lien because there was no work to be done on the deed (*Sanderson* v. *Bell* (1834), 2 Cr. & M. 304). An agistor of cows has no lien; see p. 6, *ante; Prentice* v. *Taylor* (1859), 1 F. & F. 469; and title ANIMALS, Vol. I., p. 387.

(*q*) *Chase* v. *Westmore* (1816), 5 M. & S. 180; *Blake* v. *Nicholson* (1814), 3 M. & S. 167.

(*r*) *Re Hill, Ex parte Southall* (1848), 12 Jur. 576, *per* KNIGHT BRUCE, V.-C., at p. 577.

(*s*) *R.* v. *South Devon Rail. Co.* (1850), 15 Q. B. 1043; *Re Coombs and Fernley* (1850), 4 Exch. 839, *per* PARKE, B., at p. 841; and see title ARBITRATION, Vol. I., p. 472.

(*t*) *Hughes* v. *Lenny* (1839), 5 M. & W. 183; and see title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 308.

(*a*) *Williams* v. *Millington* (1788), 1 Hy. Bl. 81; *Coppin* v. *Craig* (1816), 7 Taunt. 243; and see title AUCTION AND AUCTIONEERS, Vol. I., p. 517.

(*b*) A calico printer has also a general lien for work done in his actual business; see note (*j*), p. 8, *ante*.

(*c*) *Houlditch* v. *Milne* (1800), 3 Esp. 86, *per* Lord ELDON, C.J.; *Howes* v. *Ball* (1827), 7 B. & C. 481.

(*d*) Under the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74).

(*e*) *Ex parte Grove* (1836), 3 Bing. (N. C.) 304.

(*f*) *Hollis* v. *Claridge* (1813), 4 Taunt. 807; *Steadman* v. *Hockley* (1846), 15 M. & W. 553.

(*g*) *Savill* v. *Barchard* (1801), 4 Esp. 53; *Green* v. *Farmer* (1768), 4 Burr. 2214; *Bennett* v. *Johnson* (1784), 3 Doug. (K. B.) 387. For many years dyers endeavoured to establish a right to a general lien, but it appears that this was only established in particular districts and not everywhere; see Cross, Law of Lien, 337; *Close* v. *Waterhouse* (1802), 6 East, 523, n.

(*h*) *Re Westlake, Ex parte Willoughby* (1881), 16 Ch. D. 604.

(*i*) *Rushforth* v. *Hadfield* (1806), 7 East, 224, *per* Lord ELLENBOROUGH, C.J., at p. 229 (by implication, when he points out that a farrier is not entitled to a general lien for shoeing a horse); *Scarfe* v. *Morgan* (1838), 4 M. & W. 270, *per* PARKE, B., at p. 284.

(*j*) *Rose* v. *Hart* (1818), 8 Taunt. 499. In *Sweet* v. *Pym* (1800), 1 East, 4, it is stated that by the custom of Exeter a fuller has a general lien.

SECT. 3. Persons who have done Work on Particular Chattels.

upon a horse, for the cost of breaking it in (*k*); a horse trainer, upon a horse, both for keep and training, unless by contract or custom the owner has rights of user inconsistent with the continued possession of the trainer (*l*); a miller, upon flour or corn, for the cost of grinding (*m*); the owner of a stallion, upon a mare, for the cost of covering (*n*); a parliamentary agent, upon books and papers in his hands (*o*); a printer, upon copies of a book, for his costs of printing it (*p*); a shipwright, upon a ship, for building or repairing it (*q*); and a tailor, upon clothes, for the price (*r*).

Part V.—Equitable Lien.

SECT. 1.—*Definition and Nature.*

Equitable lien.

20. An equitable lien may be defined as an equitable right, conferred by law upon one man, to a charge upon the real or personal property of another, until certain specific claims have been satisfied.

Distinguished from equitable charge and common law lien.

It differs from an equitable charge insomuch as the latter is a right founded on contract, whereas an equitable lien is founded on the principle of equity, that he who has obtained possession of property under a contract for payment of its value will not be allowed to keep it without payment (*s*); but so far as regards their effect there is no distinction between an equitable lien and an equitable charge, and both are liable to be defeated under the Statutes of Limitation (*t*).

An equitable lien differs also from the common law lien in that the latter is founded on possession, and, except as modified

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(*k*) *Judson* v. *Etheridge* (1833), 1 Cr. & M. 743; *Scarfe* v. *Morgan* (1838), 4 M. & W. 270, *per* PARKE, B., at p. 283.

(*l*) *Bevan* v. *Waters* (1828), 3 C. & P. 520; *Forth* v. *Simpson* (1849), 13 Q. B. 680; see p. 6, *ante*.

(*m*) *Re Matthews, Ex parte Ockenden* (1754), 1 Atk. 235.

(*n*) *Scarfe* v. *Morgan, supra*.

(*o*) *Ridgway* v. *Lees* (1856), 25 L. J. (CH.) 584.

(*p*) *Blake* v. *Nicholson* (1814), 3 M. & S. 167; see *Brook* v. *Wentworth* (1797), 3 Anst. 881, as to lien of publisher on author's copyright for disbursements.

(*q*) *Ex parte Shank* (1754), 1 Atk. 234; *Woods* v. *Russell* (1822), 5 B. & Ald. 942; *Re Strickland, Ex parte Bland* (1814), 2 Rose, 91.

(*r*) *Blake* v. *Nicholson, supra*.

(*s*) *Mackreth* v. *Symmons* (1808), 15 Ves. 329. Where the assignee of a bond debt charged upon real and personal estate has omitted to enforce payment out of the personal estate, he is nevertheless entitled to a valid equitable lien on the real estate (*Justice* v. *Fooks* (1887), 57 L. T. 868). The terms of a contract between the parties may, however, preclude the existence of lien (*Dean* v. *Byrnes* (1864), 13 W. R. 299).

(*t*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8; see title LIMITATION OF ACTIONS, pp. 33 *et seq.*, *post*. The distinction between the equitable lien and the possessory lien in this respect must be noted; see p. 3, *ante*. For the distinction between an equitable lien and a charge upon land within the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8, and a simple contract debt within the Limitation Act, 1623 (21 Jac. 1, c. 16), and the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 14, see *Barnes* v. *Glenton*, [1898] 2 Q. B. 223. See also title EQUITY, Vol. XIII., p. 92.

by statute, merely confers a right to detain the property until payment (*u*); whereas the former, which exists quite irrespective of possession, confers on the holder the right to a judicial sale (*v*).

SECT. 1. Definition and Nature.

SECT. 2.—*Vendor and Purchaser.*

SUB-SECT. 1.—*Vendor's Lien.*

Vendor's lien.

21. A vendor of land (*a*) has an equitable lien on the land sold for the whole or part of the purchase-money until actual payment (*b*), even where the purchase-money is expressed to have been paid and received in the conveyance, when, in fact, it remains wholly or partly unpaid (*c*). The lien also extends to money advanced by an unpaid vendor for improvements (*d*), as well as to interest on such unpaid purchase-money or advances or such parts thereof as remain unpaid, from the time the lien comes into existence (*e*).

It is immaterial to the lien whether the purchase-money is a sum in gross or an annuity on the life of the vendor (*f*), or is payable by instalments (*g*), unless a contrary intention is shown by the parties (*h*). The lien may arise although the purchase-money is not payable until a future date, for instance, at a definite time after the vendor's death (*i*), and is not defeated by an agreement that the purchaser shall not, without the consent of the vendor and the surety of the purchaser, lease or assign the property until the original purchase price has been paid (*k*).

In what cases it arises.

22. The vendor's lien arises not only in the case of freeholds, but also where the property sold is of copyhold or leasehold

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(*u*) See pp. 25, 26, *post.*

(*v*) See p. 27, *post.*

(*a*) As to sale of land generally, see title SALE OF LAND.

(*b*) *Hearle* v. *Botelers* (1604), Cary, 35; *Chapman* v. *Tanner* (1684), 1 Vern. 267; *Mackreth* v. *Symmons* (1808), 15 Ves. 329; *Lysaght* v. *Edwards* (1876), 2 Ch. D. 499, 506; *Kettlewell* v. *Watson* (1884), 26 Ch. D. 501, C. A.; *Pollexfen* v. *Moore* (1746), 3 Atk. 272; *Coppin* v. *Coppin* (1725), 2 P. Wms. 291; *Croly* v. *Callaghan* (1842), 5 I. Eq. R. 25; *Hawkins* v. *Gardner* (1854), 2 Sm. & G. 441.

(*c*) *Saunders* v. *Leslie* (1814), 2 Ball & B. 509; *Winter* v. *Anson* (*Lord*) (1823), 1 Sim. & St. 434; *Jersey* (*Earl*) v. *Briton Ferry Floating Dock Co.* (1869), L. R. 7 Eq. 409; *Harrison* v. *Southcote* (1751), 2 Ves. Sen. 389, 393; *Austen* v. *Halsey* (1800), 6 Ves. 475; *Elliot* v. *Edwards* (1802), 3 Bos. & P. 181. As to how far a receipt in a conveyance creates an estoppel, see title ESTOPPEL, Vol. XIII., p. 371. A direction to the common agent of both parties to pay the vendor out of moneys due by the agent to the purchaser is not equivalent to payment and does not affect the vendor's lien (*Wrout* v. *Dawes* (1858), 4 Jur. (N. S.) 396; *Young* v. *White* (1844), 7 Beav. 506).

(*d*) *Re Baker and Harley, Ex parte Linden* (1841), 1 Mont. D. & De G. 428.

(*e*) *Rose* v. *Watson* (1864), 10 H. L. Cas. 672; *Re Stucley, Stucley* v. *Kekewich*, [1906] 1 Ch. 67, C. A.; and compare *Re Drax, Savile* v. *Drax*, [1903] 1 Ch. 781, C. A. The usual rate of interest allowed in equity is 4 per cent.

(*f*) *Tardiff* v. *Scrughan* (1769), cited 1 Bro. C. C. 423; *Richardson* v. *M'Causland* (1817), Beat. 457; *Clarke* v. *Royle* (1830), 3 Sim. 499; *Matthew* v. *Bowler* (1847), 6 Hare, 110; *Remington* v. *Deverall* (1795), 2 Anst. 550.

(*g*) *Nives* v. *Nives* (1880), 15 Ch. D. 649.

(*h*) *Buckland* v. *Pocknell* (1843), 13 Sim. 406; *Dixon* v. *Gayfere* (No. 3) (1855), 21 Beav. 118.

(*i*) *Winter* v. *Anson* (*Lord*) (1828), 3 Russ. 488.

(*k*) *Elliot* v. *Edwards* (1802) 3 Bos. & P. 181.

SECT. 2. Vendor and Purchaser.

tenure (*l*), or chattels (*m*), or personal property generally (*n*), and binds not only the purchaser, his heir, persons claiming under him as volunteers, and his creditors (*o*), but also those claiming under him for value who have equitable interests in the property (*p*) or have acquired the legal interest with notice of the non-payment of the purchase price (*q*).

Land acquired by public company.

23. The lien also arises in the case of the acquisition of land by a public company, either compulsorily or by agreement, for the purchase price (*r*), for compensation for severance when it forms part of the purchase-money (*s*), for damages for non-construction of accommodation works (*a*) and for the costs of an action for specific performance (*b*). On the other hand, a vendor has no lien for his costs upon the sum deposited by the company (*c*) when the condition of the bond has been performed (*d*). A railway company selling its superfluous lands has probably no lien for the price (*e*).

SUB-SECT. 2.—*Purchaser's Lien.*

Purchaser's lien.

24. A purchaser of land has an equitable lien, on the vendor's interest in the land agreed to be sold, for all sums paid by him

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(*l*) *Winter* v. *Anson* (*Lord*) (1828), 3 Russ. 448, 492; *Matthew* v. *Bowler* (1847), 6 Hare, 110; *Elliot* v. *Edwards* (1802), 3 Bos. & P. 181.

(*m*) *Re Vulcan Ironworks Co.*, [1888] W. N. 37 (trade machinery).

(*n*) *Davies* v. *Thomas*, [1900] 2 Ch. 462, C. A.; *Re Stucley, Stucley* v. *Kekewich*, [1906] 1 Ch. 67, C. A.; *Collins* v. *Collins* (No. 2), *Downes* v. *Downes* (1862), 31 Beav. 346; *Re Albert Life Assurance Co., Ex parte Western Life Assurance Society* (1870), L. R. 11 Eq. 164, 178.

(*o*) *Grant* v. *Mills* (1813), 2 Ves. & B. 306, 309; *Fawell* v. *Heelis* (1773), Amb. 724, 726; *Blackburn* v. *Gregson* (1785), 1 Bro. C. C. 420.

(*p*) Unless the circumstances are such as to give the persons acquiring equitable interests a better equity than the vendor has; see *Rice* v. *Rice* (1853), 2 Drew. 73; title EQUITY, Vol. XIII., pp. 79, 80.

(*q*) *Elliot* v. *Edwards, supra; Mackreth* v. *Symmons* (1808), 15 Ves. 329; *Gibbons* v. *Baddall* (undated), 2 Eq. Cas. Abr., 3rd ed., 682; *Walker* v. *Preswick* (1755), 2 Ves. Sen. 622; *Cator* v. *Pembroke* (*Earl*) (1783), 1 Bro. C. C. 301; *Harris* v. *Tubb* (1889), 42 Ch. D. 79; *Grant* v. *Mills, supra; Bowles* v. *Rogers* (1800), cited 6 Ves. 95; and see title EQUITY, Vol. XIII., p. 79.

(*r*) *Walker* v. *Ware, Hadham, and Buntingford Rail. Co.* (1865), L. R. 1 Eq. 195; *Winchester* (*Bishop*) v. *Mid-Hants Rail. Co.* (1867), L. R. 5 Eq. 17; *Wing* v. *Tottenham and Hampstead Junction Rail. Co.* (1868), 3 Ch. App. 740; *Marshall* v. *Scarborough and Whitby Rail. Co.*, [1889] W. N. 73; *Lycett* v. *Stafford and Uttoxeter Rail. Co.* (1872), L. R. 13 Eq. 261; see also *Re Stucley, Stucley* v. *Kekewich, supra.* For the law relating to acquiring land by agreement or by compulsory purchase, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 57 *et seq.*

(*s*) *Walker* v. *Ware, Hadham, and Buntingford Rail. Co., supra.*

(*a*) *St. Germans* (*Earl*) v. *Crystal Palace Rail. Co.* (1871), L. R. 11 Eq. 568.

(*b*) *Winchester* (*Bishop*) v. *Mid-Hants Rail. Co., supra.*

(*c*) Under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 85; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 103. Nor does the lien cover the costs of a statutory arbitration (*ibid.*, p. 86).

(*d*) *Ex parte Stevens* (1848), 2 Ph. 772; *Re Neath and Brecon Rail. Co.* (1874), 9 Ch. App. 263.

(*e*) *Re Thackwray and Young's Contract* (1888), 40 Ch. D. 34.

under the contract on account of the purchase-money, together with interest thereon (*f*), and such lien will extend to interest paid on the unpaid balance of the purchase-money (*g*) and also to the costs of an action for specific performance (*h*), as well as to the purchaser's costs of investigating title where a good title is not shown to the property contracted to be sold (*i*), including the costs of a summons under the Vendor and Purchaser Act, 1874 (*k*). In all these cases the lien is the same in effect as if the vendor had executed a mortgage of the property in favour of the purchaser for the amount covered by the lien (*l*). But a purchaser has no lien for moneys paid by him under an illegal contract (*m*).

Not lost by delay.

The lien is not lost by the purchaser, though he has destroyed his right to specific performance by delay in completing the purchase, so that where a vendor has become bankrupt prior to completion the purchaser can still enforce his lien to the extent of his deposit (*n*). But a purchaser who obtains damages in lieu of specific performance is not, it seems, entitled to a lien for such damages (*o*).

Sub-purchaser.

The lien is available also to a sub-purchaser, for what he has paid, where the original purchaser has resold before completion, upon the interest which such original purchaser acquired by part payment of the purchase-money (*p*).

Fiduciary vendors.

When the vendor is a mortgagee selling under a power of sale, the lien does not exist against the mortgagor, but only against the mortgagee to the extent of his interest in the property; but if the vendor is a trustee, it may affect the interest of his *cestui que trust* (*q*); the lien will not, however, arise in favour of a purchaser from vendors known to him to be trustees who leaves part of the purchase-money in the hands of one of them under his absolute control and without the consent of the co-trustees or the beneficiaries (*r*).

(*f*) *Burgess* v. *Wheate*, *A.-G.* v. *Wheate* (1759), 1 Eden, 177, 211; *Wythes* v. *Lee* (1856), 2 Jur. (N. S.) 130; *Westmacott* v. *Robins* (1864), 4 De G. F. & J. 390, 399, C. A.; *Rose* v. *Watson* (1864), 10 H. L. Cas. 672; *Aberaman Ironworks* v. *Wickens* (1868), 4 Ch. App. 101; *Rodger* v. *Harrison*, [1893] 1 Q. B. 161, C. A.; *Levy* v. *Stogden*, [1898] 1 Ch. 478; *Whitbread & Co., Ltd.* v. *Watt*, [1902] 1 Ch. 835, C. A. It seems that the purchaser may have a lien on an incomplete conveyance to him for the amount of his deposit (*Oxenham* v. *Esdaile* (1829), 3 Y. & J. 262).

(*g*) *Rose* v. *Watson*, *supra*.

(*h*) *Middleton* v. *Magnay* (1864), 2 Hem. & M. 233; *Turner* v. *Marriott* (1867), L. R. 3 Eq. 744; see title SPECIFIC PERFORMANCE.

(*i*) *Re Yeilding and Westbrook* (1886), 31 Ch. D. 344; *Kitton* v. *Hewett*, [1904] W. N. 21.

(*k*) 37 & 38 Vict. c. 78; see *Re Furneaux and Aird's Contract*, [1906] W. N. 215. As to the purchaser's lien on his purchase-money paid into court for compensation for the vendor's delay in giving possession, see *Thomas* v. *Buxton* (1869), L. R. 8 Eq. 120.

(*l*) *Rose* v. *Watson*, *supra*, at p. 683.

(*m*) *Ewing* v. *Osbaldiston* (1837), 2 My. & Cr. 53, 88.

(*n*) *Levy* v. *Stogden*, *supra*.

(*o*) *Cornwall* v. *Henson*, [1900] 2 Ch. 298, 305, C. A.

(*p*) *Aberaman Ironworks* v. *Wickens*, *supra*.

(*q*) *Wythes* v. *Lee* (1855), 3 Drew. 396.

(*r*) *White* v. *Wakefield* (1835), 7 Sim. 401.

SECT. 2. Vendor and Purchaser.

Property affected by lien.

25. The purchaser's lien, like the vendor's lien, is not confined to land alone, but extends also to personal property (*s*) and attaches from the moment of payment, provided, of course, that the sale is not rescinded through the purchaser's own default (*t*).

SUB-SECT. 3.—*Transfer of Vendor's and Purchaser's Lien.*

Transfer of lien.

26. The benefit of the lien of a vendor or purchaser may be transferred even by parol (*a*), but the assignee will take subject to any prior charge of a similar nature which may have been created by the incumbrancer (*b*), unless the latter be cognisant of, though not a party to, the assignment, in which case he would be taken to have acquiesced in the assignment and would be bound by it (*c*). On the bankruptcy of a party entitled to a lien, his interest therein passes to his trustee (*d*). The benefit of a lien may be assigned with the debt in respect of which it arises (*e*).

SECT. 3.—*Partnership Lien.*

Partnership lien.

27. On the dissolution of a partnership by the death, bankruptcy, or retirement of a partner, the personal representative of the deceased, the trustees of the bankrupt, and the retiring partner respectively, and on the other hand the solvent or continuing partners, have a lien on the partnership estate for the satisfaction of all demands arising out of the partnership business prior to the dissolution (*f*), including consideration money paid under a partnership deed obtained by misrepresentation or fraud (*g*), or for allowances or payments agreed to be made on the dissolution (*h*),

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(*s*) *Swainston* v. *Clay* (1863), 3 De G. J. & Sm. 558, 569, C. A. (where the purchaser of an unfinished ship, to be completed by the vendor under a contract by which an advance made to him was to be taken as part payment of the purchase-money, was given a lien for the advance as against the vendor's trustee in bankruptcy); *Winter* v. *Anson* (*Lord*) (1828), 3 Russ. 488; *Matthew* v. *Bowler* (1847), 6 Hare, 110; *Elliot* v. *Edwards* (1802), 3 Bos. & P. 181.

(*t*) See p. 31, *post*.

(*a*) *Dryden* v. *Frost* (1838), 3 My. & Cr. 670; see also *White* v. *Wakefield* (1835), 7 Sim. 401; *Burn* v. *Carvalho* (1839), 4 My. & Cr. 690; *Morrell* v. *Wootten* (1852), 16 Beav. 197. As to extinguishment of equitable lien, see p. 30, *post*.

(*b*) *Porter* v. *Hubbart* (1673), 3 Rep. Ch. 43 [78]; *Matthews* v. *Wallwyn* (1798), 4 Ves. 118; *Chambers* v. *Goldwin* (1804), 9 Ves. 254; *Mangles* v. *Dixon* (1852), 3 H. L. Cas. 702; *Macclesfield* (*Earl*) v. *Fitton* (1683), 1 Vern. 168; and compare title CHOSES IN ACTION, Vol. IV., pp. 386 *et seq.*

(*c*) *Jamieson* v. *English* (1820), 2 Mol. 337.

(*d*) *Hudson* v. *Granger* (1821), 5 B. & Ald. 27. See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 159 *et seq.*

(*e*) *Bull* v. *Faulkner* (1848), 2 De G. & Sm. 772.

(*f*) *West* v. *Skip* (1750), 1 Ves. Sen. 239, 456; *Skipp* v. *Harwood* (1747), 2 Swan. 586; *Ex parte Williams* (1805), 11 Ves. 3; *Ex parte King* (1810), 17 Ves. 115; *Kelly* v. *Hutton* (1868), 3 Ch. App. 703; *Harvey* v. *Crickett* (1816), 5 M. & S. 336; *Hague* v. *Dandeson* (1848), 2 Exch. 741, *per* PARKE, B., at p. 745; *Aberdare and Plymouth Co.* v. *Hankey* (1887), 3 T. L. R. 493; see Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 39, and title PARTNERSHIP. It seems that there is no lien as between persons who are merely part owners (*Re Leslie, Leslie* v. *French* (1883), 23 Ch. D. 552, 563) or co-adventurers (*Re Boggs, Ex parte Gemmel* (1843), 3 Mont. D. & De G. 198); and see p. 20, *post*.

(*g*) *Mycock* v. *Beatson* (1879), 13 Ch. D. 384; *Binney* v. *Mutrie* (1886), 12 App. Cas. 160, 165, P. C.; see Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 41.

(*h*) *Ex parte Rowlandson* (1813), 2 Ves. & B. 172. The lien does not cover

but this lien is confined to the assets of the partnership existing at the date of the dissolution (*i*).

SECT. 3. Partnership Lien.

Extent of lien.

28. The existence of the lien does not affect *bonâ fide* purchasers or mortgagees of the specific assets of the partnership from a continuing or surviving partner (*k*); but the purchaser of the share of a partner in the partnership takes subject to the lien (*l*).

SECT. 4.—*Lien for Expenditure on the Property of Another.*

SUB-SECT. 1.—*In General.*

Expenditure on property of another.

29. A person who has expended money for the benefit of another, or on property in which he has no interest, has, as a rule, no lien in respect of such expenditure against such other person or against the owner of the property (*m*). The maritime doctrine of salvage does not apply in such cases (*n*), and even where the person making the payment has an interest, a lien not expressly stipulated for can only arise by virtue of a trustee's right to be indemnified out of the trust estate for expenditure in its preservation (*o*), or by subrogation (*p*), or by reason of an incumbrancer's

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liabilities not arising out of the partnership, such as private loans by one partner to another (*Ryall* v. *Rowles* (1750), 1 Ves. Sen. 348), but it extends to partnership moneys borrowed by one of the firm (*Meliorucchi* v. *Royal Exchange Assurance Co.* (1728), 1 Eq. Cas. Abr. 8; *Croft* v. *Pyke* (1733), 3 P. Wms. 180).

(*i*) *Payne* v. *Hornby* (1858), 25 Beav. 280. This view, however, is contrary to that held by Lord HARDWICKE, who in two cases arising out of the same transaction decided that the lien of a partner on dissolution was not limited to the stock brought in, but extended to everything coming in lien during the continuance or after the determination of the partnership (*Skipp* v. *Harwood* (1747), 2 Swan. 586; *West* v. *Skip* (1750), 1 Ves. Sen. 239, 244, 456); and see, *Pennell* v. *Deffell* (1853), 4 De G. M. & G. 372, C. A., *per* TURNER, L.J., at p. 388; and title PARTNERSHIP. In *Stocken* v. *Dawson* (1848), 17 L. J. (CH.) 282, 286, the parties agreed that the property should be considered to have remained unchanged.

(*k*) *Re Langmead's Trusts* (1855), 7 De G. M. & G. 353, C. A.; *Re Bourne, Bourne* v. *Bourne*, [1906] 2 Ch. 427, C. A.

(*l*) *Cavander* v. *Bulteel* (1873), 9 Ch. App. 79.

(*m*) *Burridge* v. *Row* (1842), 1 Y. & C. Ch. Cas. 183; *Wallis* v. *Smith* (1882), 21 Ch. D. 243, C. A.; *Re Leslie, Leslie* v. *French* (1883), 23 Ch. D. 552; *Falcke* v. *Scottish Imperial Insurance Co.* (1886), 34 Ch. D. 234, C. A.; *Strutt* v. *Tippett* (1890), 62 L. T. 475, C. A.; see, however, *Re Pike, Burke* v. *Burke* (1888), 23 L. R. Ir. 9, and *Peruvian Guano Co.* v. *Dreyfus Brothers & Co.* (1887), reported [1892] A. C. 170, n., *per* Lord MACNAGHTEN, at p. 174 (as to cases of trover and trespass where the owner has been required by the court to make an allowance in respect of the expenditure); compare *Hooper* v. *Cooke* (1856), 25 L. J. (CH.) 467 (no lien for moneys expended in repair of dilapidated premises by owner of rentcharge as against owner of subsequent rentcharge).

(*n*) *Falcke* v. *Scottish Imperial Insurance Co., supra; Murray* v. *Pinkett* (1846), 12 Cl. & Fin. 764, H. L.; *Burridge* v. *Row, supra, per* KNIGHT BRUCE, V.-C., at p. 191; *Clack* v. *Holland* (1855), 19 Beav. 262, *per* ROMILLY, M.R., at p. 277; *Hartfort* v. *Jones* (1698), 1 Ld. Raym. 393; *Nicholson* v. *Chapman* (1739), 2 Hy. Bl. 254; *Castellain* v. *Thompson* (1862), 13 C. B. (N. S.) 105; *Aitchison* v. *Lohre* (1879), 4 App. Cas. 755. As to salvage, see title SHIPPING AND NAVIGATION.

(*o*) See title TRUSTS AND TRUSTEES, and p. 21, *post*. As to the lien of trustees and members of committee of a club on the property of the club, see title CLUBS, Vol. IV., p. 419.

(*p*) As to the doctrine of subrogation generally, see title EQUITY, Vol. XIII., p. 149; and see title INSURANCE, Vol. XVII., p. 563. For the application of the doctrine to suretyship, see title GUARANTEE, Vol. XV., pp. 509 *et seq.*; and see *ibid.*, pp. 522, 523.

SECT. 4. Lien for Expenditure on the Property of Another.

right to add to his charge money properly expended on his security (*q*).

Examples of no lien by expenditure.

Thus a tenant in common has no lien against the share of his co-tenant for payments made for the benefit of the estate (*r*), nor one joint owner for money lent to another (*s*), nor a tenant for life as against the remainderman (*t*), nor a bankrupt for premiums paid on a life policy after the bankruptcy as against his trustee in bankruptcy (*u*), nor a firm against property purchased by one partner and paid for out of the partnership money (*a*), nor a person who has expended money on property which he has bought without a title (*b*), nor a solicitor who has lent money in the name of his client, who is an executor, to pay off a debt on the testator's estate (*c*), nor a guardian who has discharged an incumbrance on an infant's estate (*d*), nor a subsequent mortgagee as against a prior incumbrancer (*e*).

Mortgagor's lien.

Expenditure by a mortgagor on the mortgaged property does not give him a lien on it in priority to the mortgagee (*f*). Thus a mortgagor who pays a premium on a policy acquires no lien against the mortgagee (*g*), nor does a mortgagor of renewable leaseholds who buys the reversion acquire a lien for the purchase-money as against the mortgagee of the lease (*h*), and

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(*q*) *Re Leslie, Leslie* v. *French* (1883), 23 Ch. D. 552; *Clack* v. *Holland* (1855), 19 Beav. 262; *Gill* v. *Downing* (1874), 30 L. T. 157; and see p. 21, *post*, and the cases cited in title INSURANCE, Vol. XVII., pp. 547, note (*n*), 563, note (*l*). As to the position of a mortgagee in this respect, see title MORTGAGE.

(*r*) *Ex parte Young* (1813), 2 Ves. & B. 242; *Re Nicholson, Ex parte Harrison* (1814), 2 Rose, 76; *Re Drury and Hudson, Ex parte Leslie* (1833), 3 L. J. (BCY.) 4; *Green* v. *Briggs* (1848), 6 Hare, 395, 401; *Kay* v. *Johnston* (1856), 21 Beav. 536, overruling *Doddington* v. *Hallet* (1750), 1 Ves. Sen. 497; and see *Leigh* v. *Dickeson* (1884), 15 Q. B. D. 60, C. A.; *Johnson* v. *Wild* (1890), 44 Ch. D. 146; but in partition actions allowance can be made for such improvements; see titles EQUITY, Vol. XIII., p. 41; PARTITION.

(*s*) *Kay* v. *Johnston, supra.*

(*t*) *Caldecott* v. *Brown* (1842), 2 Hare, 144; *Pennell* v. *Millar* (1857), 23 Beav. 172; *Floyer* v. *Bankes* (1869), L. R. 8 Eq. 115; *Norris* v. *Caledonian Insurance Co.* (1869), L. R. 8 Eq. 127; unless he makes his advances at the request of the trustees of the settlement (*Todd* v. *Moorhouse* (1874), L. R. 19 Eq. 69).

(*u*) *Tapster* v. *Ward* (1909), 101 L. T. 503, C. A.

(*a*) *Walton* v. *Butler* (1861), 29 Beav. 428.

(*b*) *Ridgway* v. *Roberts* (1844), 4 Hare, 106.

(*c*) *Christian* v. *Field* (1842), 2 Hare, 177.

(*d*) *Hooper* v. *Eyles* (1705), 2 Vern. 480.

(*e*) *Re Power's Policies*, [1899] 1 I. R. 6, C. A.; *Landowners West of England and South Wales Land Drainage and Inclosure Co.* v. *Ashford* (1881), 16 Ch. D. 411, 433. There are, however, certain exceptions in favour of a person who advances money to save property from destruction for the benefit of all who are interested in it. In *Angell* v. *Bryan* (1845), 2 Jo. & Lat. 763, SUGDEN, L.C., said, "There are cases in which the court has properly given a salvage creditor priority over all other incumbrancers." See also *Shearman* v. *British Empire Mutual Life Assurance Co.* (1872), L. R. 14 Eq. 4, overruled by *Falcke* v. *Scottish Imperial Insurance Co.* (1886), 34 Ch. D. 234, C. A.; and note (*a*), p. 22, *post*.

(*f*) *Langton* v. *Langton* (1856), 7 De G. M. & G. 30, 41, C. A.; *Saunders* v. *Dunman* (1878), 7 Ch. D. 825; *Drew* v. *Josolyne* (1887), 18 Q. B. D. 590, C. A.

(*g*) *Falcke* v. *Scottish Imperial Insurance Co., supra*; *Norris* v. *Caledonian Insurance Co.* (1869), L. R. 8 Eq. 127. As to the respective rights of a mortgagee and mortgagor to the proceeds of a policy of insurance against fire, see title INSURANCE, Vol. XVII., p. 522; Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 23 (4); *Garden* v. *Ingram* (1852), 23 L. J. (CH.) 478.

(*h*) *Leigh* v. *Burnett* (1885), 29 Ch. D. 231.

the liquidator of a company who, under the sanction of the court, spends money to secure a fund which the company has mortgaged, acquires no lien as against the mortgagee for the money so spent (*i*).

SECT. 4. Lien for Expenditure on the Property of Another.

Examples of lien by expenditure.

30. In certain cases a person who has expended money on property under the erroneous belief that he is entitled to or has an interest in it will be allowed a lien (*k*). So a person who takes goods out of pawn at the request of the owner has a lien on the goods for the moneys advanced to get them out of pledge (*l*), and where the owner of property stands by and allows a person to spend money thereon in the expectation that he will receive the benefit of it such person is entitled to a lien (*m*); but no lien in such case will arise unless it can be shown that the owner knows that the stranger is acting in the belief that he has a title, and further that such belief is founded on an erroneous impression of facts (*n*).

SUB-SECT. 2.—*Trustees and Incumbrancers.*

Trustees' and mortgagees' lien.

31. Where trustees and incumbrancers, and even in some cases creditors, though their debts be disputed (*o*), and limited owners (*p*) have made payments for the redemption of property, or for fines on renewal of leases or other payments to save property from destruction, for the benefit of all persons interested in its preservation, a lien will arise in their favour for the amount of the expenditure against the property in priority to all other claims (*q*). In the case of a tenant for life who has made such payments it makes no difference whether the trustees of the settlement could or could not have

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(*i*) *Lee and Chapman's Case* (1885), 30 Ch. D. 216, 225, C. A.; and see *Re Ormerod, Grierson & Co.*, [1890] W. N. 217.

(*k*) *Neesom* v. *Clarkson* (1845), 4 Hare, 97 (husband and wife); *Ludlow* v. *Grayall* (1822), 11 Price, 58 (intending purchaser); *Middleton* v. *Maynay* (1864), 2 Hem. & M. 233 (intending lessee); see *Rennie* v. *Young* (1858), 2 De G. & J. 136, C. A.

(*l*) *Jones* v. *Cliff* (1833), 5 C. & P. 560.

(*m*) *Unity Joint Stock Mutual Banking Association* v. *King* (1858), 25 Beav. 72; see, however, an instance to the contrary, *Millard* v. *Harvey* (1864), 10 Jur. (N. S.) 1167.

(*n*) *East-India Co.* v. *Vincent* (1740), 2 Atk. 83; *Dann* v. *Spurrier* (1802), 7 Ves. 231; *Beaufort (Duke)* v. *Patrick* (1853), 17 Beav. 60; *Dillwyn* v. *Llewelyn* (1862), 4 De G. F. & J. 517; *Ramsden* v. *Dyson* (1866), L. R. 1 H. L. 129; *Plimmer* v. *Wellington Corporation* (1884), 9 App. Cas. 699, P. C.; *Falcke* v. *Scottish Imperial Insurance Co.* (1886), 34 Ch. D. 234, 242, C. A. For the law on this subject as between husband and wife, see title HUSBAND AND WIFE, Vol. XVI., p. 403.

(*o*) *Manlove* v. *Bale and Bruton* (1688), 2 Vern. 84; *Lacon* v. *Mertins* (1743), 3 Atk. 1; *Hamilton* v. *Denny* (1809), 1 Ball & B. 199; *Jones* v. *Jones* (1846), 5 Hare, 440; *Fetherstone* v. *Mitchell* (1846), 9 I. Eq. R. 480. See, however, the observations in *Re Leslie, Leslie* v. *French* (1883), 23 Ch. D. 552, 564. As to trustees generally, see title TRUSTS AND TRUSTEES; and as to incumbrancers, see title MORTGAGE.

(*p*) *Todd* v. *Moorhouse* (1874), L. R. 19 Eq. 69; see note (*t*), p. 20, *ante*.

(*q*) See *Cleary* v. *McAndrew*, (1863), 2 Moo. P. C. C. (N. S.) 216, *per* Lord KINGSDOWN, at p. 235; *Re Nepean's Settled Estate*, [1900] 1 I. R. Eq. 298; *Hope* v. *Winter* (1709), 2 Eq. Cas. Abr. 690; *Angell* v. *Bryan* (1845), 2 Jo. & Lat. 763; see also note (*e*), p. 20, *ante*.

SECT. 4. Lien for Expenditure on the Property of Another.

raised the money by other means (*r*). But a trustee of a policy who makes or obtains such advances can neither obtain nor create such a lien, if he is, or in the due performance of his trust ought to be, in possession of funds applicable for the purpose (*s*).

A married woman who, out of her separate estate, has paid the premiums on policies effected as a provision under her marriage settlement has a lien for such payments (*t*), and the assignee of a policy has a lien for the premiums paid after the assignment, together with interest thereon, as against persons who have established a prior interest in the policy (*a*).

SUB-SECT. 3.—*Managers, Agents, and Consignees.*

Manager's and agent's lien.

32. An equitable lien in the nature of a salvage lien is allowed to managers, whether they be part owners or not, of works or estates, for expenses properly incurred and advances made in the working or management of them (*b*).

West Indian estates.

In the management of West Indian estates, consignees and agents have a lien on the estate for advances made for the immediate purposes of the estate (*c*), or for the interest on incumbrances (*d*); and this lien is independent of any particular course of dealing between the parties (*e*). Moreover, in the absence of *mala fides*, mere injudicious or wasteful management by the manager appointed by the consignee will not affect the lien (*f*). The lien extends as well to the manager of the estate abroad as to the consignee at home of the produce (*g*), and whether they be appointed by the owner or trustee of the estate or by the court (*h*); and, when appointed by the court, they are entitled to such lien in the capacity of manager as well as in that of an officer of the court (*i*). Where, however, the estate is incumbered, no lien will arise in favour of the owner, nor, as a rule, in favour of the manager, for such advances (*k*)

(*r*) *Todd* v. *Moorhouse* (1874), L. R. 19 Eq. 69.

(*s*) *Clack* v. *Holland* (1854), 19 Beav. 262, 276; and see *Re Regent's Canal Ironworks Co., Ex parte Grissell* (1875), 3 Ch. D. 411, C. A.

(*t*) *Burridge* v. *Row* (1844), 13 L. J. (CH.) 173.

(*a*) *West* v. *Reid* (1843), 2 Hare, 249; *Gill* v. *Downing* (1874), L. R. 17 Eq. 316; and see note (*e*), p. 20, *ante*.

(*b*) *Scott* v. *Nesbitt* (1808), 14 Ves. 438, *per* Lord ELDON, L.C., at p. 444; *Sayers* v. *Whitfield* (1829), 1 Knapp, 133, P. C.

(*c*) *Scott* v. *Nesbitt, supra; Fraser* v. *Burgess* (1860), 13 Moo. P. C. C. 314; *Sayers* v. *Whitfield, supra;* and see *Re Tharp* (1852), 2 Sm. & G. 578, n., *per* Lord St. LEONARDS, L.C.

(*d*) *Re Greatheed, Ex parte Davis and Boddington, Ex parte Chapman* (1859), Cust, West Indian Incumbered Estates Acts, 2nd ed., 219 (also reported 3 Sol. Jo. 544). As to the power of sale of a conveyance of a West Indian estate, see p. 28, *post*.

(*e*) *Simond* v. *Hibbert* (1830), 1 Russ. & M. 719.

(*f*) *Re Harriott, Ex parte Pengelley* (1863), 8 L. T. 854.

(*g*) *Fraser* v. *Burgess, supra; Bertrand* v. *Davies* (1862), 31 Beav. 429. Of course the contract may be inconsistent with such a lien (*Re Leith's Estate, Chambers* v. *Davidson* (1866), L. R. 1 P. C. 296; see p. 9, *ante*.

(*h*) *Scott* v. *Nesbitt, supra; Bertrand* v. *Davies, supra; Daniel* v. *Trotman* (1863), 1 Moo. P. C. C. (N. S.) 123; *Fraser* v. *Burgess, supra*.

(*i*) *Morison* v. *Morison* (1855), 7 De G. M. & G. 214, C. A.; *Fraser* v. *Burgess supra; Farquharson* v. *Balfour* (1836), 8 Sim. 210.

(*k*) *Re Greatheed, Ex parte Greatheed (W. S.), Ex parte Greatheed (John), Ex parte Fraser* (1859), Cust, West Indian Incumbered Estates Acts, 2nd ed., 235. As to the consignee's or manager's claim when the estate is managed by the

as against the incumbrancers, unless the latter have acquiesced in the payments by the manager (*l*).

SECT. 4. Lien for Expenditure on the Property of Another.

SECT. 5.—*Trustee's Lien for Costs, Charges, and Expenses.*

Trustees.

33. A trustee has an equitable lien on the trust estate for money properly expended thereon (*a*), and, where the trust estate consists of a fund, such lien will not be lost where the fund to which it attaches is ordered to be paid into court (*b*). A trustee who successfully defends an action brought for the purpose of setting aside a settlement has a lien for his costs against the trust estate notwithstanding that the settlement, though originally valid, becomes void under the Bankruptcy Acts (*c*), but a trustee has no lien for such costs if the defence to such an action is unsuccessful (*d*).

SECT. 6.—*Solicitor's Equitable Lien.*

Solicitors.

34. A solicitor is entitled not only to a common law lien for his charges upon documents in his possession belonging to his clients, but also to a lien of an equitable nature upon the fruits of judgments or orders obtained by him in favour of his clients in the suit in which he was employed for his costs in that suit (*e*).

SECT. 7.—*Maritime Lien.*

Maritime lien.

35. The maritime law admits the validity of an equitable lien, and if reasonable diligence be used and the proceeding be *bonâ fide*, such lien will not be discharged by the sale of the ship, but may be enforced against purchasers without notice (*f*).

SECT. 8.—*Miscellaneous.*

SUB-SECT. 1.—*In Cases of Waste.*

Waste.

36. Where a person, who has but a limited interest in an estate, has committed waste, a lien arises for the amount of the injury

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court, see *Morison* v. *Morison* (1855), 7 De G. M. & G. 214, C. A.; *Lyne* v. *Thompson* (1862), 30 Beav. 542; *Re Tharp* (1852), 2 Sm. & G. 578, n.; *Farquharson* v. *Balfour* (1836), 8 Sim. 210; *Shaw* v. *Simpson* (1842), 1 Y. & C. Ch. Cas. 732; and as to the effect of a manager's lien as against a remainderman, see *Bertrand* v. *Davies* (1862), 31 Beav. 429; *Scott* v. *Nesbitt* (1808), 14 Ves. 438, *per* Lord ELDON, L.C., at p. 442.

(*l*) *Fraser* v. *Burgess* (1860), 13 Moo. P. C. C. 314; *Bertrand* v. *Davies, supra.*

(*a*) *Darke* v. *Williamson* (1858), 25 Beav. 622; *Staniar* v. *Evans, Evans* v. *Staniar* (1886), 34 Ch. D. 470; *Budgett* v. *Budgett*, [1895] 1 Ch. 202. There is no lien for costs incurred by reason of a breach of trust unauthorised by the *cestui que trust* (*Leedham* v. *Chawner* (1868), 4 K. & J. 458).

(*b*) *Blenkinsop* v. *Foster* (1838), 3 Y. & C. (EX.) 205.

(*c*) *Re Holden, Ex parte Official Receiver* (1887), 20 Q. B. D. 43; and see titles BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 275 *et seq.*; FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., p. 91.

(*d*) *Re Butterworth, Ex parte Russell* (1882), 19 Ch. D. 588, 602, C. A.; *Re Holden, Ex parte Official Receiver, supra.* See, further, title TRUSTS AND TRUSTEES.

(*e*) *Welsh* v. *Hole* (1779), 1 Doug. (K. B.) 238; *Mackenzie* v. *Mackintosh* (1891), 64 L. T. 318; and see *Re Cockrell's Estate*, [1911] 2 Ch. 318. For the various liens to which solicitors are entitled, see title SOLICITORS.

(*f*) *The Kong Magnus*, [1891] P. 223; *Harmer* v. *Bell, The Bold Buccleugh* (1851), 7 Moo. P. C. C. 267; *Tatham* v. *Andree* (1863), 1 Moo. P. C. C. (N. S.) 386; *The Europa* (1863), 9 Jur. (N. S.) 699; *The Nymph* (1856), Sw. 86; *The Fairport* (1882), 8 P. D. 48; and see, further, title SHIPPING AND NAVIGATION.

SECT. 8. Miscellaneous.

against the profits receivable by him during his term, in favour of the remainderman, unless there has been collusion between the latter and the limited owner, and this lien is effective even against incumbrancers of the limited interest, though their securities were effected before waste was committed (*g*). This principle also applies, in the case of a trustee or executor who commits waste, and such lien, against any interest he may have under the will, is preferred to the right of his mortgagee (*h*).

SUB-SECT. 2.—*In Cases of Misappropriation.*

Misappropriation.

37. A mortgagee by deposit of deeds, from whom the mortgagor obtains possession of some of the deeds without the former's consent, has a lien on all the deeds to which the debtor was entitled at the date of the deposit, and it is immaterial whether the deeds were left in the mortgagor's custody as the solicitor of the mortgagee or otherwise, or whether the recovery of the deeds was accidental or improper (*i*).

SUB-SECT. 3.—*Covenants to Settle Specific Property.*

Covenants to settle property.

38. Following the maxim that equity regards as done that which ought to be done (*j*), an equitable lien is raised in favour of the covenantee where a covenantor binds himself to charge property or the income of property already in his possession (*k*), or such as he may thereafter acquire of a specific kind, or such as may be derived from a specific source (*l*), or such as he may point out by a subsequent instrument as that which was intended to be charged (*m*); and the result is the same although the property is not in possession, where the covenant or agreement is founded on valuable consideration (*n*). Where the covenant is to make a charge at a future time, when the covenantor will be in possession of lands acquired for the very purpose of the charge, a lien will arise against them (*o*), and where the covenant is to pay money to trustees to be laid out in the purchase of lands, or to purchase and settle lands, and the covenantor purchases lands but settles neither them nor pays the money, the lands will be taken to have been purchased

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(*g*) *Briggs* v. *Oxford* (*Earl*), *Beavan* v. *Oxford* (*Earl*) (1855), 1 Jur. (N. S.) 817; and see title SETTLEMENTS.

(*h*) *Morris* v. *Livie* (1842), 1 Y. & C. Ch. Cas. 380; *Cole* v. *Muddle* (1852), 10 Hare, 186; *Barnett* v. *Sheffield* (1852), 1 De G. M. & G. 371; see also *Dowse* v. *Gorton*, [1891] A. C. 190. For the lien on the share of a defaulting executor in his testator's estate, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 271.

(*i*) *Mason* v. *Morley* (1865), 11 Jur. (N. S.) 459.

(*j*) See title EQUITY, Vol. XIII., p. 73; and as to the doctrine of performance, see *ibid.*, pp. 139, 140.

(*k*) *Legard* v. *Hodges* (1792), 1 Ves. 477; *Ravenshaw* v. *Hollier* (1834), 7 Sim. 3.

(*l*) *Metcalfe* v. *York* (*Archbishop*) (1836), 1 My. & Cr. 547; *Lyde* v. *Mynn* (1833), 1 My. & K. 683; *Buller* v. *Plunkett* (1860), 7 Jur. (N. S.) 873.

(*m*) *Watson* v. *Sadleir* (1829), 1 Mol. 585.

(*n*) *Re Lucan* (*Earl*), *Hardinge* v. *Cobden* (1890), 45 Ch. D. 470; *Tew* v. *Winterton* (*Earl*) (1792), 3 Bro. C. C. 489, 493 (bond in ante-nuptial settlement to convey sufficient real estate to secure the wife a certain annuity in lieu of dower); *Prebble* v. *Boghurst* (1818), 1 Swan. 309, 321 (ante-nuptial bond to settle property which the husband might become seised of).

(*o*) *Wellesley* v. *Wellesley* (1839), 4 My. & Cr. 561.

SECT. 8. Miscellaneous.

in performance of the covenant and will be subject to a lien in favour of the covenantee (*p*).

Cases where no lien arises.

39. A covenant to convey lands of a certain value to the uses of a settlement does not create a lien on lands to which the covenantor was equitably entitled at the date of the covenant, though actually conveyed to him afterwards (*q*).

A simple covenant or agreement to charge land does not create a lien upon the covenantor's real estate where no particular land is mentioned, nor where the agreement is only for a personal security with power to call for a real security, nor where it otherwise appears to be intended to rely only upon the covenant (*r*), nor where there is no consideration (*s*). So that a covenant or promise in writing to give a security by mortgage, or to sell lands when required (*t*), or a mere covenant to settle lands of a certain value (*u*) or at or within a certain time, does not create a lien in favour of the covenantee or promisee. Nor will a lien arise where the settlement contains only a power, and not an express trust, to purchase lands, nor on a covenant by a husband to settle (*v*).

Part VI.—Enforcement of Lien.

SECT. 1.—*Legal Lien.*

Remedies in case of possessory liens.

40. Legal or possessory liens merely confer on the holder of the goods or chattels in respect of which they are claimed a passive right to detain such goods or chattels until the debt is paid (*a*), and cannot be enforced by sale of the property held, although there may be expense incurred in its retention; a person who chooses to insist on his right of retainer may do so, but he has no further right, and must put up with any inconvenience which the retention may entail (*b*). The holder of the property, as a rule, is not permitted to make any claim for the use of the place in

Retainer as a rule the only right.

(*p*) *Sowden* v. *Sowden* (1785), 1 Bro. C. C. 582; *Lechmere* v. *Carlisle* (*Earl*) (1733), 3 P. Wms. 211; *Wilcocks* v. *Wilcocks* (1706), 2 Vern. 558; *Tooke* v. *Hastings* (1689), 2 Vern. 97.

(*q*) *Gardner* v. *Townshend* (*Marquis*) (1815), Coop. G. 301; and see title EQUITY, Vol. XIII., p. 140.

(*r*) *Collins* v. *Plummer* (1709), 1 P. Wms. 104.

(*s*) *Re Lucan* (*Earl*), *Hardinge* v. *Cobden* (1890), 45 Ch. D. 470; and see titles EQUITY, Vol. XIII., pp. 97, 98; GIFTS, Vol. XV., pp. 428 *et seq.*

(*t*) *Williams* v. *Lucas* (1789), 2 Cox, Eq. Cas. 160; *Berrington* v. *Evans* (1839), 3 Y. & C. (EX.) 384.

(*u*) *Fremoult* v. *Dedire* (1718), 1 P. Wms. 429; *Mornington* v. *Keane* (1858), 2 De G. & J. 292; and see *Re Sankey Brook Coal Co., Re Radley and Bramall* (1871), L. R. 12 Eq. 472.

(*v*) *Lench* v. *Lench* (1805), 10 Ves. 511.

(*a*) See p. 2, *ante.*

(*b*) *Jones* v. *Pearle* (1723), 1 Stra. 556; *Ex parte Shank* (1754), 1 Atk. 234; *Clark* v. *Gilbert* (1835), 2 Bing. (N. C.) 343, 356; *Legg* v. *Evans* (1840), 6 M. & W. 36; *Thames Iron Works Co.* v. *Patent Derrick Co.* (1860), 1 John. & H. 93; *Mulliner* v. *Florence* (1878), 3 Q. B. D. 484, C. A.; *Bozon* v. *Bolland* (1839), 4 My. & Cr. 354; *Molesworth* v. *Robbins* (1845), 2 Jo. & Lat. 358; *Pelly* v. *Wathen* (1851), 1 De G. M. & G. 16, 23, C. A.; *Lickbarrow* v. *Mason* (1793), 6 East, 21, n., H. L., *per* BULLER, J., at p. 24, n.

SECT. 1. Legal Lien.

which it is detained, or otherwise for keeping it (*c*), and it makes no difference that, by advertisement or otherwise, he notifies the owner that such a claim will be made unless the goods are removed and such expenses paid on or before a stated time. Any money paid by the owner under protest, in satisfaction of such claim, in order to regain possession of the goods, may be recovered by action (*d*). It follows, therefore, that if the holder sells the goods he will be liable to the owner in trover for their value; and this principle applies in the case of a solicitor's lien upon his client's papers, though a general lien (*e*).

Exceptions.

There are, however, certain exceptions, as in the tea trade, where it is the custom for the vendors to be paid partly by an immediate deposit, while the vendor retains the tea or the warrants which represent it, and on non-payment of the balance to sell it and charge the purchaser with any deficiency, together with interest and other charges (*f*).

(*c*) As to animals, see title ANIMALS, Vol. I., p. 387, and p. 3, *ante*. As to an innkeeper's liability to feed a guest's horse, see title INNS AND INNKEEPERS, Vol. XVII., p. 324.

(*d*) *Somes* v. *British Empire Shipping Co.* (1860), 8 H. L. Cas. 338; *Bruce* v. *Everson* (1883), Cab. & El. 18; *Dimsdale* v. *London and Brighton Rail. Co.* (1862), 3 F. & F. 167, 169, n. Lord ELLENBOROUGH, C.J., however, in *Hartley* v. *Hitchcock* (1816), 1 Stark. 408, seems to have thought that a right to sell would arise in such cases where a reasonable time and notice to remove the goods had been given, and there are authorities to support such a right in favour of innkeepers, prior to the statutory right to sell conferred by the Innkeepers Act, 1878 (41 & 42 Vict. c. 38), s. 1), said by some to be confined by custom to London and Exeter, and by others to be a general right (see the judgment of PAGE WOOD, V.-C., in *Thames Iron Works Co.* v. *Patent Derrick Co.* (1860), 1 John. & H. 93) to sell a horse to defray the expenses of its keep, when on the reasonable appraisement of four neighbours it has been found to have eaten its full value.

(*e*) *Clark* v. *Gilbert* (1835), 2 Bing. (N. C.) 343. As to a solicitor's statutory lien and his right to enforce it, see title SOLICITORS.

(*f*) *Re Tate, Ex parte Moffatt* (1841), 2 Mont. D. & De G. 170. There are also certain other exceptions to the general rule where power to sell goods subject to a lien is given by statute, *e.g.*, the liens of (1) innkeepers, enforceable by sale under the Innkeepers Act, 1878 (41 & 42 Vict. c. 38), s. 1 (see title INNS AND INNKEEPERS, Vol. XVII., pp. 326, 327): (2) carriers, enforceable under the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 97; and see *Great Western Rail. Co.* v. *Sharman* (1892), 61 L. J. (Q. B.) 600, where it was said that a passive lien, being an imperfect remedy, could not be meant when given by Act of Parliament to be the exclusive remedy. See also, as to a carrier's right to sell on non-payment, *Field* v. *Newport, Abergavenny and Hereford Rail. Co.* (1858), 3 H. & N. 409; *North* v. *London and North Western Rail. Co.* (1863), 9 Jur. (N. S.) 897; *Ivens* v. *Great Western Rail. Co.* (1889), 53 J. P. 148; *Wallis* v. *London and South Western Rail. Co.* (1870), L. R. 5 Exch. 62; disapproved in *Caledonian Rail. Co.* v. *Guild* (1873), 1 R. (Ct. of Sess.) 198; *Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *North Central Wagon Co.* (1888), 13 App. Cas. 554; and as to the obligation of carriers to keep goods for a reasonable time, see title CARRIERS, Vol. IV., p. 93: (3) shipowners, enforceable under Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 495—501, which extends to a wharfinger's or warehouseman's claim for rent, rates, and other charges due in respect of any goods deposited by the shipowner with notice that the goods so deposited are subject to a lien; and see title SHIPPING AND NAVIGATION. For form of notice to wharfinger to exercise lien for freight and other charges under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), see Encyclopædia of Forms and Precedents, Vol. IV., p. 127: (4) vendors of chattels, enforceable under the Sale of Goods Act, 1893 (57 & 58 Vict. c. 71), ss. 39, 41, 42, 43; and see title SALE OF GOODS: (5) dock companies,

SECT. 1.
Legal Lien.

All persons entitled to general or particular liens may expressly stipulate for a power of sale and prescribe the terms of sale in the event of the lien remaining unsatisfied after a certain date; there is nothing to prevent parties from attaching such conditions at the time the lien arises (*g*).

SECT. 2.—*Equitable Lien.*

Remedies of unpaid vendor of land.

41. A vendor's lien and other liens upon real estate, are enforceable by sale (*h*), but not until they have been established by a judgment of the court (*i*) binding the persons affected by the lien (*k*). An exception to this general rule, however, exists in the case of trust property, for a lien against a trust estate is not enforceable if the effect of a sale would be to destroy the object of the trust (*l*). Where a purchaser becomes bankrupt before payment of the purchase-money, the vendor may nevertheless enforce his lien by a resale, and if the proceeds after payment of the proper expenses be insufficient to discharge the original purchase-money, he may prove against the bankrupt's estate for the balance (*m*).

Resale.

Rescission of contract.

The lien of an unpaid vendor also gives him the alternative right to rescind the contract and recover possession of the land (*n*), but he cannot enforce it by foreclosure (*o*).

Against public company.

42. The lien may be enforced against land taken by a public company, even though the undertaking for which the land was acquired is in active operation and an interest therein has been acquired by the public (*p*); and it seems that the court may, upon the application of a vendor, restrain the company from continuing

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enforceable under the Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), s. 45; and see *Dresser* v. *Bosanquet* (1862), 4 B. & S. 460, and title WATERS AND WATERCOURSES.

(*g*) See, *e.g.*, the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 48 (4); *Lamond* v. *Davall* (1847), 9 Q. B. 1030; and title SALE OF GOODS.

(*h*) *Hope* v. *Booth* (1830), 1 B. & Ad. 498; *Mackreth* v. *Symmons* (1808), 15 Ves. 329; *Westmacott* v. *Robins* (1862), 4 De G. F. & J. 390, 396, C. A.; *Swainston* v. *Clay* (1863), 3 De G. J. & Sm. 558, C. A. As to enforcement of an equitable lien with interest, see *Re Drax, Savile* v. *Drax*, [1903] 1 Ch. 781, C. A.; *Lippard* v. *Ricketts* (1872), L. R. 14 Eq. 291.

(*i*) Actions for the sale and distribution of the proceeds of property subject to any lien are assigned to the Chancery Division by the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34 (3).

(*k*) *A.-G.* v. *Sittingbourne and Sheerness Rail. Co.* (1866), L. R. 1 Eq. 636.

(*l*) *Darke* v. *Williamson* (1858), 25 Beav. 622.

(*m*) *Re Perkins, Ex parte Mexican Santa Barbara Mining Co.* (1890), 24 Q. B. D. 613, C. A.; as to proof by secured creditor see the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 39, Sched. II., r. 9, and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 224 *et seq.* A judgment for specific performance does not create a debt for which there is a vendor's lien within the meaning of this provision (*Re Burr, Ex parte Clarke*, [1892] W. N. 138).

(*n*) *Lysaght* v. *Edwards* (1876), 2 Ch. D. 499, 506.

(*o*) *Munns* v. *Isle of Wight Rail. Co.* (1870), 5 Ch. App. 414.

(*p*) *Walker* v. *Ware, Hadham, and Buntingford Rail. Co.* (1865), L. R. 1 Eq. 195; *Wing* v. *Tottenham and Hampstead Junction Rail. Co.* (1868), 3 Ch. App. 740; *Raper* v. *Crystal Palace and South-London Rail. Co.* (1868), 16 W. R. 413; *Williams* v. *Great Eastern Rail. Co.* (1868), 16 W. R. 821; and see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 97 *et seq.*

SECT. 2. Equitable Lien.

in possession and using the land until the purchase-money has been paid (*q*).

West Indian estates.

43. Other equitable liens enforceable by sale are those of consignees of West Indian estates (*r*), and such liens have priority over all other incumbrances, including securities given to the Crown (*s*).

Part VII.—Extinguishment of Lien.

SECT. 1.—*Possessory Lien* (*a*).

Refusal of tender.

44. A tender by the debtor of the amount due to the creditor puts an end to the creditor's right to retain the goods, but a demand by the creditor for a larger sum than is covered by the lien is not a waiver of his lien (*b*).

Abandonment of lien.

Lien is also waived or destroyed where a claim has been abandoned for a number of years (*c*), or where the party claims to retain goods on grounds different from those on which he rests his claim for lien, and makes no mention of lien (*d*), or where, having a lien on goods for general balance, he claims a lien thereon merely for a particular debt (*e*).

Taking security.

45. If security be taken for payment at a future date of a debt for which the creditor has a lien upon property of the debtor, the lien is in some cases destroyed (*f*). The mere taking of a security does not necessarily destroy the lien; there must be something in the facts of the case or in the nature of the security taken which is inconsistent with, and destructive of, the lien (*g*), as, for

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(*q*) *Allgood* v. *Merrybent and Darlington Rail. Co.* (1886), 33 Ch. D. 571; *Winchester* (*Bishop*) v. *Mid-Hants Rail. Co.* (1867), L. R. 5 Eq. 17; see, however, the following cases to the contrary:—*Pell* v. *Northampton and Banbury Junction Rail. Co.* (1866), 2 Ch. App. 100; *Munns* v. *Isle of Wight Rail. Co.* (1870), 5 Ch. App. 414; *Latimer* v. *Aylesbury and Buckingham Rail. Co.* (1878), 9 Ch. D. 385, C. A.; *Lycett* v. *Stafford and Uttoxeter Rail. Co.* (1872), L. R. 13 Eq. 261.

(*r*) *Fraser* v. *Burgess* (1860), 13 Moo. P. C. C. 314; *Bertrand* v. *Davies* (1862), 31 Beav. 429, 443; *Fetherstone* v. *Mitchell* (1848), 11 I. Eq. R. 35; *Locke* v. *Evans* (1823), 11 I. Eq. R. 52; *Hill* v. *Brown* (1844), 6 I. Eq. R. 403; *Re Tharp* (1852), 2 Sm. & G. 578, n., and see p. 22, *ante;* see also *Re Harriott, Ex parte Pengelley* (1863), 8 L. T. 854; *Re MacDowall, Ex parte Normand, Ex parte Graham* (1864), Cust, West Indian Incumbered Estates Acts, 2nd ed., 300 (also reported 8 Sol. Jo. 851).

(*s*) *Re MacDowall, Ex parte Normand, Ex parte Graham, supra.*

(*a*) As to possessory liens, see pp. 2 *et seq., ante.*

(*b*) *Scarfe* v. *Morgan* (1838), 4 M. & W. 270; *Dirks* v. *Richards* (1842), 4 Man. & G. 574; see title BAILMENT, Vol. I., p. 548.

(*c*) *Re Noble, Ex parte Douglas* (1833), 3 Deac. & Ch. 310.

(*d*) *Boardman* v. *Gill* (1879), 1 Camp. 410, n.; *Weeks* v. *Goode* (1859), 6 C. B. (N. S.) 367; *Cannee* v. *Spanton* (1844), 8 Scott (N. R.), 714; and see title BAILMENT, Vol. I., p. 548; but mere omission to claim the lien when the goods are demanded is not a waiver (*White* v. *Gainer* (1824), 9 Moore (C. P.), 41).

(*e*) *Morley* v. *Hay* (1828), 7 L. J. (O. S.) (K. B.) 104.

(*f*) *Cowell* v. *Simpson* (1809), 16 Ves. 275, 279; *Balch* v. *Symes* (1823), Turn. & R. 87; *Hewison* v. *Guthrie* (1836), 2 Bing. (N. C.) 755; see also *Horncastle* v. *Farran* (1820), 3 B. & Ald. 497.

(*g*) *Solarte* v. *Maes Hilbers* (1832), 1 L. J. (K. B.) 196; *Mason* v. *Morley* (No. 1) (1860), 34 Beav. 471; *Angus* v. *MacLachlan* (1883), 23 Ch. D. 330; *Bank of Africa*

instance, a security taken on property already subject to the lien, or a security which gives time for payment or which gives a right to interest not otherwise payable (*h*). Where bills are given as security the lien may be treated as merely suspended, and may revive on the bills being dishonoured (*i*).

Loss of possession.

46. Redelivery of goods to the owner (*k*) or his agent, destroys the lien (*l*), and when once made cannot be recalled (*m*), even if made by mistake (*n*); but if such redelivery is induced by fraud, the lien revives if possession is recovered, even though such recovery is effected by stratagem (*o*). But a lien is not lost by the deposit of chattels with a third party on behalf of the person entitled to the lien, or if pursuant to the agreement the owner is allowed the temporary use of the chattel and duly returns it to the third party (*p*).

Improper sale.

Where a person having a lien on certain articles improperly sells them, he loses his lien, and cannot retain the purchase-money (*q*).

Refusal of delivery.

Where there is an agreement between a consignor of goods and a carrier for a general lien, such lien is not lost as against the consignor by reason of the refusal of the consignee to accept delivery of the goods (*r*).

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v. *Salisbury Gold Mining Co.*, [1892] A. C. 281, P. C. Thus under the law prior to the Debtors Act, 1869 (32 & 33 Vict. c. 62), when a debtor could be attached, such attachment did not deprive a solicitor of his right to a charging order for costs because the two remedies were consistent (*Lloyd* v. *Mason* (1845), 4 Hare, 132), nor does a judgment for costs deprive a solicitor of his general retaining lien over documents (*Re Aikin's Estate*, [1894] 1 I. R. 225). As to waiver of a solicitor's lien, see title SOLICITORS.

(*h*) *Re Morris*, [1908] 1 K. B. 473, *per* BUCKLEY, L.J., at p. 477.

(*i*) *Stevenson* v. *Blakelock* (1813), 1 M. & S. 535.

(*k*) *Ex parte Shank* (1754), 1 Atk. 234; *Kruger* v. *Wilcox* (1755), Amb. 252 (where a factor allowed the owner to sell goods through a broker and informed the broker that the owner would deal with the goods); see also *Hartley* v. *Hitchcock* (1816), 1 Stark. 408; *Castling* v. *Aubert* (1802), 2 East, 325. Whether possession has been parted with or not is a question of fact (*Bernal* v. *Pim* (1835), 1 Gale, 17). But a captain of a ship who is compelled by law to allow goods to be landed at the Custom House does not lose his lien for freight, even though he has parted with possession of the goods (*Wilson* v. *Kymer* (1813), 1 M. & S. 157).

(*l*) *Sweet* v. *Pym* (1800), 1 East, 4. But where a policy had been deposited to secure a loan with a person who on the death of the owner was one of his executors, and the insurance office would not pay the policy moneys without the receipt of all the executors, the joining of the depositee-executor in such receipt did not put an end to his lien on the policy moneys (*Glaholm* v. *Rowntree* (1837), 6 Ad. & El. 710).

(*m*) *Sweet* v. *Pym*, *supra*.

(*n*) *Dicas* v. *Stockley* (1836), 7 C. & P. 587; see *Bligh* v. *Davies* (1860), 28 Beav. 211.

(*o*) *Bristol* (*Earl*) v. *Wilsmore* (1823), 1 B. & C. 514; *Hawse* v. *Crowe* (1826), Ry. & M. 414, in which cases cheques subsequently dishonoured were fraudulently given to obtain possession of goods which had been sold on terms that they were to be paid for in cash; see also *Wallace* v. *Woodgate* (1824), Ry. & M. 193.

(*p*) *Levy* v. *Barnard* (1818), 8 Taunt. 149; *Reeves* v. *Capper* (1838), 5 Bing. (N. C.) 136.

(*q*) *Jones* v. *Thurloe* (1723), 8 Mod. Rep. 172; *Clark* v. *Gilbert* (1835), 2 Bing. (N. C.) 343; *Mulliner* v. *Florence* (1878), 3 Q. B. D. 484, C. A.

(*r*) *Westfield* v. *Great Western Rail. Co.* (1883), 52 L. J. (Q. B.) 276.

SECT. 2.

Equitable Lien.

Taking security.

SECT. 2.—*Equitable Lien* (*s*).

47. A vendor's lien is not, as a rule, lost by the taking of security for the purchase-money in the form of a draft, promissory note, or bill of exchange (*t*), even though negotiated by the vendor (*a*), nor by taking as security a mortgage bond (*b*), or covenant (*c*), from the purchaser himself, although it would probably be otherwise if the bond or covenant were taken from a third party (*d*). So in the case of land taken by a public company, where the amount of the price and compensation exceeds the deposit paid into the bank, the payment of the valuation and the giving of the bond under the Lands Clauses Consolidation Act, 1845 (*e*), does not destroy the lien (*f*), nor does the giving of a bond in the case of a contract under which the consideration is to be in cash or, at the option of the company, such security as shall be agreed on (*g*).

On the other hand, if the property is sold in consideration of a security (*h*), or, if the contract between the parties, or the inference to be clearly drawn from the circumstances, shows an intention that the vendor should rely upon the security only and not upon the property, the lien will be lost (*i*).

Loss of lien depends on intention.

But in all such cases the question whether the lien is lost depends on the intention of the parties as a fact ascertained from the circumstances of the particular case (*k*). Thus, where the parties agree to postpone payment of the purchase-money until a

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(*s*) As to equitable liens, see pp. 14 *et seq.*, *ante*.

(*t*) *Hughes* v. *Kearney* (1803), 1 Sch. & Lef. 132; *Grant* v. *Mills* (1813), 2 Ves. & B. 306; *Gibbons* v. *Baddall* (undated), 2 Eq. Cas. Abr., 3rd ed., 682; *Re Lightoller, Ex parte Peake* (1816), 1 Madd. 346; *Gunn* v. *Bolckow, Vaughan & Co.* (1875), 10 Ch. App. 491; see also *Re Defries (J.) & Sons, Ltd., Eichholz* v. *Defries (J.) & Sons, Ltd.*, [1909] 2 Ch. 423; *Henderson* v. *Arthur*, [1907] 1 K. B. 10, 13, C. A.

(*a*) *Re Wright, Ex parte Loaring* (1814), 2 Rose, 79; *Re Defries (J.) & Sons, Ltd., Eichholz* v. *Defries (J.) & Sons, Ltd., supra.*

(*b*) *Collins* v. *Collins* (No. 2), *Downes* v. *Downes* (1862), 31 Beav. 346.

(*c*) *Tardiff* v. *Scrughan* (1769), cited 1 Bro. C. C. 423; *Elliot* v. *Edwards* (1802), 3 Bos. & P. 181; *Nairn* v. *Prowse* (1802), 6 Ves. 752; *Mackreth* v. *Symmons* (1808), 15 Ves. 329; *Hope* v. *Booth* (1830), 1 B. & Ad. 498; see, however, *Fowel* v. *Heelis* (1773), 1 Bro. C. C. 421.

(*d*) *Cood* v. *Cood and Pollard* (1822), 10 Price, 109, Ex. Ch.

(*e*) 8 & 9 Vict. c. 18, s. 85; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 99 *et seq.*

(*f*) *Walker* v. *Ware, Hadham, and Buntingford Rail. Co.* (1865), L. R. 1 Eq. 195.

(*g*) *Pell* v. *Midland and South Wales Rail. Co.* (1869), 17 W. R. 506.

(*h*) *Winter* v. *Anson (Lord)* (1828), 3 Russ. 488; *Clarke* v. *Royle* (1830), 3 Sim. 499; *Buckland* v. *Pocknell* (1843), 13 Sim. 406.

(*i*) *Parrott* v. *Sweetland* (1835), 3 My. & K. 655; *Winter* v. *Anson (Lord), supra*, at p. 492; *Re Albert Life Assurance Co., Ex parte Western Life Assurance Society* (1870), L. R. 11 Eq. 164; *Re Brentwood Brick and Coal Co.* (1876), 4 Ch. D. 562, C. A.; *Re London and Lancashire Paper Mills Co.* (1888), 58 L. T. 798. *Gore and Durant's Case* (1866), L. R. 2 Eq. 349, was distinguished on the ground that, though payment was to be made as in *Re Brentwood Brick and Coal Co., supra*, out of moneys arising out of certain sources which never became available, the agreement was to be void on non-payment within a fixed time; compare *Re Durrow Brick and Tile Works Co.*, [1904] 1 I. R. 530, C. A.

(*k*) Compare *Re Taylor, Stileman and Underwood*, [1891] 1 Ch. 590, C. A.

resale (*l*), or the vendor takes a bond and a mortgage of part of the property sold (*m*), or where the consideration is an annual rent payable by a railway company (*n*), or the payment of an annuity for two or more lives secured by the bond of the purchaser (*o*), or where the vendor concurs in a mortgage by the purchaser of the property to a person who lends part of the purchase-money (*a*), or where the vendor takes a mortgage for part of the purchase-money, and a promissory note payable on demand for the remainder (*b*), in each of these cases the lien is lost. It also seems that the lien is destroyed if the bond or covenant, instead of being given by the purchaser alone, is joined in by sureties (*c*). The result is the same if the vendor takes from the purchaser, as special security for the purchase-money, a sum of stock (*d*) or, probably, a mortgage upon another estate of the purchaser (*e*), although such a mortgage is not conclusive evidence of an intention to give up the lien (*f*).

The principle derived from the authorities appears to be that the taking of a distinct security affords evidence that the lien has been abandoned, but that this inference may be rebutted by proof of an agreement to the contrary; moreover, it appears to be settled that both vendor and purchaser lose their liens if by their own act or default the contract is not completed (*g*).

Registered land.

48. The lien of a vendor will also be lost if, in Yorkshire, he fails to register a memorandum thereof in accordance with the Yorkshire Registries Act, 1884 (*h*). In the case of land in a district where compulsory registration is in force under the Land Transfer Acts, 1875 and 1897 (*i*), the vendor's lien must be registered to protect it, unless the land is being registered for the first time with a possessory title only (*k*).

(*l*) *Re Parkes, Ex parte Parkes* (1823), 1 Gl. & J. 228.

(*m*) *Capper* v. *Spottiswoode* (1829), Taml. 21.

(*n*) *Jersey* (*Earl*) v. *Briton Ferry Floating Dock Co.* (1869), L. R. 7 Eq. 409; and see *Winter* v. *Anson* (*Lord*) (1828), 3 Russ. 488.

(*o*) *Dixon* v. *Gayfere* (No. 3) (1855), 21 Beav. 118

(*a*) *Cood* v. *Cood and Pollard* (1821), 9 Price, 544.

(*b*) *Bond* v. *Kent* (1692), 2 Vern. 281.

(*c*) *Cood* v. *Cood and Pollard* (1822), 10 Price, 109, Ex. Ch

(*d*) *Nairn* v. *Prowse* (1802), 6 Ves. 752.

(*e*) *Ibid.*

(*f*) *Mackreth* v. *Symmons* (1808), 15 Ves. 329, *per* LordEldon, L.C., at p. 348; see p. 28, *ante*.

(*g*) *Oxenham* v. *Esdaile* (1828), 2 Y. & J. 493; *Esdaile* v. *Oxenham* (1824), 3 B. & C. 225; *Dinn* v. *Grant* (1852), 5 De G. & Sm. 451; *Ridout* v. *Fowler*, [1904] 1 Ch. 658. For an instance where a lien is preserved as to part and lost as to the remainder, see *Mackreth* v. *Symmons, supra;* see also *Re Ryland, Ex parte Ladd, Ex parte Mole* (1834), 3 Deac. & Ch. 647 (tenant rejecting lease after expenditure on property), and *Re Durrow Brick and Tile Works Co.*, [1904] 1 I. R. 530, C. A. (vendor's lien lost by placing third parties in false position).

(*h*) 47 & 48 Vict. c. 54, s. 7. Non-registration under the Middlesex Registry Act, 1708 (7 Ann. c. 20), does not avoid interests in land not created in writing (*Sumpter* v. *Cooper* (1831), 2 B. & Ad. 223; *Re Stephens' Estate* (1875), 10 I. R. Eq. 282; *Re Burke's Estate, Ex parte Burke* (1881), 9 L. R. Ir. 24, C. A.; *Kettlewell* v. *Watson* (1884), 26 Ch. D. 501).

(*i*) 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65.

(*k*) See Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 32; Land Transfer

SECT. 2.
Equitable Lien.

Partnership lien.

49. A partnership lien is lost if by agreement the assets of the partnership are distributed among the partners so as to become their separate property (*l*), unless the distribution is made expressly subject to the lien (*m*).

Rules, 1903, r. 142; and, generally, title REAL PROPERTY AND CHATTELS REAL.

(*l*) *Lingen* v. *Simpson* (1824), 1 Sim. & St. 600; *Holroyd* v. *Griffiths* (1856), 3 Drew. 428; and see *Ex parte Ruffin* (1801), 6 Ves. 119; *Re Hayward, Ex parte Burdekin* (1842), 2 Mont. D. & De G. 704. As to partnership lien, see p. 18, *ante*.

(*m*) *Holderness* v. *Shackels* (1828), 8 B. & C. 612.

LIFE INSURANCE.

See INSURANCE.

LIFE-BOATS.

See SHIPPING AND NAVIGATION.

LIFE-SAVING APPLIANCES.

See PUBLIC HEALTH AND LOCAL ADMINISTRATION; SHIPPING AND NAVIGATION.

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See EASEMENTS AND PROFITS À PRENDRE.

LIGHT COIN.

See CONSTITUTIONAL LAW; CRIMINAL LAW AND PROCEDURE.

LIGHT RAILWAYS.

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LIMITATION OF ACTIONS.

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Part I.—Introduction.

PART I. Introduction.

Nature of Statutes of Limitation.

50. For most actions there are prescribed by statute periods of limitation within which proceedings must be commenced to prevent the statutory bar.

The statutes which impose periods of limitation for classes of actions are called Statutes of Limitation (*a*). Their provisions vary according to their subject-matter, but they are all *in pari materiâ* and should receive a uniform construction; they are beneficial statutes, and are to be construed liberally and not strictly (*b*).

Construction.

All Statutes of Limitation, except those which govern rights to real property (*c*), are rules of procedure only, and form part of the *lex fori*. Therefore, if an action is brought in England, the period of limitation, wherever the cause of action arose, is governed by the appropriate Statute of Limitation (*d*).

Part II.—Simple Contract Debts and Personal Actions.

SECT. 1.—*Periods of Limitation.*

Actions of tort and simple contract.

51. The period of limitation for most actions of tort and for actions arising out of simple contract is six years from the accrual of the cause of action (*e*).

(*a*) *Gregory* v. *Torquay Corporation*, [1911] 2 K. B. 556. The Statutes of Limitation are, for actions on simple contracts and torts (see the text, *infra*), the Limitation Act, 1623 (21 Jac. 1, c. 16), amended by stat. (1705) 4 & 5 Ann. c. 3, the Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), and the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97); for actions on specialty debts etc. (see p. 76, *post*), the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42); for actions to recover land and money charged on land (see p. 82), the Real Property Limitation Acts, 1833 (3 & 4 Will. 4, c. 27), 1837 (7 Will. 4 & 1 Vict. c. 28), and 1874 (37 & 38 Vict. c. 57), and the Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38); in the case of Crown property (see p. 159, *post*), the Crown Suits Acts, 1769 (9 Geo. 3, c. 16), and 1861 (24 & 25 Vict. c. 62); in the case of the property of the Duchy of Cornwall (see p. 161, *post*), stats. (1844) 7 & 8 Vict. c. 105, (1860) 23 & 24 Vict. c. 53; for penal actions (see p. 174, *post*), stat. (1588-9) 31 Eliz. c. 5, and the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42); for actions against trustees (see p. 161, *post*), the Trustee Act, 1888 (51 & 52 Vict. c. 59); for actions against public authorities (see p. 176, *post;* title PUBLIC AUTHORITIES AND PUBLIC OFFICERS), the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61). Besides these general statutes there are special statutes fixing special periods of limitations in particular cases (see p. 177, *post*). As to the effect of the Judicature Acts upon the Statutes of Limitation, see title ACTION, Vol. I., pp. 46, 47.

(*b*) *Murray* v. *East India Co.* (1821), 5 B. & Ald. 204, 215; *Doe* d. *Duroure* v. *Jones* (1791), 4 Term Rep. 300, 308; *Tolson* v. *Kaye* (1822), 3 Brod. & Bing. 217, 227; *A'Court* v. *Cross* (1825), 3 Bing. 329, 332; *Hunter* v. *Gibbons* (1856), 1 H. & N. 459; *King* v. *Walker* (1761), 1 Wm. Bl. 286; *Lafond* v. *Ruddock* (1853), 13 C. B. 813, 820; *Scales* v. *Jacob* (1826), 3 Bing. 638, 645; *Perry* v. *Jackson* (1792), 4 Term Rep. 516, 519.

(*c*) See *Dundee Harbour* (*Trustees*) v. *Dougall* (1852), 1 Macq. 317, 321, H. L.

(*d*) *Lafond* v. *Ruddock*, *supra*, *per* JERVIS, C.J., at p. 818; *Bury* v. *Goldner* (1844), 1 Dow. & L. 834; *Finch* v. *Finch* (1876), 45 L. J. (CH.) 816; and see title CONFLICT OF LAWS, Vol. VI., pp. 246—248, 302, 306 *et seq.*

(*e*) Limitation Act, 1623 (21 Jac. 1, c. 16), s. 3; Mercantile Law Amendment

SECT. 1. Periods of Limitation.

Actions on awards, for copyhold fines, escape, and *fieri facias*.

52. For actions of debt upon an award when the submission is not by specialty (*f*), or for any fine due in respect of copyhold estates (*g*), or for an escape (*h*), or for money levied on a *fieri facias* (*i*), the period of limitation is six years from the accrual of the cause of action (*i*).

Trespass to the person.

53. For actions of trespass to the person (*k*) the period of limitation is four years after the accrual of the cause of action (*l*).

Slander.

54. For actions of slander, when the words are actionable *per se*, the period of limitation is two years from the speaking of the words (*m*), but if the words are not actionable *per se*, then six years from the happening of the damage (*n*).

Libel.

An action of libel must be brought within six years from publication (*o*).

SECT. 2.—*Actions to which the Limitation Act*, 1623, *applies.*

SUB-SECT. 1.—*Actions within the Act.*

General application.

55. The Limitation Act, 1623 (*p*) (frequently referred to in this part of this title as "the Act of 1623"), applies to all actions arising out of simple contracts and to all actions of tort at common law (*q*),

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Act, 1856 (19 & 20 Vict. c. 97), s. 9. As to the meaning of the term "simple contract," see title CONTRACT, Vol. VIII., p. 334. As to what actions are within the Act, see the text, *infra*. Actions of accounts relating to trade between merchant and merchant were excluded from the Limitation Act, 1623 (21 Jac. 1, c. 16); see *Robinson* v. *Alexander* (1834), 2 Cl. & Fin. 717, H. L., but the limitation of six years was applied to them by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 9; see *Friend* v. *Young*, [1897] 2 Ch. 421, 431.

(*f*) *Turner* v. *Midland Rail. Co.*, [1911] 1 K. B. 832; see *Hodsden* v. *Harridge* (1669), 2 Wms. Saund. (ed. 1871) 150.

(*g*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 3; see *Monckton* v. *Payne*, [1899] 2 Q. B. 603; *Fraser* v. *Mason* (1883), 11 Q. B. D. 574, C. A.

(*h*) As to escape, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 508 *et seq.*

(*i*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 3; see title EXECUTION, Vol. XIV., pp. 37 *et seq.*

(*k*) *I.e.*, assault and false imprisonment; see title TRESPASS; see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 296 *et seq.*

(*l*) Limitation Act, 1623 (21 Jac. 1, c. 16), s. 3.

(*m*) *Ibid.* As to words actionable *per se*, see title LIBEL AND SLANDER, Vol. XVIII., pp. 606 *et seq.*

(*n*) *Saunders* v. *Edwards* (1662), 1 Sid. 95; *Law* v. *Harwood* (1628), Cro. Car. 140; *Topsall* v. *Edwards* (1629), Cro. Car. 163; *Browne* v. *Gibbons* (1703), 1 Salk. 206; see *Littlebury* v. *Wright* (1662), 1 Sid. 95; *Backhouse* v. *Bonomi* (1861), 9 H. L. Cas. 503, *per* Lord CRANWORTH, at pp. 512, 513; compare *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127. For an action of slander of title the period of limitation is six years (*Law* v. *Harwood*, *supra*).

(*o*) *Say and Seal* (*Viscount*) v. *Stephens* (1628), Cro. Car. 535.

(*p*) 21 Jac. 1, c. 16, s. 3.

(*q*) The Limitation Act, 1623 (21 Jac. 1, c. 16), was limited to actions at common law, but is now applicable to actions in any division of the High Court (see p. 169, *post*); as to its application formerly in equity, see note (*l*), *ibid.* The Act of 1623 mentions certain particular forms of action, namely, all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, trover, and replevin for taking away of goods and cattle; of account and upon the case, other than accounts between merchant and merchant, their factors and servants; of debt grounded upon any lending on contract without specialty; of debt for arrears of rents (as to which see note (*s*), p. 40, *post*), and all actions of assault, menace, battery, wounding, or imprisonment. *Assumpsit* (action founded on contract other than an action of debt) is not specifically mentioned, but was held to be

SECT. 2.

Actions to which the Limitation Act, 1623, applies.

except those actions for which there is a special period of limitation provided (*r*).

Particular instances of simple contract debts.

56. The Limitation Act, 1623 (*s*), also applies to the personal remedy on a simple contract debt which is charged on land, where there is no covenant to pay (*t*); to a simple contract debt which is recited in a deed, unless there is in the deed an express or implied contract to pay it (*u*); to a warrant of attorney to confess judgment for the amount of a simple contract debt (*x*); to an action for mesne profits (*y*); to an action against the equitable assignee of leaseholds in possession, grounded on his liability to perform the covenants in the lease (*a*); to a set-off or counterclaim (*b*); to an action founded on a foreign judgment (*c*); and to an Admiralty action for seamen's wages (*d*).

Actions given by statute.

57. An action which a statute expressly enables to be brought, but which is not an action for a statutory debt, is within (*e*) the Act of 1623 (*f*). Thus, an action against a director of a company under the Companies (Consolidation) Act, 1908 (*g*), s. 84 (*h*), and the action referred to in the Copyhold Act, 1894, s. 26 (*i*), are, it seems,

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within the statute; see *Chandler* v. *Vilett* (1670), 2 Wms. Saund. (ed. 1871) 391. As to trover, see *Swayn* v. *Stephens* (1632), Cro. Car. 245; title TROVER AND DETINUE. As to merchants' accounts, see note (*e*), pp. 37, 38, *ante*. Forms of action are now abolished (see title ACTION, Vol. I., p. 45); but the Limitation Act, 1623 (21 Jac. 1, c. 16), still applies to the circumstances which constituted the actions named in it, although the actions are no longer called by the same names; see *Gibbs* v. *Guild* (1882), 9 Q. B. D. 59, 67, C. A.

(*r*) See p. 176, *post*.

(*s*) Limitation Act, 1623 (21 Jac. 1, c. 16), s. 3.

(*t*) *Firth* v. *Slingsby* (1888), 58 L. T. 481; *Barnes* v. *Glenton*, [1899] 1 Q. B. 885, C. A.

(*u*) *Iven* v. *Elwes* (1854), 3 Drew. 25.

(*x*) *Clarke* v. *Figes* (1817), 2 Stark. 234; see title JUDGMENTS AND ORDERS, Vol. XVIII., p. 190.

(*y*) Buller, Law of Nisi Prius, 88; Adams, Action of Ejectment, 4th ed., 393; *Reade* v. *Reade* (1801), 5 Ves. 744.

(*a*) *Sanders* v. *Benson* (1841), 4 Beav. 350.

(*b*) Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), s. 4; R. S. C., Ord. 19, r. 3; *Remington* v. *Stevens* (1748), 2 Stra. 1271; *Rawley* v. *Rawley* (1876), 1 Q. B. D. 460, C. A.; see *Dingle* v. *Coppen*, *Coppen* v. *Dingle*, [1899] 1 Ch. 726; *Smith* v. *Betty*, [1903] 2 K. B. 317, 323, C. A. See as to pleading and practice in case of set-off, p. 184, *post*; title SET-OFF AND COUNTERCLAIM.

(*c*) *Dupleix* v. *De Roven* (1706), 2 Vern. 540; see *Wilson* v. *Dunsany* (*Lady*) (1854), 18 Beav. 293; disapproved on another point, *Re Kloebe*, *Kannreuther* v. *Geiselbrecht* (1884), 28 Ch. D. 175; *Reimers* v. *Druce* (1857), 23 Beav. 145; and see title JUDGMENTS AND ORDERS, Vol. XVIII., p. 219. As to an action on an English judgment, see p. 85, *post*.

(*d*) Stat. (1705) 4 & 5 Ann. c. 3, s. 17; see title SHIPPING AND NAVIGATION.

(*e*) *Cork and Bandon Rail. Co.* v. *Goode* (1853), 13 C. B. 826, *per* MAULE, J., at p. 835; see, also, *Salford County Borough Corporation* v. *Lancashire County Council* (1890), 25 Q. B. D. 384, C. A. (expenses of local authority); *Re Newbegin's Estate*, *Eggleton* v. *Newbegin* (1887), 36 Ch. D. 477; *Re Watson*, *Stamford Union* v. *Bartlett*, [1899] 1 Ch. 72; *Re Clabbon*, *an Infant*, [1904] 2 Ch. 465 (maintenance of pauper lunatic); *Tobacco Pipe Makers' Co.* v. *Loder* (1851), 16 Q. B. 765 (penalty under bye-law of chartered company). An action for a statutory debt is an action on a specialty, as to which see p. 76, *post*.

(*f*) Limitation Act, 1623 (21 Jac. 1, c. 16).

(*g*) 8 Edw. 7, c. 69.

(*h*) *Thomson* v. *Clanmorris* (*Lord*), [1900] 1 Ch. 718, C. A.; see also title COMPANIES, Vol. V., pp. 136 *et seq.*

(*i*) 57 & 58 Vict. c. 46; see title COPYHOLDS, Vol. VIII., p. 122.

SECT. 2. Actions to which the Limitation Act, 1623, applies.

within the Act of 1623 (*j*), as is also a claim for an indemnity under the Land Transfer Act, 1897, s. 26 (*k*).

Devastavit and claims against estate of deceased.

58. The Act of 1623 (*l*) applies to a claim against an executor personally founded on a *devastavit* (*m*), and to proceedings to enforce the statutory right which simple contract creditors have (*n*) against the real estate of their deceased debtors (*o*).

SUB-SECT. 2.—*Actions not within the Act.*

Land. Rentcharges etc.

59. The Limitation Act, 1623 (*p*), does not apply to an action for the recovery of land (*q*), or for a rentcharge or arrears of a rentcharge (*r*), or for rent reserved on an indenture of demise (*s*); nor does it apply to an action brought on a statute for a statutory debt (*t*), or on a record (*a*), or other specialty (*b*).

Specialty.

Equitable claims.

60. Except in cases which come within the Mercantile Law Amendment Act, 1856 (*c*), or the Trustee Act, 1888 (*d*), the Act of 1623 (*e*) does not apply to a purely equitable right for which there was no analogous remedy at common law (*f*).

Actions *in rem.*

An action *in rem* for damages to a ship by collision is not within

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(*j*) Limitation Act, 1623 (21 Jac. 1, c. 16).

(*k*) 60 & 61 Vict. c. 65, s. 7 (7). See pp. 41, 46, *post.*

(*l*) Limitation Act, 1623 (21 Jac. 1, c. 16), s. 3.

(*m*) See *Re Croydon* (1908), 125 L. T. Jo. 282; and the cases cited in title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 317, note (*a*); and see generally *ibid.*, pp. 317, 318; compare *ibid.*, p. 265. At common law the remedy for a *devastavit* was an action of trespass; see *Thorne* v. *Kerr* (1855), 2 K. & J. 54, 63. As to the effect of the Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8, see also pp. 161, 162, *post.*

(*n*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 246.

(*o*) *Fordham* v. *Wallis* (1853), 10 Hare, 217. As to marshalling of assets before the Administration of Estates Act, 1833 (3 & 4 Will. 4, c. 100), see *Fordham* v. *Wallis*, *supra.* If a testator by his will charges his real estate with his simple contract debts, then the period of limitation is twelve years; see p. 82, *post;* title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 254.

(*p*) 21 Jac. 1, c. 16, s. 3.

(*q*) See p. 104, *post.*

(*r*) Limitation Act, 1623 (21 Jac. 1, c. 16), s. 3. See Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 3, p. 76, *post; Freeman* v. *Stacy* (1629), Hut. 109; *Stackhouse* v. *Barnston* (1805), 10 Ves. 453, 467; *Cupit* v. *Jackson* (1824), M'Cle. 495; *Collins* v. *Goodall* (1691), 2 Vern. 235.

(*s*) *Freeman* v. *Stacy*, *supra.* The words in the Act, "actions of debt for arrearages of rent," are limited to arrears of rent, where the demise is without deed (*ibid.*). As to arrears of rent where the demise is by deed, see p. 77, *post.*

(*t*) *Talory* v. *Jackson* (1638), Cro. Car. 513; *Cork and Bandon Rail. Co.* v. *Goode* (1853), 13 C. B. 826; *Shepherd* v. *Hills* (1855), 11 Exch. 55; *Nichols* v. *Regent's Canal Co.* (1894), 71 L. T. 249, *per* CHARLES, J., at p. 254 (reversed on another point, 71 L. T. 836, C. A.); *Re Cornwall Minerals Rail. Co.*, [1897] 2 Ch. 74; *Magherafelt Union* v. *Gribben* (1889), 24 L. R. Ir. 520; *Hampstead Corporation* v. *Caunt*, [1903] 2 K. B. 1; see p. 39, *ante.*

(*a*) *Jones* v. *Pope* (1666), 1 Wms. Saund. (ed. 1871) 55. Therefore an action on an English judgment is not within the statute; see p. 85, *post.* As to an action on a foreign judgment, see p. 39, *ante.*

(*b*) *Jones* v. *Pope*, *supra.* As to what debts are specialty debts and as to the period of limitation for such debts, see p. 76, *post.*

(*c*) 19 & 20 Vict. c. 97, s. 9; see note (*e*), p. 37, *ante.*

(*d*) 51 & 52 Vict. c. 59; see p. 161, *post.*

(*e*) Limitation Act, 1623 (21 Jac. 1, c. 16).

(*f*) See pp. 169, 170, *post.*

SECT. 2.
Actions to which the Limitation Act, 1623, applies.

the Limitation Act, 1623 (*g*), nor is a penal action (*h*), nor an action claiming a mandamus (*i*).

Mandamus.

61. The Act of 1623 (*j*) does not in general apply to proceedings by and against the Crown (*k*); but it has been made applicable to the claim of a person to indemnity from the Crown under the Land Transfer Act, 1897 (*l*).

The Crown.

If a debt which is not statute-barred is vested in the Crown, the statute ceases to run during the time it is vested in the Crown (*m*). But a debt which is already statute-barred will not be revived by being vested in the Crown, and the statute may be pleaded in answer to a claim by the Crown in respect of such a debt (*n*).

SECT. 3.—*The Remedy Barred, not the Right.*

The statute takes away the remedy only.

62. The Limitation Act, 1623 (*o*), only takes away the remedies by action or by set-off (*p*); it leaves the right otherwise untouched (*q*), and if a creditor whose debt is statute-barred has any means of enforcing his claim other than by action or set-off (*p*), the Act does not prevent him from recovering by such means (*r*).

Appropriation of payments.

Thus money paid to a creditor by the debtor without appropriation may be appropriated to the statute-barred debt (*s*), though the creditor

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(*g*) *The Kong Magnus*, [1891] P. 223; compare *The Longford* (1889), 14 P. D. 34, C. A.; *The Burns*, [1907] P. 137, C. A.

(*h*) See p. 174, *post*.

(*i*) *Ward* v. *Lowndes* (1859), 1 E. & E. 940, 956; and see title CROWN PRACTICE, Vol. X., p. 106. But as the granting of a mandamus is to a certain extent a matter of discretion, the court may refuse to grant a mandamus the object of which is to secure the payment of a statute-barred debt; see *Ward* v. *Lowndes* (1859), 1 E. & E. 940, 956; *Ringland* v. *Lowndes* (1863), 15 C. B. (N. S.) 173, *per* BYLES, J., at p. 199; reversed on another point (1864), 17 C. B. (N. S.) 514, Ex. Ch.; *Salford County Borough Corporation* v. *Lancashire County Council* (1890), 25 Q. B. D. 384, C. A. There is no Statute of Limitations applicable generally to an action for a mandamus, but as to a mandamus to enforce judgment against guardians of the poor, see p. 180, *post*. As to the prerogative writ of mandamus, see title CROWN PRACTICE, Vol. X., pp. 111 *et seq.*

(*j*) Limitation Act, 1623 (21 Jac. 1, c. 16).

(*k*) The Crown not being mentioned therein; see *Rustomjee* v. *R.* (1876), 1 Q. B. D. 487; *Lambert* v. *Taylor* (1825), 4 B. & C. 138; *Brummell* v. *M'Pherson* (1828), 5 Russ. 263. As to the Statutes of Limitation affecting the Crown, see p. 159, *post*.

(*l*) 60 & 61 Vict. c. 65, s. 7 (7); see p. 46, *post*, and title REAL PROPERTY AND CHATTELS REAL.

(*m*) *Lambert* v. *Taylor*, *supra*. If the debt after being vested in the Crown again becomes vested in a subject, the statute, it seems, runs from the time when it so became vested in the subject (*ibid.*).

(*n*) *R.* v. *Morrall* (1818), 6 Price, 24.

(*o*) 21 Jac. 1, c. 16, s. 3.

(*p*) See note (*b*), p. 39, *ante*.

(*q*) "Statute-barred debts are due, though payment of them cannot be enforced by action" (*Curwen* v. *Milburn* (1889), 42 Ch. D. 424, C. A., *per* COTTON, L.J., at p. 434). As to the effect of the Statutes of Limitation in bankruptcy, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 41, 91, 202.

(*r*) *Wainford* v. *Barker* (1697), 1 Ld. Raym. 232; *Courtenay* v. *Williams* (1844), 3 Hare, 539, 551; *Poole* v. *Poole* (1871), 7 Ch. App. 17; *Re Milnes, Milnes* v. *Sherwin* (1885), 53 L. T. 534. So a creditor who has in his hands securities belonging to a surety is entitled to hold them, although time has run against the principal debtor (*Carter* v. *White* (1883), 25 Ch. D. 666; and see title GUARANTEE, Vol. XV., pp. 561 *et seq.*).

(*s*) See title CONTRACT, Vol. VII., p. 451, and p. 69, *post*.

SECT. 3.

The Remedy Barred, not the Right.

cannot so appropriate money received on behalf of, but without the knowledge of, the debtor (*t*).

If a creditor has a lien or other security for his debt, he may enforce his lien or security after the debt is barred (*a*). Thus the lien of a solicitor on documents in his hands for a statute-barred debt is not affected (*b*) by the Act of 1623 (*c*); though no order can be made under the Solicitors Act, 1860 (*d*), making solicitors' costs in an action a charge on the property recovered or preserved, if the right to recover payment of such costs is barred (*e*).

Securities may be enforced.

The right which trustees have to be indemnified out of the trust estate extends to all solicitors' costs properly incurred by trustees, whether those costs are statute-barred or not, if trustees have paid, or are willing to pay, such costs (*f*).

Trustees' indemnity as to costs.

If a solicitor improperly detains money due to a client, the Act of 1623 (*c*) is no bar to the recovery of the money by means of the summary jurisdiction of the High Court (*g*).

Claims against solicitors.

SECT. 4.—*When Time begins to Run.*

SUB-SECT. 1.—*In General.*

Accrual of cause of action.

63. The period of limitation under the Limitation Act, 1623 (*h*), begins when the cause of action accrues. A cause of action accrues, when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed (*i*).

SUB-SECT. 2.—*In Actions Founded on Contract.*

Breach of contract.

64. In an action for a breach of contract the cause of action is the breach (*k*). Accordingly such an action must be brought within

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(*t*) *Waller* v. *Lacy* (1840), 1 Man. & G. 54.

(*a*) *Spears* v. *Hartly* (1800), 3 Esp. 81; *Richards* v. *Curlewis* (1854), 3 Eq. Rep. 278; *Higgins* v. *Scott* (1831), 2 B. & Ad. 413; *Re Broomhead* (1847), 5 Dow. & L. 52; *London and Midland Bank* v. *Mitchell*, [1899] 2 Ch. 161; compare *Re Hepburn, Ex parte Smith* (1884), 14 Q. B. D. 394, 399; and see the cases dealing with the executor's right of retainer of a statute-barred debt cited in title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 258, and in *Re Low, Bland* v. *Low*, [1894] 1 Ch. 147, C. A.; and see the cases as to the acknowledgment or part payment of a statute-barred debt, cited on pp. 58, 59, 67, *post*, and see also title LIEN, p. 3, *ante*.

(*b*) *Higgins* v. *Scott* (1831), *supra*; *Re Murray*, [1867] W. N. 190; *Re Carter's Estate, Carter* v. *Carter*, [1885] W. N. 184.

(*c*) Limitation Act, 1623 (21 Jac. 1, c. 16), s. 3.

(*d*) 23 & 24 Vict. c. 127.

(*e*) *Ibid.*, s. 28; see, further, title SOLICITORS.

(*f*) *Budgett* v. *Budgett*, [1895] 1 Ch. 202. As to the taxation of statute-barred items in a solicitor's bill, see *Re Brockman*, [1909] 2 Ch. 170 C. A.; *Curwen* v. *Milburn* (1889), 42 Ch. D. 424, C. A.; and title SOLICITORS.

(*g*) *Ex parte Sharpe* (1837), 5 Dowl. 717, compare *Ex parte Yeatman* (1835), 4 Dowl. 304; *Sittingbourne and Sheerness Rail. Co.* v. *Lawson*, [1886] W. N. 76.

(*h*) Limitation Act, 1623 (21 Jac. 1, c. 16), s. 3. The rules governing its running of time are the same under the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42). As to disabilities, see p. 56, *post*.

(*i*) *Cooke* v. *Gill* (1873), L. R. 8 C. P. 107, *per* BRETT, J., at p. 116; *Read* v. *Brown* (1888), 22 Q. B. D. 128, C. A.; *Coburn* v. *Colledge*, [1897] 1 Q. B. 702, C. A.; title ACTION, Vol. I., p. 6. As to non-existence of plaintiff or defendant, see p. 53, *post*.

(*k*) *Gould* v. *Johnson* (1703), 2 Salk. 422; *East India Co.* v. *Oditchurn Paul* (1849), 7 Moo. P. C. C. 85.

SECT. 4.
When Time begins to Run.

six years of the breach; after the expiration of that period the action will be barred, although damage may have accrued to the plaintiff within six years of action brought (*l*). In such an action it is not necessary to prove actual damage, and special damage is merely alleged as a measure of the damages to be recovered (*m*). The time is not extended by the fact that the breach has not been discovered or that damage has not resulted until after the expiration of six years (*n*).

Contract in respect of a contingency.

65. If the contract is to do something at a particular time or upon the happening of a contingency, and the thing contracted for is not done, the cause of action arises at the time specified or upon the contingency happening (*o*).

Promise to pay on demand.

If the promise is to do anything upon request other than the payment of a present debt, time runs from the request (*p*). In the case of a promise to pay a present debt on demand, no demand is necessary, and the cause of action arises on the promise (*q*).

Money lent.

66. In an action for money lent, if a time is specified for repayment, or any condition for repayment, other than mere demand, is imposed, the statute runs on the expiration of the time specified or on the happening of the condition (*r*).

(*l*) *Battley* v. *Faulkner* (1820), 3 B. & Ald. 288; *Howell* v. *Young* (1826), 5 B. & C. 259, 265. If no damage has resulted from the breach, the plaintiff is entitled to nominal damages; see title DAMAGES, Vol. X., pp. 305, 308.

(*m*) *Battley* v. *Faulkner, supra; Howell* v. *Young, supra.*

(*n*) *Howell* v. *Young, supra; Brown* v. *Howard* (1820), 2 Brod. & Bing. 73; *Smith* v. *Fox* (1848), 6 Hare, 386; *Wood* v. *Jones* (1889), 61 L. T. 551; see *Bean* v. *Wade* (1885), Cab. & El. 519. As to fraud, see p. 49, *post.*

(*o*) *Fenton* v. *Emblers* (1762), 3 Burr. 1278; *Waters* v. *Thanet* (*Earl*) (1842), 2 Q. B. 757; compare *Hammond* v. *Smith* (1864), 33 Beav. 452. Where the promise is to pay a debt "whensoever my circumstances enable me to do so, and I may be called upon for that purpose," no demand is necessary, and the cause of action arises when the debtor is able to pay although the creditor makes no demand and has no knowledge or notice of the debtor's ability to pay (*Waters* v. *Thanet* (*Earl*), *supra*).

(*p*) *Webb* v. *Martin* (1661), 1 Lev. 48; *Shutford* v. *Borough* (1628), Godb. 437; *Bill* v. *Lake* (1629), Het. 138.

(*q*) *Collins* v. *Benning* (1701), 12 Mod. Rep. 444. The fact that the debt is to be repaid with simple or even compound interest makes no difference (*Norton* v. *Ellam* (1837), 2 M. & W. 461; *Jackson* v. *Ogg* (1859), John. 397). But as to such a promise by a surety, see title GUARANTEE, Vol. XV., p. 488; and see p. 45, *post.* In the case of a statutory obligation, *e.g.*, to pay on demand the expenses of paving a street (see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 203, 223), time does not run until a demand of payment is made on the person from whom the expenses are sought to be recovered, and in case of change of ownership a fresh demand must be made (*Hampstead Corporation* v. *Caunt*, [1903] 2 K. B. 1; but see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 235).

(*r*) *Barker's Claim*, [1894] 3 Ch. 290, C. A. When money is lent and a date for repayment is specified, the cause of action accrues on that date, and a clause in the contract authorising the sale of any security given and containing an undertaking by the debtor to pay the difference between the amount then due and the proceeds of the sale does not give rise to a new cause of action (*ibid.*). As to money-lending generally, see title MONEY AND MONEY-LENDING. In *Atkinson* v. *Bradford Third Equitable Benefit Building Society* (1890), 25 Q. B. D. 377, C. A., where the money was only repayable on the production by the lender personally, or by someone with his written authority, of a loan pass-book, it was held that the statute did not run until the pass-book had been produced.

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If no time is specified the statute runs from the date of the loan (*s*).

Debt payable by instalments.

If in an agreement for the repayment of an existing debt by instalments it is provided that on default of payment of any instalment the whole debt shall be recoverable, the statute runs as to the whole debt from the time of the first default in payment of an instalment (*a*).

Bill or note payable on demand.

67. If a bill or note is payable on demand, the statute runs from the date of making or accepting, and no demand is necessary (*b*). If, however, a note payable on demand is deposited with a banker for delivery to the payee on his producing another note cancelled, the statute only runs from the time the note is so delivered by the banker (*c*).

Bill payable at sight.

A bill payable at sight must be presented within a reasonable time (*d*), and the statute runs from its presentment (*e*), but, as between the holder and the drawer, no time less than six years is unreasonable for presentment, unless some loss be caused to the drawer by the delay (*f*). Where presentment is unnecessary (*g*), the statute runs from the time when the holder first becomes aware of some fact that makes presentment unnecessary (*h*).

Bill accepted in blank.

If a bill is accepted in blank and is not filled up for more than six years, the acceptor is none the less liable at the suit of a *bonâ fide* holder for value, and in such a case time does not run against a *bonâ fide* holder for value until the bill, as filled up, becomes due (*i*). But if such a bill remains uncompleted in the hands of the payee for more than six years, the payee cannot then fill up the bill and sue the acceptor on it (*k*).

Bill payable at a fixed time.

In the case of a bill or note payable at a fixed time after date the statute runs only from the time at which the bill or note becomes due, even although the action is for money lent for which the note is a security, because the money does not become payable till the time has expired (*l*). If a bill is payable at a specified period after sight or demand, the statute does not run till the

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(*s*) *Garden* v. *Bruce* (1868), L. R. 3 C. P. 300. If a cheque is given for the money agreed to be lent, the statute runs not from the giving, but from the cashing, of the cheque (*ibid.*).

(*a*) *Hemp* v. *Garland* (1843), 4 Q. B. 519; *Reeves* v. *Butcher*, [1891] 2 Q. B. 509, C. A.; see *Irving* v. *Veitch* (1837), 3 M. & W. 90; *Re Stock, Ex parte Amos* (1896), 66 L. J. (Q. B.) 146; see *M'Donnell* v. *Broderick*, [1896] 2 I. R. 136, C. A.

(*b*) *Norton* v. *Ellam* (1837), 2 M. & W. 461; *Christie* v. *Fonsick* (1811), 1 Selwyn, Law of Nisi Prius, 13th ed., 301; *Rumball* v. *Ball* (1711), 10 Mod. Rep. 38; *Re George, Francis* v. *Bruce* (1890), 44 Ch. D. 627; see p. 43, *ante*.

(*c*) *Savage* v. *Aldren* (1817), 2 Stark. 232.

(*d*) See title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 528, 531.

(*e*) *Ibid.*, p. 476; *Re Boyse, Crofton* v. *Crofton, Canonge's Claim* (1886), 33 Ch. D. 612.

(*f*) *Laws* v. *Rand* (1857), 3 C. B. (N. S.) 442; *Robinson* v. *Hawksford* (1846), 9 Q. B. 52.

(*g*) See *Terry* v. *Parker* (1837), 6 Ad. & El. 502; *Wirth* v. *Austin* (1875), L. R. 10 C. P. 689; and title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 533 *et seq.*, 541.

(*h*) See *Re Bethell, Bethell* v. *Bethell* (1887), 34 Ch. D. 561.

(*i*) *Montague* v. *Perkins* (1853), 22 L. J. (C. P.) 187.

(*k*) See *Re Bethell, Bethell* v. *Bethell, supra*.

(*l*) *Wittersheim* v. *Carlisle* (*Lady*) (1791), 1 Hy. Bl. 631; *Buckler* v. *Moor* (1671), 1 Mod. Rep. 89.

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expiration of such period (*m*). In a case in which days of grace are allowed, the cause of action on a dishonoured bill or note does not arise against the acceptor or the drawer or indorsee until after the expiration of the last day of grace (*n*). If a bill of exchange is dishonoured by non-acceptance, the statute begins to run against the payee immediately notice of dishonour is given (*o*); but the holder of a bill is not obliged to present it for acceptance; he may wait till the time for payment arrives, and then present it for payment; in such a case time would not run against the holder till the expiration of the period fixed for payment (*p*).

Days of grace.

Dishonour by non-acceptance.

68. If a cheque is duly presented and dishonoured, an action will lie against the drawer, but no such action will lie without presentment, unless there are special circumstances which render presentment unnecessary (*q*).

Cheques.

If a cheque is not presented within a reasonable time, no cause of action accrues against the drawee upon payment being refused, and the holder can sue only upon the original consideration for which the cheque was given or on the new promise to pay which arises on the cheque being given for an existing debt (*r*).

Delay in presentment.

69. Upon a contract to indemnify, the statute runs from the time when the plaintiff is actually damnified, not from the time when the event happens which causes the loss (*a*). Thus, if a debtor authorises another person to draw a bill on the debtor for the amount of the debt, and the debtor refuses to accept the bill so drawn, and the drawer is compelled to pay, the statute runs not from the refusal to accept but from the time when the drawer is compelled to pay (*b*). But if a bill is dishonoured by non-payment and the payee who indorses the bill is sued by an indorsee and compelled to pay, the right of the payee to sue the drawer is barred at the expiration of six years from the time when the bill was dishonoured (*c*).

Contract to indemnify.

In an action on a policy of insurance for loss occasioned by the

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(*m*) *Thorpe* v. *Booth* (1826), Ry. & M. 388; *Thorpe* v. *Coombe* (1826), 8 Dow. & Ry. (K. B.) 347; see *Moore* v. *Petchell* (1856), 22 Beav. 172.

(*n*) See title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 477, 478; *Morris* v. *Richards* (1881), 45 L. T. 210 (where the last day was Sunday); *Fergusson* v. *Douglas, Heron & Co.* (1796), 6 Bro. Parl. Cas. 276.

(*o*) *Whitehead* v. *Walker* (1842), 9 M. & W. 506; see *Wilkinson* v. *Verity* (1871), L. R. 6 C. P. 206, 209; title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 559.

(*p*) *Whitehead* v. *Walker*, *supra*, at p. 515.

(*q*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 46, 73; see title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 518, 528, 531 *et seq.*

(*r*) See *Re Bethell, Ex parte Bethell* (1887), 34 Ch. D. 561, and title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 518, 531.

(*a*) *Collinge* v. *Heywood* (1839), 9 Ad. & El. 633, overruling *Bullock* v. *Lloyd* (1825) 2 C. & P. 119; *Tunstall* v. *Bartlett, Knowles* v. *Bartlett*, (1866), 14 L. T. 400; see title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 559, note (*a*); *Angrove* v. *Tippett* (1865), 11 L. T. 708. As to the operation of the statute on the liability of a husband for his wife's ante-nuptial debts, see title HUSBAND AND WIFE, Vol. XVI., pp. 409, note (*o*), 411.

(*b*) *Huntley* v. *Sanderson* (1833), 1 Cr. & M. 467.

(*c*) *Webster* v. *Kirk* (1852), 17 Q. B. 944.

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barratry of a captain in taking his ship out of her course and procuring her to be condemned and sold, as the barratry is not complete until the ship is delivered to the purchaser, only then does the statute begin to run (*d*).

Land Transfer Act, 1897.

The cause of action for an indemnity under the Land Transfer Act, 1897 (*e*), s. 7, is deemed to arise at the time when the claimant knows, or, but for his own default, might know, of the existence of his claim (*f*).

Surety and creditor.

70. As between a surety and a creditor, the statute runs in favour of the surety, when he becomes liable to make a payment to the creditor (*g*).

Thus claims in respect of advances made more than six years before action will, as against the guarantor of a banking account, be barred, though claims in respect of interest and commission which accrued due within that period may not (*h*).

In the case of the guarantee of the payment of a mortgage debt time runs in favour of the surety, not from the date of the loan, but from the expiration of a reasonable time after that date, during which time the mortgagee must be treated as having agreed not to sue (*i*). If the guarantee is to pay on demand, time runs only from a demand (*j*), while if the guarantee is for the safety of the money advanced, time only runs from the date when the security is shown to be unsafe (*k*).

Surety and principal.

If a surety pays the debt or part of it, the statute runs against his right to recover from the principal from the time when such payment was made (*l*).

Co-sureties.

As between co-sureties, co-contractors, or co-debtors, the statute runs against the right of contribution of one who has paid more than his share from the time of such payment (*m*); it is immaterial that at the time of the action for contribution the statute may have run between the principal creditor and the co-surety who is sued for contribution (*n*). A co-surety who has been called upon by

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(*d*) *Hibbert* v. *Martin* (1808), 1 Camp. 538; and see title INSURANCE, Vol. XVII., pp. 444, 445.

(*e*) 60 & 61 Vict. c. 65.

(*f*) *Ibid.*, s. 7 (7). As to this section, see *A.-G.* v. *Odell*, [1906] 2 Ch. 47, C. A.; and title REAL PROPERTY AND CHATTELS REAL; and see pp. 40. 41, *ante*.

(*g*) *Colvin* v. *Buckle* (1841), 8 M. & W. 680; *Holl* v. *Hadley* (1835), 2 Ad. & El. 758.

(*h*) *Parr's Banking Co.* v. *Yates*, [1898] 2 Q. B. 460, C. A.; see title GUARANTEE, Vol. XV., pp. 482, 483, 492, 551, note (*i*). As to a claim for interest ceasing as a rule, where the claim to the principal is barred, see p. 68, *post*.

(*i*) *Henton* v. *Paddison* (1893), 68 L. T. 405.

(*j*) *Re Brown's (J.) Estate, Brown* v. *Brown*, [1893] 2 Ch. 300; see title GUARANTEE, Vol. XV., p. 488.

(*k*) *Sheers* v. *Thimbleby & Son* (1897), 76 L. T. 709, 711, C. A. Compare the cases of guarantee of mortgage debt by specialty, p. 77, *post*.

(*l*) *Davies* v. *Humphreys* (1840), 6 M. & W. 153; *Considine* v. *Considine* (1846), 9 I. L. R. 400. As to the time when the right of exoneration arises, see title GUARANTEE, Vol. XV., p. 519, and the cases cited, note (*u*), *ibid.*

(*m*) *Davies* v. *Humphreys*, *supra*; *Re Snowdon, Ex parte Snowdon* (1881), 17 Ch. D. 44, C. A.; *Gardner* v. *Brooke*, [1897] 2 I. R. 6, C. A.; and as to the right of contribution, see title GUARANTEE, Vol. XV., pp. 526—530.

(*n*) *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514; *Gardner* v. *Brooke*, *supra*.

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the creditor to pay the whole of the debt may, although he has paid nothing, bring an action against his co-surety who has not been called upon to pay to compel him to contribute towards the common liability; and the statute does not run against his right to bring such an action until the claim of the creditor has been established against the surety (*o*).

Partners.

71. While a partnership is subsisting, the statute has no application to the claim of one partner against another in respect of rights arising out of the partnership (*p*).

Factor.

72. In an action against a factor for not accounting, the statute does not run until demand, the contract being to account on demand (*a*).

Money had and received.

In an action for money had and received to recover the consideration for the purchase of a void annuity, the statute runs from the time when the annuity is set aside (*b*).

Cash at bank.

If money is paid into a bank on deposit account, the statute does not run against an action to recover it until demand is made for its return (*c*). In the case of money on current account, time runs from the payment in (*d*).

Money paid by mistake.

In an action for money paid by mistake, common to both parties, the cause of action runs from the time of payment and no demand is necessary (*e*).

Money paid for the use of another.

In an action for money paid for the use of another, where from the mere payment the law implies a promise to repay on demand, the statute runs from the payment, but where no such promise is implied by law, the statute does not run until the payment is adopted by the person on whose behalf it is made (*f*).

(*o*) *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514; *Robinson* v. *Harkin*, [1896] 2 Ch. 415 (liability of co-trustee for breach of trust); and see title GUARANTEE, Vol. XV., pp. 520, 529.

(*p*) *Barton* v. *North Staffordshire Rail. Co.* (1888), 38 Ch. D. 458, 463; and see *Noyes* v. *Crawley* (1878), 10 Ch. D. 31 (dissenting from *Miller* v. *Miller* (1869), L. R. 8 Eq. 499); *Knox* v. *Gye* (1872), L. R. 5 H. L. 656; *Chan Kit San* v. *Ho Fung Hang*, [1902] A. C. 257; compare *Betjemann* v. *Betjemann*, [1895] 2 Ch. 474, C. A.; title PARTNERSHIP; and see p. 171, *post*.

(*a*) *Topham* v. *Braddick* (1809), 1 Taunt. 572. After a reasonable time had elapsed (*e.g.*, fourteen years) a jury might presume that a demand had been made and that the factor had accounted (*ibid.*). As to factors, see title AGENCY, Vol. I., pp. 152, 153.

(*b*) *Cowper* v. *Godmond* (1833), 9 Bing. 748; *Huggins* v. *Coates* (1843), 5 Q. B. 432. As to claims for money had and received, see title CONTRACT, Vol. VII., pp. 472 *et seq.*

(*c*) *Re Tidd, Tidd* v. *Overell*, [1893] 3 Ch. 154, 156. As to the general deposit of money with a bailee, see title BAILMENT, Vol. I., p. 541.

(*d*) *Foley* v. *Hill* (1848), 2 H. L. Cas. 28; *Pott* v. *Clegg* (1847), 16 M. & W. 321; and see title BANKERS AND BANKING, Vol. I., pp. 585, 588.

(*e*) *Baker* v. *Courage & Co.*, [1910] 1 K. B. 56; compare *Freeman* v. *Jeffries* (1869), L. R. 4 Exch. 189, *per* MARTIN and BRAMWELL, BB., at pp. 199, 200; see also *Re Robinson, McLaren* v. *Public Trustee*, [1911] 1 Ch. 502, and title MISTAKE.

(*f*) Thus if a sub-tenant voluntarily pays rent due by the mesne landlord to the head landlord, the statute does not run until the mesne landlord adopts the payment (*Ahearne* v. *M'Swiney* (1874), 8 I. R. C. L. 568). If such a payment be made by compulsion, the statute runs from the payment; see *Grogan* v. *Regan*, [1902] 2 I. R. 196, C. A.

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If goods are sold on credit, the statute runs, not from the sale or delivery of the goods, but from the time when the term of credit expires (*g*).

Goods sold on credit.

Work done.

On a general contract for work to be done the cause of action accrues when the work is done (*h*). But a contract to do work may contain a condition that the price should be paid out of a certain fund or when a certain contingency has happened, and in such a case the cause of action does not arise until the fund comes into existence or until the contingency has happened (*i*).

Solicitors' costs.

73. If a solicitor sues for his costs in an action, the statute only begins to run from the date of the termination of the action or of the lawful ending of the employment of the solicitor (*k*).

If there is an appeal from the judgment in the action, the statute does not begin to run against the solicitor, if he continues to act as such, till the appeal is decided (*l*). But when judgment has been given and there is no appeal, the statute runs from the judgment, and subsequent items of costs incidental to the business of the action will not take the earlier items out of the statute (*m*).

Miscellaneous work.

This rule applies only to such continuous work as bringing and prosecuting or defending an action; in respect of miscellaneous work done by a solicitor, the statute runs from the completion of the whole of each piece of work (*n*).

Delivery of bill.

A solicitor cannot sue a client for costs until the expiration of one month after delivery of a signed bill, but, nevertheless, time runs against a solicitor from the completion of the work and not from the delivery of the bill (*o*).

Copyhold fines.

74. In an action for a fine due on the admittance of a copyhold tenant time runs against the lord from the admittance; and even where the fine is arbitrary, time runs from the admittance, not from the assessment of the fine (*p*).

(*g*) *Helps* v. *Winterbottom* (1831), 2 B. & Ad. 431; and see title SALE OF GOODS.

(*h*) *Emery* v. *Day* (1834), 1 Cr. M. & R. 245, *per* PARKE, B., at p. 248; see *Hyde* v. *Partridge* (1705), 2 Ld. Raym. 1204; and see title WORK AND LABOUR.

(*i*) *Re Kensington Station Act* (1875), L. R. 20 Eq. 197; *Re Gloucester, Aberystwith and Central Wales Rail. Co.* (1860), 2 Giff. 47; *Nichols* v. *North Metropolitan Railway and Canal Co.* (1895), 71 L. T. 836, C. A. (solicitor's costs).

(*k*) *Nicholls* v. *Wilson* (1843), 11 M. & W. 106; *Harris* v. *Osbourn* (1834), 2 Cr. & M. 629; *Martindale* v. *Falkner* (1846), 2 C. B. 706; *Whitehead* v. *Lord* (1852), 7 Exch. 691; *Underwood, Son, and Piper* v. *Lewis*, [1894] 2 Q. B. 306, C. A. See also title SOLICITORS.

(*l*) *Harris* v. *Quine* (1869), L. R. 4 Q. B. 653.

(*m*) *Rothery* v. *Munnings* (1830), 1 B. & Ad. 15; compare *Re Hall and Barker* (1878), 9 Ch. D. 538; *Re Nelson, Son, and Hastings* (1885), 30 Ch. D. 1, C. A.; see *Re Cartwright* (1873), L. R. 16 Eq. 469; *Re Romer and Haslam*, [1893] 2 Q. B. 286, C. A.; *Baile* v. *Baile* (1872), L. R. 13 Eq. 497.

(*n*) *Beck* v. *Pierce* (1889), 23 Q. B. D. 316, 323, C. A.; *Phillips* v. *Broadley* (1846), 9 Q. B. 744. As to a solicitor pleading the statute, see *Re Triston* (1850), 1 L. M. &. P. 74. As to an action against a solicitor for negligence, see p. 51, *post*.

(*o*) *Coburn* v. *Colledge*, [1897] 1 Q. B. 702, C. A.; and see *Cheese* v. *Keen*, [1908] 1 Ch. 245. As to the effect of a lien, see p. 42, *ante*, and title LIEN, p. 3, *ante*.

(*p*) *Monckton* v. *Payne*, [1899] 2 Q. B. 603; see *Fraser* v. *Mason* (1883), 11 Q. B. D. 574, C. A.

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75. In an action to enforce an award of compensation under the Lands Clauses Act, 1845, the statute does not run till the date of the award (*q*).

Compensation award.

SUB-SECT. 3.—*In Actions of Tort.*

Fraud.

Fraudulent concealment.

76. In an action of deceit, if damages are claimed, the statute runs from the time when the plaintiff acted on the fraudulent representation, unless the existence of the fraud has been fraudulently concealed by the wrongdoer, in which case time runs only from the date of the discovery of the fraud, or from the date when the person injured might, by the use of due care, have discovered the fraud (*a*). So also, in a case of fraudulent conversion of stock, time runs from the discovery of the fraud (*b*).

Fraudulent taking of minerals.

If one person furtively takes the minerals of another by means of a wilful and secret underground trespass, and no laches is attributable to the owner of the minerals in not discovering the existence of the wrongful workings by the trespasser, the statute has no application till the fraudulent trespass is discovered, and it is not necessary, to prevent the application of the statute, that there should have been on the part of the wrongdoer any active measures to prevent detection (*c*). But if the wrongful working of minerals

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(*q*) *Turner* v. *Midland Rail. Co.*, [1911] 1 K. B. 832; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 76.

(*a*) *Thomson* v. *Clanmorris* (*Lord*), [1900] 1 Ch. 718, C. A.; *Gibbs* v. *Guild* (1882), 9 Q. B. D. 59, C. A.; *Barber* v. *Houston* (1884), 14 L. R. Ir. 273; see *Armstrong* v. *Millburn* (1886), 54 L. T. 247, 723, C. A. Before the Judicature Act, 1873 (36 & 37 Vict. c. 66), there was a variance between courts of law and courts of equity as to the effect of the fraudulent concealment of the cause of action in those cases where there was a concurrent remedy both at common law and in equity; the courts of common law holding that in spite of such concealment the statute ran from the time when the cause of action arose, except when the concealment was of itself an actionable wrong (*Imperial Gas Co.* v. *London Gas Co.* (1854), 10 Exch. 39; *Hunter* v. *Gibbons* (1856), 1 H. & N. 459); the courts of equity holding that the statute in such cases ran from the time of the discovery only (*Booth* v. *Warrington* (*Earl*) (1714), 4 Bro. Parl. Cas. 163; *South-sea Co.* v. *Wymondsell* (1732), 3 P. Wms. 143; *Hovenden* v. *Annesley* (*Lord*) (1806), 2 Sch. & Lef. 607, 634; *Blair* v. *Bromley* (1847), 2 Ph. 354). The effect of the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (11), is to cause the equitable rule to prevail in all cases in which before that Act there was a concurrent remedy at common law and in equity. In actions at common law, where there was no concurrent remedy in equity before the Act, the common law rule prevails as regards the original cause of action; but where the fraudulent concealment is of itself a cause of action, time runs against the common law remedy of the persons defrauded from the discovery of the fraud; see *Barber* v. *Houston*, *supra*; *Armstrong* v. *Millburn*, *supra*. *Quære*, whether the rule as to fraudulent concealment of a cause of action applies in any case, except where the transaction giving rise to the cause of action is of a fraudulent nature (*Barber* v. *Houston*, *supra*; *Armstrong* v. *Millburn*, *supra*). As to fraud at common law, see *Bree* v. *Holbech* (1781), 2 Doug. (K. B.) 654. As to the bringing into account of money paid under a misrepresentation, see *Smith* v. *Alsop* (1824), McCle. 622. As to the limitation of time in an action for compensation for untrue statements in a company's prospectus, see title COMPANIES, Vol. V., pp. 136—140. As to the limitation of time in an action for replacement of shares consequent on the registration of a forged transfer, see *ibid.*, pp. 697, 698. See, further, p. 172, *post*; title EQUITY, Vol. XIII., pp. 170, 175; and, as to actions of deceit, see title MISREPRESENTATION AND FRAUD.

(*b*) *Re Crosley*, *Munns* v. *Burn* (1887), 35 Ch. D. 266, C. A.

(*c*) *Bulli Coal Mining Co.* v. *Osborne*, [1899] A. C. 351, P. C.

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is only inadvertent, the statute runs from the date of the working (*d*).

Misrepresentation.

If the rescission of a contract or deed is claimed on the ground of fraudulent misrepresentation, time does not begin to run until the person defrauded knew all the facts which would have entitled him to bring the action for rescission (*e*). But in order to prevent the statute running, the fraud must be that of the party sued or of his agent acting within his authority (*f*).

Partners.

In the case of a claim, based on concealed fraud, by the representatives of a deceased partner against the surviving partner, the latter cannot set up the statute as a defence and allege that his co-partner might by the use of due care have discovered the fraud, for one partner is entitled to rely on the good faith of his co-partners (*g*).

Trover and detinue.

77. In an action of trover, although the plaintiff is ignorant of the conversion (*h*), time runs from the conversion, unless it was effected by fraud (*i*). The mere taking away or destroying a part of property the rest of which remains in the hands of a bailee is not such a conversion as enables the owner to sue in trover for the whole; nor can the bailee when sued set up such taking away or destruction of a part as a conversion of the whole for the purpose of supporting a plea of the statute (*k*). If goods have been converted and afterwards sold, and the plaintiff waives the tort and sues for money had and received, time still runs from the conversion and not from the receipt of the money (*l*).

Of goods.

If goods come into the possession of a person with the consent of the owner, who is entitled to their delivery on demand, time does not run against the owner's right to recover them, until there has been such demand and refusal to deliver by the bailee (*m*). The rule is the same where the goods of a person are in

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(*d*) *Dean* v. *Thwaite* (1855), 21 Beav. 621; *Trotter* v. *Maclean* (1879), 13 Ch. D. 574; *Re Astley and Tyldesley Coal and Salt Co., and Tyldesley Coal Co.* (1899), 68 L. J. (Q. B.) 252. The *dictum* to the contrary in *Ecclesiastical Commissioners for England* v. *North Eastern Rail. Co.* (1877), 4 Ch. D. 845, *per* MALINS, V.-C., at p. 860, has been frequently disapproved; see *Bulli Coal Mining Co.* v. *Osborne*, [1899] A. C. 351, P. C.; *Re Astley and Tyldesley Coal and Salt Co., and Tydlesley Coal Co., supra.* Omitting to enter workings in a map is not of itself sufficient evidence of fraud (*Dawes* v. *Bagnall* (1875), 23 W. R. 690); and see title MINES, MINERALS, AND QUARRIES.

(*e*) *Molloy* v. *Mutual Reserve Life Insurance Co.* (1906), 94 L. T. 756, C. A.; see *Barber* v. *Houston* (1884), 14 L. R. Ir. 273; *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1, 13, C. A. As to the necessity for acting promptly, see title EQUITY, Vol. XIII., p. 174.

(*f*) *Thorne* v. *Heard and Marsh*, [1895] A. C. 495.

(*g*) *Betjemann* v. *Betjemann*, [1895] 2 Ch. 474, C. A.; see *Rawlins* v. *Wickham* (1858), 3 De G. & J. 304, C. A.; and see title PARTNERSHIP.

(*h*) *Granger* v. *George* (1826), 5 B. & C. 149; see *Edwards* v. *Clay* (1860), 28 Beav. 145; *Hinchliffe* v. *Sharpe* (1898), 77 L. T. 714; title TROVER AND DETINUE.

(*i*) See p. 49, *ante*.

(*k*) *Philpott* v. *Kelley* (1835), 3 Ad. & El. 106; and see titles ACTION, Vol. I., p. 23; BAILMENT, Vol. I., p. 565.

(*l*) *Denys* v. *Shuckburgh* (1840), 4 Y. & C. (EX.) 42; see *Goding* v. *Ferris* (1791), 2 Hy. Bl. 14; *Crook* v. *M'Tavish* (1823), 1 Bing. 167; *Fraser* v. *Swansea Canal Co.* (1834), 1 Ad. & El. 354.

(*m*) *Wilkinson* v. *Verity, Ltd.* (1871), L. R. 6 C. P. 206; *Montague* (*Wortley*) v. *Sandwich* (*Lord*) (1702), 7 Mod. Rep. 99; *Edwards* v. *Clay* (1860), 28 Beav.

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the possession of another who holds them in ignorance of the right of the owner (*n*).

Action for title-deeds.

If a person is in possession of land, such possession justifies the possession of the title-deeds, and time does not begin to run against an action to recover the title-deeds, so long as the person is in possession of the land (*o*).

Negligence.

78. Where one is employed by another to perform a duty, the failure to perform, or negligence in the performance of, such duty gives rise to a cause of action, and the statute runs from the date of such non-performance or negligence, and not from its being discovered or from the occurring of damage (*a*).

Trespass.

79. In an action for trespass to land or goods the statute runs from the time when the trespass is committed, or, if several acts of trespass are committed, from the date of each act (*b*).

Waste.

If a tenant for life impeachable for waste fells timber, the statute begins to run against the remainderman from the time of the felling, or, if the remainderman waives the tort and sues for money had and received, from the time when the timber becomes money in the hands of the wrongdoer (*c*).

False imprisonment.

False imprisonment is a continuing cause of action, or a fresh cause of action arises, as long as the imprisonment continues; hence if the imprisonment began more than four years before action but continued to a time within that period, damages for so much of the imprisonment as took place within the four years before action may be recovered, although a plea of the statute prevents the recovery of damages for so much of the imprisonment as took place outside that period (*d*).

In an action for malicious prosecution the cause of action is the institution or prosecution of criminal proceedings, and time runs from the close of the proceedings, not from any imprisonment which follows as the result thereof (*e*).

145; *Compton* v. *Chandless* (1801), 4 Esp. 18; and see titles ACTION, Vol. I.' pp. 23, 24; BAILMENT, Vol. I., p. 565. As to the deposit of money, see p. 47, *ante*'

(*n*) *Spackman* v. *Foster* (1883), 11 Q. B. D. 99; *Miller* v. *Dell*, [1891] 1 Q. B. 468, C. A. (title-deeds fraudulently taken and deposited as security).

(*o*) *Plant* v. *Cotterill* (1860), 5 H. & N. 430; see *Wells* (*Dean and Chapter*) v. *Doddington* (1845), 2 Coll. 73.

(*a*) *Howell* v. *Young* (1826), 5 B. & C. 259; *Short* v. *M'Carthy* (1820), 3 B. & Ald. 626; *Smith* v. *Fox* (1848), 6 Hare, 386; *Hughes* v. *Twisden* (1886), 55 L. J. (CH.) 481; *Bean* v. *Wade* (1885), Cab. & El. 519; *Wood* v. *Jones* (1889), 61 L. T. 551; and see title NEGLIGENCE. The result is the same whether the action is founded on tort or on breach of a contract to use due care (*Howell* v. *Young*, *supra*, *per* BAYLEY, J., at p. 266). As to tort generally, see title TORT.

(*b*) Thus in an action for mesne profits which is an action of trespass, only arrears for six years before action can be recovered (Buller, Law of Nisi Prius, 88; Adams, Action of Ejectment, 4th ed., 339; *Reade* v. *Reade* (1801), 5 Ves. 744); and see title TRESPASS. As to actions of *devastavit*, see p. 40, *ante*; and title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 317 *et seq.*

(*c*) *Higginbotham* v. *Hawkins* (1872), 7 Ch. App. 676; *Seagram* v. *Knight* (1867), 2 Ch. App. 628; see *Hughes* v. *Thomas* (1811), 13 East, 474. As to waste by a tenant for life who is also entitled to the first estate of inheritance, see p. 53, *post*; and as to equitable waste, see p. 138, *post*. See also titles LANDLORD AND TENANT, Vol. XVIII., pp. 430, 496 *et seq.*; SETTLEMENTS.

(*d*) *Coventry* v. *Apsley* (1691), 2 Salk. 420; see *Massey* v. *Johnson* (1810), 12 East, 67; *Bailey* v. *Warden* (1815), 4 M. & S. 400.

(*e*) *Violett* v. *Sympson* (1857), 8 E. & B. 344.

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Libel and slander.

80. In an action of libel, if there is only one act of publication, the statute runs from the publication; but if the publication is a continuous act, as where a book or newspaper is published and offered for sale, the statute does not run, as long as the libel is on sale (*f*). In an action for slander, when the words are actionable without proof of special damage, the statute runs from the uttering of the slander (*g*). When the words are not actionable without special damage, the statute does not run until the damage occurs (*h*).

Where damage is part of the cause of action.

81. Where damage is part of the cause of action and no act is committed which is of itself wrongful, the statute runs from the date of the damage and not of the act which causes the damage (*i*). Thus, if a lessee of minerals works them and leaves insufficient support for the surface, which belongs to another person, and damage in consequence occurs to the surface more than six years after the working of the minerals, the statute runs from the occurrence of the damage and not from the working of the mine or from the leaving of insufficient support (*k*). Where there has been a continuance of the damage, a fresh cause of action arises from time to time, as often as damage is caused (*l*). If the owner of the mines works them and causes damage to the surface more than six years before action, and within six years of action a fresh subsidence causing damage occurs without any fresh working by the mine-owner, an action in respect of the fresh damage is not barred, as the fresh subsidence resulting in injury gives a fresh cause of action (*m*). If in such case the subsidence causing damage is continuous, there is a continuing cause of action as long as the subsidence continues (*n*).

Continuing cause of action.

(*f*) *Brunswick* (*Duke*) v. *Harmer* (1849), 14 Q. B. 185 (where an action was brought in 1848 to recover damages for a libel published in a newspaper in 1830, and the plea of the statute was held to be negatived by proof of the sale of one copy just before action).

(*g*) The period of limitation in this case is two years; see p. 38, *ante*. As to when words are actionable without proof of damage, see title LIBEL AND SLANDER, Vol. XVIII., p. 607.

(*h*) *Saunders* v. *Edwards* (1662), 1 Sid. 95; *Littlebury* v. *Wright* (1662), 1 Sid. 95; see *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127. In such a case the period of limitation is six years from the happening of the damage; see p. 38, *ante*.

(*i*) *Backhouse* v. *Bonomi* (1861), 9 H. L. Cas. 503; see *Whitehouse* v. *Fellowes* (1861), 10 C. B. (N. S.) 765; *Hodsden* v. *Harridge* (1669), 2 Wms. Saund., 6th ed., 61 m, 63 e; *Lloyd* v. *Wigney* (1830), 6 Bing. 489; *Wordsworth* v. *Harley* (1830), 1 B. & Ad. 391; *Roberts* v. *Read* (1812), 16 East, 215; *Gillon* v. *Boddington* (1824), Ry. & M. 161; *Howell* v. *Young* (1826), 5 B. & C. 259; and see title DAMAGES, Vol. X., pp. 308 *et seq.*

(*k*) *Backhouse* v. *Bonomi*, *supra*.

(*l*) *Whitehouse* v. *Fellowes*, *supra*; *Battishill* v. *Reed* (1856), 18 C. B. 696; *Devery* v. *Grand Canal Co.* (1875), 9 I. R. C. L. 194, Ex. Ch.

(*m*) *Darley Main Colliery Co.* v. *Mitchell*, *supra*, overruling *Lamb* v. *Walker* (1878), 3 Q. B. D. 389; see *West Leigh Colliery Co., Ltd.* v. *Tunnicliffe and Hampson, Ltd.*, [1908] A. C. 27; title DAMAGES, Vol. X., p. 310.

(*n*) *Crumbie* v. *Wallsend Local Board*, [1891] 1 Q. B. 503, C. A.; *Fairbrother* v. *Bury Rural Sanitary Authority* (1889), 37 W. R. 544; *Hole* v. *Chard Union*, [1894] 1 Ch. 293, C. A.

SUB-SECT. 4.—*Persons Capable of Suing or of being Sued* (*o*).

SECT. 4.

When Time begins to Run.

82. A cause of action cannot accrue unless there be a person in existence capable of suing (*p*) and another person in existence who can be sued (*q*).

When cause of action accrues.

83. If a person, to whom a cause of action would have accrued had he been living, dies intestate before the time when the cause of action would have accrued, if he were living, the statute does not begin to run until administration is taken out (*r*); but the statute runs against an executor from the accruer of the cause of action, if the executor acts or takes out probate (*s*). If probate is not granted for more than six years from the accruer of the cause of action and no action is brought before probate, it seems that the executor's claim would be barred (*t*). If probate is granted and afterwards revoked and an administrator is appointed, the statute does not run against the administrator until letters of administration have been granted (*t*).

Death of person entitled.

Administrator.

Executor.

84. If a cause of action accrues to a convict while he is still under incapacity as such, and no administrator or *interim* curator of his property is appointed, time, it seems, would not begin to run against him until the determination of the incapacity (*a*).

Convict.

85. If waste is committed by a tenant for life impeachable for waste, who is also entitled to the first estate of inheritance, no action can be brought till the death of the tenant for life; such a claim against his estate must be brought within six years of his death (*b*). If the tenant for life and the remainderman are different persons, and the remainderman dies before the tenant for life, and the tenant for life becomes administrator of the remainderman, no such action can be brought during the life of the administrator (*c*).

Tenant for life and remainderman.

(*o*) As to the operation of the statute with regard to claims against the estates of deceased persons, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 144, 145, 253, 254.

(*p*) *Murray* v. *East India Co.* (1821), 5 B. & Ald. 204, *per* ABBOTT, C.J., at p. 214. As to disabilities, see p. 56, *post.*

(*q*) *Douglas* v. *Forrest* (1828), 4 Bing. 686, *per* BEST, C.J., at p. 704. Compare the cases as to lunatics, pp. 56, 171, *post.*

(*r*) *Sanders* v. *Stanford* (1579), cited in *Saffyn* v. *Adams* (1605), Cro. Jac. 60; see *Pratt* v. *Swaine* (1828), 8 B. & C. 285; *Hyde* v. *Price* (1837), Coop. Pr. Cas. 193; and cases cited in title EXECUTORS AND ADMINSTRATORS, Vol. XIV., p. 230, note (*g*).

(*s*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 144, 145, 230. As to actions against personal representatives, see p. 54, *post.*

(*t*) *Chan Kit San* v. *Ho Fung Hang*, [1902] A. C. 257, P. C.

(*a*) See the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), ss. 7, 8; titles ACTION, Vol. I., p. 29; CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 429. By the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 10, imprisonment of a plaintiff ceased to be a cause of incapacity, but the Forfeiture Act, 1870, (33 & 34 Vict. c. 23), seems to have reimposed the disability in the case of a convict as defined therein when there is no administrator or *interim* curator appointed.

(*b*) *Birch-Wolfe* v. *Birch* (1870), L. R. 9 Eq. 683.

(*c*) *Seagram* v. *Knight* (1867), 2 Ch. App. 628. As to the presumption of payment keeping a debt alive, when the hand which is to pay is the same as the hand which should receive, see p. 72, *post.*

SECT. 4.
When Time begins to Run.

86. If a debtor is in such a position that, even if an action were brought, and judgment given, against him, the judgment could not be enforced, a cause of action cannot accrue against him (*d*).

SUB-SECT. 5.—*When Time continues to Run.*

There must be a person who can be sued.

Time once running will continue to run.

Death.

87. Time which has once began to run will as a rule continue to do so, even though subsequent events occur which make it impossible that an action should be brought. This rule holds good with respect to all Statutes of Limitation (*e*).

Thus, if time has begun to run against a person entitled to sue, or in favour of a person capable of being sued, the fact of his death and that there is an interval between his death and the grant of administration does not prevent time from running against (*f*), or in favour of (*g*), the administrator, as the case may be. If, however, a debtor takes out administration to his creditor, this, being an act of law, suspends the remedy, and the statute ceases to run during the administration (*h*).

Bankruptcy.

So in respect of debts provable in bankruptcy, the statute ceases to run during the bankruptcy, but will continue to run afresh if and when the bankruptcy is annulled (*i*). In the case, however, of the bankruptcy of a creditor the statute runs against the trustee (*k*).

Suspension of cause of action.

88. At common law the right to bring an action could not be suspended by the act of the party, for, if the right was suspended, it was extinguished (*a*). But if a negotiable instrument is taken in

(*d*) *E.g.*, Ambassadors; see titles ACTION, Vol. I., p. 19, 20; CONSTITUTIONAL LAW, Vol. VI., pp. 428 *et seq.* As to the operation of the statute with regard to claims against the estates of insolvent persons, see titles ACTION, Vol. I., p. 21; BANKRUPTCY AND INSOLVENCY, Vol. II., p. 202.

(*e*) *Homfray* v. *Scroope* (1849), 13 Q. B. 509, 512; *Smith* v. *Hill* (1746), 1 Wils. 134; *Doe* d. *Duroure* v. *Jones* (1791), 4 Term Rep. 300; *Rhodes* v. *Smethurst* (1838), 4 M. & W. 42; affirmed (1840), 6 M. & W. 351, Ex. Ch.; *Howlett* v. *Lambert* (1840), 2 I. Eq. R. 254; see *Skeffington* v. *Whitehurst* (1837), 3 Y. & C. (EX.) 1, 34; *Doe* d. *Griggs* v. *Shane* (1787), 4 Term Rep. 306, n. (b); *Stowel* v. *Zouch* (*Lord*) (1569), 1 Plowd. 353, 366; *Cotterell* v. *Dutton* (1813), 4 Taunt. 826; *Gray* v. *Mendez* (1723), 1 Stra. 556; *Wilcox* v. *Huggins* (1730), 1 Barn. (K. B.) 335; (1731), 2 Barn. (K. B.) 5; *Copley* v. *Dorkmincque* (1676), 2 Lev. 166; *M'Donnell* v. *Broderick*, [1896] 2 I. R. 136. It was held in *Prideaux* v. *Webber* (1661), 1 Lev. 31, that when time had begun to run it continued to run, although the courts were closed in consequence of rebellion (see *Beckford* v. *Wade* (1805), 17 Ves. 87, 93, P. C., and *Bynion's Case* (1667), cited in *Hall* v. *Wybourn* (1689), 2 Salk. 420). The fact that the last day of the statutory period is a non-juridical day does not excuse a plaintiff who commences his action on the next day (see *Morris* v. *Richards* (1881), 45 L. T. 210; *Déchêne* v. *Montreal City*, [1894] A. C. 640, P. C.). As to time generally, see title TIME.

(*f*) *Penny* v. *Brice* (1865), 18 C. B. (N. S.) 393; *Fergusson* v. *Fyffe* (1841), 8 Cl. & Fin. 121, 140, H. L.; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 228.

(*g*) *Freake* v. *Cranefeldt* (1838), 3 My. & Cr. 499; *Boatwright* v. *Boatwright* (1873), L. R. 17 Eq. 71; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 253.

(*h*) *Seagram* v. *Knight* (1867), 2 Ch. App. 628; and as to a debtor-executor, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 269.

(*i*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 60, 202.

(*k*) *Re Mansel, Ex parte Norton* (1892), 9 MOIT. 198, C. A.; see *South-sea Co.* v. *Wymondsell* (1732), 3 P. Wms. 143. As to the effect of a winding-up order on claims against a company, see title COMPANIES, Vol. V., p. 509.

(*a*) *Ford* v. *Beech* (1848), 11 Q. B. 852, Ex. Ch.; *Belshaw* v. *Bush* (1851), 11

SECT. 4. When Time begins to Run.

payment of a debt, the cause of action is suspended till dishonour (*b*); and an arrangement between a debtor and his creditors may be in such a form as to amount to an agreement that payment should be accepted in a particular way, and that in default the creditors should be remitted to the original cause of action, so that there is a fresh right of action upon the original debt, when default is made, and time does not run till then (*c*). In equity a deed of arrangement between debtor and creditor, by which the creditor covenants not to sue the debtor, while the trusts of the deed continue, or until life interests have determined, suspends the operation of the statutes during the specified time (*d*), but a mere letter of licence and contract not to sue for a specified time does not have that effect (*e*).

Deed of arrangement.

89. If a plaintiff brings an action and dies, his personal representatives may, within a year of probate of the will or of the grant of administration, commence a fresh action, and on the death of a defendant the plaintiff may commence a fresh action against his representatives within the same period, although more than six years may then have elapsed from the accrual of the original cause of action (*f*).

Fresh proceedings by and against representatives.

C. B. 191; but see *Slater* v. *Jones* (1873), L. R. 8 Exch. 186, 192; *Reeves* v. *Hearne* (1836), 1 M. & W. 323.

(*b*) 2 Wms. Saund. (ed. 1871) 351, n.; *Turney* v. *Dodwell* (1854), 3 E. & B. 136; *Belshaw* v. *Bush* (1851), 11 C. B. 191, 205; *Re a Debtor, Ex parte the Debtor*, [1908] 1 K. B. 344, C. A.; see *Irving* v. *Veitch* (1837), 3 M. & W. 90; *Marreco* v. *Richardson*, [1908] 2 K. B. 584, C. A.

(*c*) *Irving* v. *Veitch, supra; Re Stock, Ex parte Amos* (1896), 3 Mans. 324; *M'Donnell* v. *Broderick*, [1896] 2 I. R. 136; see *Edwards* v. *Coombe* (1872), L. R. 7 C. P. 519; *Re Hatton* (1872), 7 Ch. App. 723; and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 334, 337.

(*d*) *O'Brien* v. *Osborne* (1852), 10 Hare, 92; *Iven* v. *Elwes* (1854), 3 Drew. 25; see p. 173, *post*.

(*e*) *Fuller* v. *Redman* (No. 2) (1859), 26 Beav. 614, 619.

(*f*) *Swindell* v. *Bulkeley* (1886), 18 Q. B. D. 250, C. A.; *Kinsey* v. *Heyward* (1699), 1 Ld. Raym. 432; *Wilcocks* v. *Huggins* (1731), 2 Stra. 907; *Hodsden* v. *Harridge* (1669), 2 Wms. Saund. (ed. 1871) 150, 173; *Curlewis* v. *Mornington* (*Lord*) (1857), 7 E. & B. 283; compare *Knight* v. *Bate* (1778), 2 Cowp. 738; *Adam* v. *Bristol* (*Inhabitants*) (1834), 2 Ad. & El. 389; R. S. C., Ord. 17, r. 2; see *Curtis* v. *Sheffield* (1882), 20 Ch. D. 398, 401; *Fussell* v. *Dowding* (1884), 27 Ch. D. 237; *Micklethwaite* v. *Vavasour* (1893), 37 Sol. Jo. 386. These decisions are the effect of an equitable construction of the Limitation Act, 1623 (23 Jac. 1, c. 16), s. 4, by which if judgment in any action to which the Act applies was given for the plaintiff and it was reversed by error, or a verdict passed for the plaintiff and, upon matters alleged in arrest of judgment, judgment was given against the plaintiff, or if the defendant was outlawed and afterwards reversed his outlawry, the plaintiff or his heirs, executors or administrators might commence a new action within a year after the reversal of the judgment on the giving of judgment against the plaintiff on the reversal of the outlawry. The procedure mentioned has now been abolished; see R. S. C., Ord. 58, r. 1; Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59). It is doubtful whether the provision above referred to has any application to the existing procedure or whether it should be applied to the entry of judgment for a defendant in the Court of Appeal; see R. S. C., Ord. 40, rr. 3, 5; as to an order carrying on proceedings, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 228.

SECT. 5.

Disabilities.

Infancy or lunacy of plaintiff.

Absence of defendant beyond the seas.

SECT. 5.—*Disabilities.*

90. If a cause of action accrues to a person who is at the time of the accrual either under age or of unsound mind, the statute does not run until he is of age or of sound mind (*g*).

91. If at the time when a cause of action accrues to a plaintiff the defendant is beyond the seas, that is, is out of the United Kingdom of Great Britain and Ireland or of the islands of Man, Guernsey, Jersey, Alderney and Sark, or any islands adjacent to any of them being part of the King's dominions (*h*), the statute does not run until the defendant returns from beyond the seas (*i*). This provision applies to the absence from the United Kingdom of a defendant who has never been there, and to a foreigner as much as to a native of the United Kingdom (*k*). It also applies when the cause of action arises abroad, although the remedy is barred in the country where the cause of action arose, provided the liability is not extinguished by the law of that country (*l*).

Return of defendant.

If a defendant who is beyond the seas when the cause of action arises is afterwards in the United Kingdom for ever so short a time, even without the plaintiff's knowledge, time begins to run from the defendant's being there (*m*).

(*g*) Limitation Act, 1623 (21 Jac. 1, c. 16), s. 7; see *Roche* v. *Hepman* (1729), 1 Barn. (K. B.) 172; *Crosier* v. *Tomlinson* (1676), 2 Mod. Rep. 71; *Piggott* v. *Rush* (1836), 4 Ad. & El. 912; and titles INFANTS AND CHILDREN, Vol. XVII., p. 62; LUNATICS AND PERSONS OF UNSOUND MIND, pp. 462 *et seq.*, *post.* The Limitation Act, 1623 (21 Jac. 1, c. 16), s. 7, which was extended to actions for seamen's wages in the Admiralty Court (now the Probate, Divorce, and Admiralty Division of the High Court) by stat. (1705) 4 & 5 Ann. c. 3, s. 18, provided for three other disabilities of plaintiffs, namely, coverture, imprisonment, and absence beyond the seas. As to coverture, see *Richards* v. *Richards* (1831), 2 B. & Ad. 447; *Scarpellini* v. *Atcheson* (1845), 7 Q. B. 864; and see title HUSBAND AND WIFE, Vol. XVI., p. 329, note (*a*). Coverture has ceased to be a disability; see *ibid.*, pp. 391, 434, 454; *Weldon* v. *Neal* (1884), 51 L. T. 289. Imprisonment and absence of a plaintiff beyond the seas ceased to be disabilities for the purposes of the Limitation Act, 1623 (21 Jac. 1, c. 16), and stat. (1705) 4 & 5 Ann. c. 3, on the passing of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97); see *ibid.*, s. 10, the provisions of which are retrospective (*Cornill* v *Hudson* (1857), 8 E. & B. 429; *Pardo* v. *Bingham* (1869), 4 Ch. App. 735); but as to imprisonment, see Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 8; and see note (*a*), p. 53, *ante.* The law as to the disabilities under the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 4, is the same as under the Limitation Act, 1623 (21 Jac. 1, c. 16).

(*h*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 7; Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 12. At common law "beyond seas" meant beyond the seas actually surrounding Great Britain; Ireland was therefore at common law beyond the seas (*Anon.* (1690), 1 Show. 91, *per* HOLT, C.J.; *Lane* v. *Bennett* (1836), 1 M. & W. 70), but Scotland was not (*King* v. *Walker* (1761), 1 Wm. Bl. 286). Compare the Army Act, 1881 (44 & 45 Vict. c. 58), ss. 145 (3), 190 (25).

(*i*) Stat. (1705) 4 & 5 Ann. c. 3, s. 19.

(*k*) See *Strithorst* v. *Graeme* (1770), 2 Wm. Bl. 723; *Lafond* v. *Ruddock* (1853), 13 C. B. 813; *Pardo* v. *Bingham* (1869), 4 Ch. App. 735, 738; *Reimers* v. *Druce* (1859), 23 Beav. 145.

(*l*) See *Williams* v. *Jones* (1811), 13 East, 439; and see *Finch* v. *Finch* (1876), 45 L. J. (CH.) 816; *Shelby* v. *Guy* (1826), 11 Wheaton, 361, 371; notes to *Mostyn* v. *Fabrigas* (1774), 1 Cowp. 161; 1 Smith, L. C., 11th ed., 591, 634 *et seq.*; title CONFLICT OF LAWS, Vol. VI., p. 306.

(*m*) *Gregory* v. *Hurrill* (1826), 5 B. & C. 341.

SECT. 5.
Disabilities.

Disability of co-plaintiff.

92. If one co-plaintiff is under a disability when the cause of action accrues and the other co-plaintiff is not, the statutory provisions relating to disabilities have, it seems, no application, and time runs from the accrual of the cause of action (*n*).

Absence beyond the seas of co-debtor;

If one co-debtor is beyond the seas at the time when the cause of action accrues against him, and another co-debtor is then within the seas, time runs from the accrual of the cause of action against the latter, and he may be sued during the absence of his co-debtor (*o*). The absent co-debtor may also be sued within the statutory period of his return (*o*).

of co-contractors.

In the case of any cause of action in respect of contract, except one founded on debt, the absence beyond the seas of one or more of several persons liable to be sued would, it seems, prevent an action being brought against those persons who are within the seas (*p*). If one of two co-contractors is beyond the seas when the cause of action accrues against them, and he dies beyond the seas, the survivor may, it seems, be sued within six years of such death (*q*).

Successive disabilities.

93. If a person entitled to a cause of action is under one disability when the cause of action accrues, and this disability comes to an end, but such person is then under another disability, time will not begin to run till the second disability has ceased (*r*). If there is any interval between the determination of the first disability and the supervening of the second, time will begin to run on the determination of the first disability, and the second disability would have no effect (*s*).

Disability continuing till death.

If a person is under disability when the cause of action accrues to him, and so continues up to his death, his personal representatives have a right of action, although the statutory period of limitation has elapsed during his lifetime (*a*). The right of the executor of such a person is, it seems, limited to six years from the death (*b*). It is conceived that if the person entitled to a cause of action dies intestate under disability, time does not run until letters of administration have been granted (*c*).

(*n*) *Perry* v. *Jackson* (1792), 4 Term Rep. 516. This decision relates to absence beyond the seas, which is no longer a disability in this case, but the reasoning is applicable to any kind of disability.

(*o*) Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 11; see, further, title CONTRACT, Vol. VII., p. 460.

(*p*) The Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 11, only applies to "co-debtors," whereas in *ibid.*, s. 14, the expression used is "co-contractors or co-debtors."

(*q*) *Towns* v. *Mead* (1855), 16 C. B. 123, *per* JERVIS, C.J., at pp. 133, 134.

(*r*) *Supple's Lessee* v. *Raymond* (1830), Hayes, 6 (decided in Ireland under a corresponding section of an Irish Act (stat. (1634) 10 Car. 1, sess. 2, c. 6, s. 13)); *Borrows* v. *Ellison* (1871), L. R. 6 Exch. 128 (decided in England under the corresponding section of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 16 (now repealed)).

(*s*) *Borrows* v. *Ellison, supra.*

(*a*) *Strithorst* v. *Graeme* (1770), 2 Wm. Bl. 723; *Townsend* v. *Deacon* (1849), 3 Exch. 706.

(*b*) *Townsend* v. *Deacon, supra, per* ROLFE, B., at pp. 711, 712; see *Wych* v. *East India Co.* (1734), 3 P. Wms. 308.

(*c*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 230; and p. 53, *ante.*

SECT. 5. Disabilities.

Executor of person dying under disability, being under disability himself.

Assuming that there is any limitation of time in the case of the executor of a person who dies under a disability, it seems that if all the executors are, or a sole executor is, under disability when the testator dies, and administration is not taken out in the meantime, but probate is granted when the disability is removed, time will not run until one of the executors or the sole executor ceases to be under disability (*d*).

If a person liable to an action remains beyond the seas from the time when the cause of action accrued until his death, an action lies against his personal representatives, although the statutory period may have elapsed in his lifetime, and time will not begin to run till letters of administration have been taken out or the executor has proved or acted (*e*). If the executor is himself abroad at the time of his testator's death, time will not begin to run until the executor has both returned home and either acted in England or proved (*e*).

Persons under disability may sue or be sued.

94. The provision as to disability is a saving clause, and of itself imposes no disability, and a plaintiff to whom it applies may, while he is under a disability, bring his action in the same way as if the statutory provisions as to such disability had not been passed, whether the statutory period of limitation has elapsed or not, and may also do so within the statutory period after the determination of the disability (*f*). The same construction is to be put on the provisions relating to the absence of defendants beyond the seas (*g*).

SECT. 6.—*Effect of Acknowledgments in Writing.*

SUB-SECT. 1.—*In General.*

Acknowledgment of debt.

95. A debt may be taken out of the operation of the Limitation Act, 1623 (*h*), by an express unconditional promise to pay, or by an unconditional acknowledgment of the debt from which a promise to pay is implied, or by a promise to pay on the fulfilling of a condition, or on the expiration of a specified time or the happening of a certain event, if the condition is fulfilled, or the specified time has elapsed or the specified event has happened (*i*). Time begins to run afresh from the making of such an unconditional promise or

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(*d*) *Cotton's Case* (1590), 1 Leon. 211, decided under the Statute of Fines (1488), 4 Hen. 7, c. 24 (now repealed); see *Dillon* v. *Leman* (1795), 2 Hy. Bl. 584. *Doe* d. *George* v. *Jesson* (1805), 6 East, 80, decided under the Limitation Act, 1623 (21 Jac. 1, c. 16), s. 2 (now repealed), is no authority on this point, as the wording of that provision differs alike from that of the Limitation Act, 1623 (21 Jac. 1, c. 16), s. 7, and that of the Statute of Fines (1488), 4 Hen. 7, c. 24.

(*e*) *Story* v. *Fry* (1842), 1 Y. & C. Ch. Cas. 603; *Flood* v. *Patterson* (1861), 29 Beav. 295.

(*f*) *Forbes* v. *Smith* (1855), 11 Exch. 161.

(*g*) In *Musurus Bey* v. *Gadban*, [1894] 1 Q. B. 533; affirmed, [1894] 2 Q. B. 352, C. A., it was held that although it was possible to issue a writ for service out of the jurisdiction and to obtain leave to serve it or to give notice of it out of the jurisdiction, yet the effect of stat. (1705) 4 & 5 Ann. c. 16, s. 19, remains the same, and time does not run against the plaintiff while the defendant is beyond the seas. As to service of process out of the jurisdiction, see titles CONFLICT OF LAWS, Vol. VI., pp. 181, 291; PRACTICE AND PROCEDURE.

(*h*) 21 Jac. 1, c. 16.

(*i*) *Tanner* v. *Smart* (1827), 6 B. & C. 603.

SECT. 6. Effect of Acknowledgments in Writing.

acknowledgment, or, in the case of a conditional or contingent promise, from the fulfilment of the condition, or the lapse of the specified time, or the happening of the specified event. The promise, express or implied, is a new contract, the consideration for which is the old debt, and such a promise constitutes a new cause of action (*k*).

Acknowledgment before action.

An acknowledgment has the same effect whether made before or after the expiration of six years from the accrual of the original cause of action, provided it is made within six years of action brought (*l*).

Acknowledgment after action.

An acknowledgment after action brought is of no effect in that action (*m*).

Form.

96. The promise must be in writing signed by the party chargeable (*n*). If there are two or more joint contractors or executors or administrators of any contractor, a written acknowledgment or promise made and signed by one or more will not affect the other or others who have not signed (*o*).

Parol evidence of acknowledgment.

97. If there is no date on a written acknowledgment, the date may, it seems, be supplied by parol evidence (*p*). The name of the creditor may, it seems, be supplied in the same way (*a*); and if it is not clear from the acknowledgment itself to what debt it refers, parol

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(*k*) *Tanner* v. *Smart* (1827), 6 B. & C. 603; *Maunsell* v. *Hedges* (1851), 2 I. C. L. R. 88; *Hammond* v. *Smith* (1864), 33 Beav. 452. This is the result of the judicial construction of the Limitation Act, 1623 (21 Jac. 1, c. 16), which contains no provisions as to acknowledgments. The provisions in the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 5, are only applicable to specialty debts; *quære* whether, as to any other debts governed by that Act, an acknowledgment can have any effect; see p. 38, *ante*.

(*l*) *Williams* v. *Gun* (1710), Fortes. Rep. 177, 180; *Spickernell* v. *Hotham* (1854), Kay, 669; *Willins* v. *Smith* (1854), 4 E. & B. 180, *per* COLERIDGE, J., at p. 185; The observations of POLLOCK, C.B., in *Cornforth* v. *Smithard* (1859), 5 H. & N. 13, at p. 14, and of BRAMWELL, B., S. C., *sub nom. Cornforth* v. *Smithurst*, as reported 8 W. R. 8, to the contrary effect, may now, it seems, be disregarded; see *Scales* v. *Jacob* (1826), 3 Bing. 638, *per* BEST, C.J., at p. 653; and *Haydon* v. *Williams* (1830), 7 Bing. 163, *per* TINDAL, C.J., at p. 168; *Chasemore* v. *Turner* (1875), L. R. 10 Q. B. 500, Ex. Ch.

(*m*) *Bateman* v. *Pinder* (1842), 3 Q. B. 574. The cases to the contrary effect (*Yea* v. *Fouraker* (1760), 2 Burr. 1099; *Thornton* v. *Illingworth* (1824), 2 B. & C. 824; *Rucker* v. *Hannay* (1789), 4 East, 604, n.; *Lloyd* v. *Maund* (1788), 2 Term Rep. 760) are earlier than *Tanner* v. *Smart*, *supra*, and are not to be treated as authorities. If an acknowledgment is made after action brought, the plaintiff may discontinue and commence a fresh action.

(*n*) Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14) (commonly called Lord Tenterden's Act), s. 1; and see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 424. As to the effect of payment of principal or interest made by any person, see p. 67, *post*. As to acknowledgment by one of two or more contractors etc., see p. 61, *post*. The Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), contains no provision as to the nature or construction of the acknowledgment required, but merely alters the mode of proof and leaves the nature and construction of an acknowledgment untouched (*Haydon* v. *Williams* (1830), 7 Bing. 163; *Moodie* v. *Bannister* (1859), 4 Drew. 432, 440). For forms of acknowledgment suitable to various circumstances, see Encyclopædia of Forms and Precedents, Vol. I., pp. 188 *et seq.*

(*o*) Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), s. 1; see p. 61, *post*.

(*p*) *Edmunds* v. *Downes* (1834), 2 Cr. & M. 459, 463, but see S. C. as reported 4 Tyr. 173, 179; and see title EVIDENCE, Vol. XIII., pp. 518 *et seq.*; compare title GUARANTEE, Vol., XV., p. 456.

(*a*) See *Hartley* v. *Wharton* (1840), 11 Ad. & El. 934.

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evidence may be given to identify the debt (*b*). If a written acknowledgment is lost, parol evidence of its contents is admissible (*c*).

Acknowledgment need not be stamped as an agreement.

98. No acknowledgment nor other writing made necessary by the foregoing provisions (*d*) is to be deemed to be an agreement within the meaning of any statute relating to stamp duty (*e*). A written acknowledgment need not be stamped as an agreement if there is other evidence of the original debt (*f*). But a document which is put forward as an acknowledgment must be stamped with the stamp (if any) other than an agreement stamp, which from its form it is required to bear. Thus a bill of exchange or promissory note not properly stamped cannot be put in evidence as an acknowledgment, or as forming part of an acknowledgment along with another writing referring to it (*g*). A document in the form of a receipt without a stamp cannot be put in evidence to prove the payment of the money mentioned therein as received, or any fact to be inferred from such payment, but may be used to prove any other fact, supported by the document, which is independent of the question whether the payment was made or not (*h*).

Acknowledgment of liability other than debt has no effect.

99. It is only in the case of a debt that a promise to pay or an acknowledgment takes a liability out of the statute; an acknowledgment of a liability in respect of a breach of contract other than a debt (*i*) or of a tort (*j*) will not in general have any such effect. If upon a breach of contract there is no need for the assessment of damages, but a definite sum can be recovered as liquidated damages by virtue of a stipulation between the parties, a mere acknowledgment of the breach has, it seems, no effect, but an acknowledgment of the stipulated sum being due takes the case out of the statute (*k*).

(*b*) *Spickernell* v. *Hotham* (1854), Kay, 669; *Bewley* v. *Power* (1833), Hayes & Jo. 368; *Whitcombe* v. *Steere* (1903), 19 T. L. R. 697; see *McGuffie* v. *Burleigh* (1898), 78 L. T. 264 (two letters connected by parol evidence).

(*c*) *Haydon* v. *Williams* (1830), 7 Bing. 163; see *Read* v. *Price*, [1909] 2 K. B. 724, C. A.

(*d*) Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), s. 1; see p. 59, *ante*.

(*e*) Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), s. 8; see *Taylor* v. *Steele* (1847), 16 M. & W. 665; *Wheatley* v. *Williams* (1836), 1 M. & W. 533; and title CONTRACT, Vol. VII., p. 538. As to stamp duties generally, see title REVENUE.

(*f*) *Morris* v. *Dixon* (1836), 4 Ad. & El. 845.

(*g*) *Jones* v. *Ryder* (1838), 4 M. & W. 32; *Foster* v. *Dawber* (1851), 6 Exch. 839; *Parmiter* v. *Parmiter* (1860), 1 John. & H. 135; *Evans* v. *Prothero* (1850), 2 Mac. & G. 319; *Holmes* v. *Mackrell* (1858), 3 C. B. (N. S.) 789. As to stamp duties on bills of exchange and promissory notes, see title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 570 *et seq.*

(*h*) *Matheson* v. *Ross* (1849), 2 H. L. Cas. 286.

(*i*) *Boydell* v. *Drummond* (1808), 2 Camp. 157; see *Whitehead* v. *Howard* (1820), 2 Brod. & Bing. 372.

(*j*) *Hurst* v. *Parker* (1817), 1 B. & Ald. 92; *Short* v. *M'Carthy* (1820), 3 B. & Ald. 626; *Gibbons* v. *M'Casland* (1818), 1 B. & Ald. 690. As to an acknowledgment with regard to actions under the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), see p. 59, *ante*.

(*k*) See *Whitehead* v. *Howard* (1820), 2 Brod. & Bing. 372.

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If an action is brought for an account in circumstances such that the plaintiff might have sued either in *assumpsit* or trover, and an account has been rendered by the defendant which would take the debt out of the statute if the plaintiff sued in *assumpsit*, but would have no effect if the plaintiff sued in trover, the defence of the statute is not good, and the action should be treated as analogous to an action of *assumpsit* (*l*).

Disability at time of acknowledgment made.

As an acknowledgment or part payment operates to take a debt out of the statute by renewing the promise to pay or conferring a new cause of action, it seems that, if the creditor is under disability or the debtor beyond the seas at the time an acknowledgment or part payment is made, time will not run until the disability has ceased or the debtor has returned within the seas (*m*).

SUB-SECT. 2.—*By and to whom Acknowledgment must be Made.*

Acknowledgment: by agent;

100. An acknowledgment or promise in a writing, signed by the duly authorised agent of the party chargeable, has the same effect as if the writing had been signed by the party chargeable (*n*).

If the signature of the agent is on the document containing the acknowledgment, the position of the signature is immaterial, so long as it verifies the whole acknowledgment (*o*). The question whether the agent had or had not authority to make the acknowledgment is a question of fact to be decided according to the particular circumstances of each case (*p*).

by executor.

An acknowledgment of a debt by an executor, if made in words from which, if used by his testator, a promise to pay would be implied, is sufficient to take the debt out of the statute (*q*).

Co-contractors.

101. The provision that no joint contractor, executor, nor administrator is to be chargeable in respect of any written acknowledgment or promise signed by any other or others (*r*), does not lessen the effect of any payment of any principal or interest made by any person (*s*). If in an action against two or more such joint contractors, executors or administrators it appears at the trial or otherwise that the plaintiff, though barred as to one or more of such persons, is entitled to recover against the

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(*l*) See *Hony* v. *Hony* (1824), 1 Sim. & St. 568; and as to such actions, see title ACTIONS, Vol. I., pp. 36 *et seq.*; TROVER AND DETINUE.

(*m*) See *Flood* v. *Patterson* (1861), 29 Beav. 295; and compare p. 56, *ante*.

(*n*) Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 13, which applies to all acknowledgments made since the Act, though the debt acknowledged was contracted before (*Archer* v. *Leonard* (1863), 15 I. Ch. R. 267; *Leland* v. *Murphy* (1866), 16 I. Ch. R. 500); and see title AGENCY, Vol. I., p. 207.

(*o*) *Holmes* v. *Mackrell* (1858), 3 C. B. (N. S.) 789; compare *Ingram* v. *Little* (1883), Cab. & El. 186.

(*p*) See *Curwen* v. *Milburn* (1889), 42 Ch. D. 424, *per* NORTH, J.

(*q*) See *Briggs* v. *Wilson* (1854), 5 De G. M. & G. 12, C. A.; *Re Wolmershausen, Wolmershausen* v. *Wolmershausen* (1890), 62 L. T. 541; compare *Tullock* v. *Dunn* (1826), Ry. & M. 416; *M'Culloch* v. *Dawes* (1826), 9 Dow. & Ry. (K. B.) 40; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 252.

(*r*) See p. 59, *ante*.

(*s*) See p. 67, *post*.

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other or others of the defendants, by virtue of a new acknowledgment or promise or otherwise, judgment may be given and costs allowed for the plaintiff, as to the defendant or defendants against whom he recovers, and for the other defendant or defendants against the plaintiff (*t*).

Acknowledgment by one of several executors.

In spite of this provision an acknowledgment of a debt made by one of several executors binds the testator's estate, and, after the death of the executor who makes such an acknowledgment, an order may be made in an administration action for payment of the debt out of assets remaining unadministered in the hands or under the control of the surviving executors (*u*).

Trustees.

One executor may even, it seems, notwithstanding the dissent of his co-executor, give a valid acknowledgment of a statute-barred debt of his testator, and thus bind the testator's estate, but one of two or more trustees has no power to bind the trust estate by such an acknowledgment (*v*).

Partners.

As one of several partners is the agent of the others, he can bind the firm by acknowledging a partnership debt (*w*).

Infants.

102. As an infant is capable of contracting a debt for necessaries (*x*), he may make an acknowledgment of such a debt so as to take it out of the statute (*y*).

Acknowledgment must be to creditor or his agent.

103. A promise to pay or an acknowledgment of a debt must be made to the creditor or his agent (*z*); an acknowledgment made to a stranger (*a*), or not communicated to the creditor (*b*) is ineffectual; and, although an admission of a debt by an administrator,

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(*t*) Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), s. 1. As to judgments generally, see title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 175 *et seq.*

(*u*) *Re Macdonald, Dick* v. *Fraser*, [1897] 2 Ch. 181; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 252, 253.

(*v*) *Astbury* v. *Astbury*, [1898] 2 Ch. 111, 115; see, further, title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 252, note (*f*), 253.

(*w*) *Braithwaite* v. *Britain* (1836), 1 Keen, 206, 221; and see title PARTNERSHIP, and p. 73, *post.* Acknowledgments made by a partner must be distinguished from acknowledgments made by one of several ordinary joint contractors.

(*x*) See title INFANTS AND CHILDREN, Vol. XVII., pp. 63 *et seq.* As to married women, see p. 72, *post.*

(*y*) *Willins* v. *Smith* (1854), 4 E. & B. 180.

(*z*) *Edmonds* v. *Goater* (1852), 15 Beav. 415; *Clark* v. *Hougham* (1823), 2 B. & C. 149.

(*a*) *Grenfell* v. *Girdlestone* (1837), 2 Y. & C. (EX.) 662, 676; *Moodie* v. *Bannister* (1859), 4 Drew. 432; *Godwin* v. *Culley* (1859), 4 H. & N. 373; *Fuller* v. *Redman* (No. 2) (1859), 26 Beav. 614; *Howcutt* v. *Bonser* (1849), 3 Exch. 491, 500; *Stamford, Spalding, and Boston Banking Co.* v. *Smith*, [1892] 1 Q. B. 765, C. A.; *Rogers* v. *Quinn* (1889), 26 L. R. Ir. 136. The cases to the contrary (*Richardson* v. *Fen* (1771), Lofft, 86; *Mountstephen* v. *Brooke* (1819), 3 B. & Ald. 141; *Halliday* v. *Ward* (1811), 3 Camp. 32), which are all before *Tanner* v. *Smart* (1827), 6 B. & C. 603; and *Smith* v. *Poole* (1841), 12 Sim. 17 (see *Courtenay* v. *Williams* (1844), 3 Hare, 539; *Spollan* v. *Magan* (1851), 1 I. C. L. R. 691, and *Re Littles* (1847), 10 I. Eq. R. 275, which are since *Tanner* v. *Smart, supra*), are not to be treated as authorities.

(*b*) *Bush* v. *Martin* (1863), 2 H. & C. 311; *Re Severn and Wye and Severn Bridge Rail. Co.*, [1896] W. N. 30; *Lowndes* v. *Garnett and Moseley Gold-mining Co. of America* (1864), 33 L. J. (CH.) 418.

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in a signed deposition or cross-examination, is sufficient to take the debt out of the statute (*c*), an advertisement to creditors to bring in their claims (*d*), or an admission of a debt by a debtor in bankruptcy proceedings (*e*) or in the schedule to a composition or inspectorship deed, even if verified by his affidavit (*f*), has no such effect.

SUB-SECT. 3.—*What Acknowledgments are Sufficient.*

Construction of acknowledgment.

104. The construction of the document containing an acknowledgment is for the court alone, unless the document is connected with extrinsic evidence affecting its construction, when the construction is a question for the jury (*g*).

What words are sufficient.

105. Any words are a sufficient acknowledgment, if they either expressly or by implication amount to an unconditional acknowledgment of a debt or to a promise to pay (*h*). If the words used amount to such an acknowledgment or promise, they are not qualified, even if accompanied by a request for time (*i*), by expressions stating or implying that the debtor is unable to pay at present,

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(*c*) *Re Beynon, Beynon* v. *Beynon*, [1873] W. N. 186. As to an executor including his debt in an affidavit for Inland Revenue, see *Maniram* v. *Seth Rupchand* (1906), 22 T. L. R. 619, P. C.; title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 252.

(*d*) *Scott* v. *Jones* (1838), 4 Cl. & Fin. 382, H. L. (overruling *Andrews* v. *Brown* (1714), Prec. Ch. 385); *Re Stephens, Warburton* v. *Stephens* (1889), 43 Ch. D. 39.

(*e*) *M'Donnell* v. *Broderick*, [1896] 2 I. R. 136; *Smallcombe* v. *Bruges* (1824), M'Cle. 45; *Pott* v. *Clegg* (1847), 16 M. & W. 321; *Re Clendinning, Ex parte Anderson* (1859), 9 I. Ch. R. 284; *Re Tollemache, Ex parte Revell* (No. 1) (1884), 13 Q. B. D. 720, C. A.; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 70 *et seq.*

(*f*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 202, notes (*d*), (*e*). As to an acknowledgment by a person on the eve of bankruptcy, see p. 70, *post.*

(*g*) *Routledge* v. *Ramsay* (1838), 8 Ad. & El. 221; *Morrell* v. *Frith* (1838), 3 M. & W. 402; *Collis* v. *Stack* (1857), 1 H. & N. 605. Previously to these cases there were decisions on this point to the contrary effect; see *Lloyd* v. *Maund* (1788), 2 Term Rep. 760; *Rucker* v. *Hannay* (1804), 4 East, 604, n.; *Bird* v. *Gammon* (1837), 3 Bing. (N. C.) 883; *Frost* v. *Bengough* (1823), 1 Bing. 266; *Colledge* v. *Horn* (1825), 3 Bing. 119; while in other cases the point was considered as doubtful; see *Dodson* v. *Mackey* (1835), 8 Ad. & El. 225, n.; *Bucket* v. *Church* (1840), 9 C. & P. 209; *Linsell* v. *Bonsor* (1835), 2 Bing. (N. C.) 241.

(*h*) See *Edmonds* v. *Goater* (1852), 15 Beav. 415; *Bourdin* v. *Greenwood* (1871), L. R. 13 Eq. 281; *Re Bentley, Ex parte Wilson, Ex parte Wyman* (1841), 1 Mont. D. & De G. 586; *Waller* v. *Lacy* (1840), 1 Scott (N. R.), 186; *Lobb* v. *Stanley* (1844), 5 Q. B. 574; *Hart* v. *Prendergast* (1845), 14 M. & W. 741; *Williams* v. *Griffith* (1849), 3 Exch. 335; *Robarts* v. *Robarts* (1828), 1 Moo. & P. 487; *Brydges* v. *Plumptre* (1827), 9 Dow. & Ry. (K. B.) 746; *Brigstocke* v. *Smith* (1833), 1 Cr. & M. 483; *Linsell* v. *Bonsor* (1835), 2 Bing. (N. C.) 241; *Poynder* v. *Bluck* (1837), 5 Dowl. 570; *Collinson* v. *Margesson* (1858), 27 L. J. (EX.) 305; *Richardson* v. *Barry* (1860), 29 Beav. 22; *Cockrill* v. *Sparkes* (1863), 1 H. & C. 699; *Cassidy* v. *Firman* (1867), 1 I. R. C. L. 8; *Green* v. *Humphreys* (1884), 26 Ch. D. 474, C. A. The leading case is *Tanner* v. *Smart* (1827), 6 B. & C. 603, cited in notes (*i*), (*k*), (*m*), pp. 58, 59, *ante*, which was decided before Lord Tenterden's Act (Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14)), but has remained an authority ever since. The cases before *Tanner* v. *Smart*, *supra*, which are inconsistent with it (see Darby and Bosanquet on the Statutes of Limitations, 2nd ed., pp. 66, 67), are not to be regarded as authorities.

(*i*) *Dodson* v. *Mackey* (1835), 8 Ad. & El. 225, n.; *Collis* v. *Stack* (1857), 1 H. & N. 605; *Spickernell* v. *Hotham* (1854), Kay, 669; *Martin* v. *Geoghegan* (1850), 13 I. L. R. 403.

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but will pay in the future (*j*), or by an expression of hope to pay (*k*). But when there is no unconditional acknowledgment or promise, expressions of inability to pay at the present, or assurances on the part of the debtor, that he will do his best to pay, or hopes that he will in the future be able to pay, may amount to a condition or qualification and prevent the implication of a promise (*l*).

A promise to pay a debt when proved (*m*), or when ascertained (*n*), or when the debtor's affairs are arranged (*o*), is a sufficient acknowledgment and is not qualified by a condition.

Conditional promise.

A conditional promise is a sufficient acknowledgment, if there is proof that the condition has been fulfilled within six years of action brought (*p*).

Words held insufficient.

106. A request for an account or for details of the alleged debt, or an admission of an open account between the parties, is a sufficient

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(*j*) *Dabbs* v. *Humphries* (1834), 10 Bing. 446; *Spickernell* v. *Hotham* (1854), Kay, 669; *Collis* v. *Stack* (1857), 1 H. & N. 605; *Lee* v. *Wilmot* (1866), L. R. 1 Exch. 364; *Pryke* v. *Hill* (1899), 79 L. T. 738; *Wilby* v. *Elgee* (1875), L. R. 10 C. P. 497; *Re Buskin, Ex parte Farlow* (1894), 15 R. 117; *Cooper* v. *Kendall*, [1909] 1 K. B. 405, C. A.; but see *Tanner* v. *Smart* (1827), 6 B. & C. 603. In *Tanner* v. *Smart, supra*, the words used were, "I cannot pay the debt at present but I will pay it as soon as I can," and no evidence was given that the debtor was able to pay; it was held that, there being no proof of ability to pay, the acknowledgment was not sufficient. In *Cooper* v. *Kendall, supra*, the words used were "I admit I owe . . . Mr. S. C. the sum of £210 5*s*., but I cannot meet this liability at the moment, although I hope to call upon you within fourteen days to make a definite proposal for repayment of that amount with interest from date of loan"; no evidence was given of ability to pay. It was held that, there being first an unqualified acknowledgment of the debt, the accompanying words were not sufficient to rebut the promise to pay implied in that acknowledgment. In *Cooper* v. *Kendall, supra*, at p. 409, *Tanner* v. *Smart, supra*, was distinguished on the ground that there was no express admission of the debt in that case.

(*k*) *Sidwell* v. *Mason* (1857), 2 H. & N. 306, *per* BRAMWELL, B., at p. 310; *Whitcombe* v. *Steere* (1903), 19 T. L. R. 697; *Lang* v. *Mackenzie* (1830), 4 C. & P. 463.

(*l*) *Fearn* v. *Lewis* (1830), 6 Bing. 349; *Morrell* v. *Frith* (1838), 3 M. & W. 402; *Rackham* v. *Marriott* (1856), 1 H. & N. 234 ("an extreme case," see *Sidwell* v. *Mason, supra, per* POLLOCK, C.B., at p. 308); *Richardson* v. *Barry* (1860), 29 Beav. 22; *Mowbray* v. *Appleby* (1899), 80 L. T. 805.

(*m*) *Holmes* v. *Smith* (1857), 7 I. C. L. R. 461; *Leland* v. *Murphy* (1866), 16 I. Ch. R. 500.

(*n*) *Cheslyn* v. *Dalby* (1840), 4 Y. & C. (EX.) 238; *Gardner* v. *M'Mahon* (1842), 3 Q. B. 561; *Archer* v. *Leonard* (1863), 15 I. Ch. R. 267; *Nichols* v. *Regent's Canal Co.* (1894), 63 L. J. (Q. B.) 641; reversed on another point, 71 L. T. 836, C. A.; *Langrish* v. *Watts*, [1903] 1 K. B. 636, C. A.

(*o*) *Chasemore* v. *Turner* (1875), L. R. 10 Q. B. 500, Ex. Ch.

(*p*) *Humphreys* v. *Jones* (1845), 14 M. & W. 1; *Fisk* v. *Mitchell* (1871), 24 L. T. 272; *Maunsell* v. *Hedges* (1851), 2 I. C. L. R. 88; *Hammond* v. *Smith* (1864), 33 Beav. 452; *Buccleuch* (*Duke*) v. *Eden* (1889), 61 L. T. 360; but see *Bird* v. *Gammon* (1837), 3 Bing. (N. C.) 883; *Cornforth* v. *Smithard* (1859), 5 H. & N. 13; *Gould* v. *Shirley* (1829), 2 Moo. & P. 581; *Haydon* v. *Williams* (1830), 7 Bing. 163; *Edmunds* v. *Downes* (1834), 2 Cr. & M. 459; *Waters* v. *Thanet* (*Earl*) (1842), 2 Q. B. 757; *Meyerhoff* v. *Froehlich* (1878), 3 C. P. D. 333; *Jupp* v. *Powell* (1884), Cab. & El. 349; *Re Bethell, Bethell* v. *Bethell* (1887), 34 Ch. D. 561; *Lusher* v. *Hassard* (1904), 20 T. L. R. 563, C. A.; *Cory* v. *Bretton* (1830), 4 C. & P. 462; *Hodgens* v. *Graham* (1831), Alc. & N. 49; *Kennett* v. *Milbank* (1831), 8 Bing. 38; *Buckmaster* v. *Russell* (1861), 10 C. B. (N. S.) 745; *Re River Steamer Co., Mitchell's Claim* (1871), 6 Ch. App. 822; *Barrett & Son, Ltd.* v. *Davies* (1904), 91 L. T. 736; *Fenner* v. *Lord* (1898), 14 T. L. R. 450. A promise to pay out of a particular fund or in a particular way is a conditional promise; see p. 66, *post*.

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acknowledgment from which a promise to pay the amount found to be due may be inferred (*q*). But an agreement to take a particular item into account between the parties, without any statement as to how the account stands (*r*), or a mere expression of willingness to go into an account, the alleged debtor insisting that there is nothing due from him and that he is prepared to show this by the accounts (*s*), or a reference to a past application for an account (*a*), or an admission of a debt accompanied by a refusal to pay without an order of the court (*b*), is not a sufficient acknowledgment.

Promise not to plead the statute.

107. A mere promise not to plead the statute, if made without any new consideration, and if unaccompanied by expressions which amount to an acknowledgment of the debt, but made in terms consistent with an intention to dispute the claim on other grounds, is not a sufficient acknowledgment (*c*). If there is a new consideration for a promise not to plead the statute, an action will lie for the breach of the promise, or the promise might be pleaded (*d*) as a good reply to a defence of the statute (*e*).

Amount of debt need not be expressed.

108. If some debt is acknowledged, it is immaterial that the correctness of the amount claimed is disputed in the acknowledgment (*f*). The amount of the debt must be proved at the trial, or the damages will be merely nominal (*g*). A recital in a deed that the defendant was indebted to the plaintiff, but that the amount was not ascertained and that the defendant was willing to pay the amount to be ascertained as therein mentioned, is an absolute promise to pay the amount proved at the trial to be due (*h*). If,

(*q*) *Rendell* v. *Carpenter* (1828), 2 Y. & J. 484; *Prance* v. *Sympson* (1854), Kay, 678; *Sidwell* v. *Mason* (1857), 2 H. & N. 306; *Godwin* v. *Culley* (1859), 4 H. & N. 373; *Burrows* v. *Baker* (1869), 3 I. R. Eq. 596; *Quincey* v. *Sharpe* (1876), 1 Ex. D. 72; *Skeet* v. *Lindsay* (1877), 2 Ex. D. 314; *Banner* v. *Berridge* (1881), 18 Ch. D. 254; *Curwen* v. *Milburn* (1889), 42 Ch. D. 424; *Langrish* v. *Watts*, [1903] 1 K. B. 636, C. A.; *Maniram* v. *Seth Rupchand* (1906), 22 T. L. R. 619, P. C.; compare *Spong* v. *Wright* (1842), 9 M. & W. 629.

(*r*) *Hughes* v. *Paramore* (1855), 7 De G. M. & G. 229, C. A.; see *Nash* v. *Hill* (1858), 1 F. & F. 198.

(*s*) *Crawford* v. *Crawford* (1867), 2 I. R. Eq. 166.

(*a*) *Williams* v. *Griffith* (1849), 3 Exch. 335.

(*b*) *Briggs* v. *Wilson* (1854), 5 De G. M. & G. 12, C. A., *per* TURNER, L.J., at p. 21.

(*c*) See *East India Co.* v. *Oditchurn Paul* (1849), 7 Moo. P. C. C. 85, *per* Lord CAMPBELL, C.J., at p. 112; *Gardner* v. *M'Mahon* (1842), 3 Q. B. 561, *per* WIGHTMAN, J., at p. 568; see *Fuller* v. *Redman* (No. 2) (1859), 26 Beav. 615, *per* ROMILLY, M.R., at p. 619; *Bewley* v. *Power* (1833), Hayes & Jo. 368.

(*d*) Having regard to the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24. As to pleading generally, see title PLEADING; and see title EQUITY, Vol. XIII., pp. 62 *et seq.*

(*e*) See *Lade* v. *Trill*, *Trill* v. *Lade* (1842), 6 Jur. 272, and p. 186, *post.*

(*f*) *Haydon* v. *Williams* (1830), 7 Bing. 163; *Kennett* v. *Milbank* (1831), 8 Bing. 38; *Bewley* v. *Power*, *supra*; *Courtenay* v. *Williams* (1844), 3 Hare, 539; *Richardson* v. *Fen* (1771), Lofft, 86; *Colledge* v. *Horn* (1825), 3 Bing. 119; *Rendell* v. *Carpenter*, *supra*; *Lechmere* v. *Fletcher* (1833), 1 Cr. & M. 623; *Bird* v. *Gammon* (1837), 3 Bing. (N. C.) 883; *Waller* v. *Lacy* (1840), 1 Scott (N. R.), 186; *Gardner* v. *M'Mahon*, *supra*; *Sidwell* v. *Mason*, *supra*; *Edwards and Godwin* v. *Culley* (1859), 4 H. & N. 377; *Skeet* v. *Lindsag*, *supra.*

(*g*) *Dickenson* v. *Hatfield* (1831), 5 C. & P. 46.

(*h*) *Cheslyn* v. *Dalby* (1840), 4 Y. & C. (EX.) 238.

SECT. 6.
Effect of Acknowledgments in Writing.

however, a definite sum smaller than the sum claimed is acknowledged to be due, only the sum named is taken out of the statute (*i*).

Solicitor's costs.

An undertaking to pay a solicitor any sum which may be found due to him for costs, when the same are taxed and certified, takes the amount as settled by taxation out of the statute (*k*).

Admission of account pending.

For the purpose of an action for an account, it is enough if there is an acknowledgment that an account is pending (*l*).

Statement of accounts.

An agreed statement of accounts, where all the items are on one side only, if the statement is not signed by the party liable and is inoperative as an acknowledgment, will not be allowed to support an action on an account stated in respect of items which are statute-barred (*m*). If, however, there are items on both sides and a balance is struck, the case is one of part payment (*n*).

Limited acknowledgment.

Payment in particular manner.

109. An acknowledgment coupled with an assertion that the debtor has a set-off sufficient to countervail the debt is not sufficient (*o*). A submission to arbitration, containing a promise to pay whatever shall be found due at such times and in such proportions as the arbitrators shall appoint, is not available as an acknowledgment, if the arbitration proves abortive, unless the submission contains an unqualified acknowledgment of the debt (*p*). If the acknowledgment is only part of a general arrangement of accounts between the parties, an unconditional promise to pay will not be inferred (*q*). If an acknowledgment points to payment only in a particular manner, or out of a particular fund, a promise to pay in any other manner cannot be implied (*r*). Where, however, there are other expressions which alone would amount to an absolute promise, a particular mode of payment may possibly

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(*i*) *Dabbs* v. *Humphries* (1834), 10 Bing. 446.

(*k*) *Archer* v. *Leonard* (1863), 15 I. Ch. R. 267; see *Curwen* v. *Milburn* (1889), 42 Ch. D. 424; *Nichols* v. *Regent's Canal Co.* (1894), 63 L. J. (Q. B.) 641, *per* CHARLES, J. (reversed on another point, 71 L. T. 836, C. A.). As to the taxation of statute-barred items, see p. 42, *ante*, and as to taxation of costs generally, see title SOLICITORS.

(*l*) *Langrish* v. *Watts*, [1903] 2 K. B. 636, C. A.; *Prance* v. *Sympson* (1854), Kay, 678; compare *Friend* v. *Young*, [1897] 2 Ch. 421.

(*m*) *Clark* v. *Alexander* (1844), 8 Scott (N. R.), 147; *Ashby* v. *James* (1843), 11 M. & W. 542; *Re Brenan* v. *Crawley* (1868), 16 W. R. 754; *Jones* v. *Ryder* (1838), 4 M. & W. 32; *Nash* v. *Hill* (1858), 1 F. & F. 198. The joint effect of these cases is, it seems, to overrule *Smith* v. *Forty* (1829), 4 C. & P. 126, where the contrary was held (see also *Ashby* v. *Ashby* (1829), 3 Moo. & P. 186; *Catling* v. *Skoulding* (1795), 6 Term Rep. 189); and as to account stated generally, see title CONTRACT, Vol. VII., pp. 489 *et seq.*

(*n*) See p. 70, *post*.

(*o*) *Re River Steamer Co., Mitchell's Claim* (1871), 6 Ch. App. 822. As to set-off generally, see title SET-OFF AND COUNTERCLAIM.

(*p*) *Hales* v. *Stevenson* (1863), 8 L. T. 798, Ex. Ch.; see *Fenner* v. *Lord* (1898), 14 T. L. R. 450.

(*q*) *Cripps* v. *Davis* (1843), 12 M. & W. 159; *Goate* v. *Goate* (1856), 1 H. & N. 29; *Francis* v. *Hawkesley* (1859), 1 E. & E. 1052.

(*r*) *Whippy* v. *Hillary* (1832), 3 B. & Ad. 399; *Martin* v. *Knowles* (1833), 1 Nev. & M. (K. B.) 421; *Routledge* v. *Ramsay* (1838), 8 Ad. & El. 221; *Cawley* v. *Furnell* (1851), 20 L. J. (C. P.) 197; *Smith* v. *Thorne* (1852), 18 Q. B. 134; *Courtenay* v. *Williams* (1844), 3 Hare, 539, 550; *Re Littles* (1847), 10 I Eq. R. 275; *Buckmaster* v. *Russell* (1861), 10 C. B. (N. S.) 745; *Philips* v. *Philips* (1844), 3 Hare, 281.

be so mentioned as merely to suggest a convenient arrangement and not to qualify the promise (*s*).

SECT. 6. Effect of Acknowledgments in Writing.

SECT. 7.—*Part Payment and Payment of Interest.*

SUB-SECT. 1.—*In General.*

Part payment of principal or payment of interest.

110. The effect of the Limitation Act, 1623 (*a*), may be avoided not only by an acknowledgment in words, but by part payment of principal or by payment of interest; and the effect of such payments is saved from the operation of the Statute of Frauds Amendment Act, 1828 (*b*), respecting acknowledgments in writing (*c*). The principle applies to payments of interest, even though the debt does not properly carry interest (*d*). The principle is that any such payment is an acknowledgment of the existence of the debt, from which is implied a promise to pay the residue or the principal, as the case may be (*e*). The payment must, however, be such that from it a promise to pay can be inferred in fact and not merely implied in law (*f*). A promise to pay the principal cannot be inferred from the compulsory payment of interest under a judgment (*g*).

Promise to pay must be implied.

Circumstances must support implied promise.

111. If there are any circumstances attending the payment which rebut the implication of a promise to pay, as, for instance, a refusal to pay the remainder of the debt, no effect can be given to the payment (*h*). The payment must be made, first, on account of some debt; secondly, on account of the debt sued for; and thirdly, as part only of what is due (*i*). Express declarations of the debtor at the time of the payment are conclusive, but assertions made by him subsequently to the payment are not (*k*).

(*s*) *Gardner* v. *M'Mahon* (1842), 3 Q. B. 561; *Evans* v. *Simon* (1853), 9 Exch. 282. As to the effect of an acknowledgment contained in a letter written "without prejudice," see title EVIDENCE, Vol. XIII., p. 558.

(*a*) 21 Jac. 1, c. 16.

(*b*) 9 Geo. 4, c. 14, s. 1; see p. 59, *ante*.

(*c*) *Fordham* v. *Wallis* (1852), 10 Hare, 217, 225. The effect of such payment is the result of judicial decisions on the Limitation Act, 1623 (21 Jac. 1, c. 16), but is recognised by the Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14). The provisions as to acknowledgment by part payment in the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 5, are only applicable to specialty debts; see p. 59, *ante*, and p. 79, *post*; *quære* whether a part payment on account of a simple contract debt which is within the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 3, has any effect.

(*d*) *Bamfield* v. *Tupper* (1851), 7 Exch. 27; see *Bealy* v. *Greenslade* (1831), 2 Cr. & J. 61; *Re Rutherford, Brown* v. *Rutherford* (1880), 14 Ch. D. 687, C. A., *per* JAMES, L.J., at p. 691.

(*e*) *Morgan* v. *Rowlands* (1872), L. R. 7 Q. B. 493; *Green* v. *Humphreys* (1884), 26 Ch. D. 474, C. A.; see *Re Boswell, Merritt* v. *Boswell*, [1906] 2 Ch. 359, *per* KEKEWICH, J., at p. 363.

(*f*) *Morgan* v. *Rowlands, supra*, at p. 498; *Green* v. *Humphreys, supra*; *Lindsay* v. *Maguire*, [1899] 2 I. R. 554.

(*g*) *Morgan* v. *Rowlands, supra*.

(*h*) *Wainman* v. *Kynman* (1847), 1 Exch. 118; *Davies* v. *Edwards* (1851), 7 Exch. 22; see *Foster* v. *Dawber* (1851), 6 Exch. 839.

(*i*) *Tippets* v. *Heane* (1834), 1 Cr. M. & R. 252; *Holme* v. *Green* (1816), 1 Stark. 488; see *Burkitt* v. *Blanshard* (1848), 3 Exch. 89; *Linsell* v. *Bonsor* (1835), 2 Bing. (N. C.) 241.

(*k*) *Baildon* v. *Walton* (1847), 1 Exch. 617, 633.

SECT. 7. Part Payment and Payment of Interest.

Nature of the payment.

The nature of a payment may be inferred from the nature of similar payments made at other times (*l*); and, although the plaintiff must in all cases give some evidence that the payment relied on was made on account of some debt, the circumstances attending the payment, even without any direct evidence, may be such as to render it improbable that such payment could be made for any other purpose (*m*). When it is once established that the payment was made on account of some debt, and that no other debt than the one sued for then existed, the inference may be drawn that the payment was in respect of the debt sued for (*n*). If more debts than one are due, and a payment is made which is not specifically appropriated, it is a question of fact in respect of which debt the payment was made (*o*). If the debt sued for is ascertained, as on a promissory note, and a payment smaller than the amount of the debt is made in respect of it, it follows, in the absence of any statement or circumstances leading to a different conclusion, that the payment must have been made as part payment; but if, on the contrary, the amount of the debt is unascertained, as upon a running account, or for work and labour, it does not follow that the payment was made as part payment; in such case, therefore, there must be evidence that the payment was not intended as in full discharge (*p*).

Payment of principal in regard to interest.

112. As regards the payment of principal, it is conceived that, if a debt properly carries interest, the principal and interest constitute one demand, and therefore payment of principal or of part of it takes the interest also out of the statute, unless the liability to pay interest is repudiated (*q*).

Payment of interest.

113. With respect to payment of interest, if the payment is shown to have been made as interest (*r*), the only question that can in general arise is in respect of what debt it was made.

(*l*) *Worthington* v. *Grimsditch* (1845), 7 Q. B. 479.

(*m*) *Burn* v. *Boulton* (1846), 2 C. B. 476.

(*n*) *Evans* v. *Davies* (1836), 4 Ad. & El. 840; see *Tippets* v. *Heane* (1834), 1 Cr. M. & R. 252.

(*o*) *Re Rainforth, Gwynn* v. *Gwynn* (1879), 49 L. J. (CH.) 5, C. A. As to appropriation of payments, see p. 69, *post;* title CONTRACT, Vol. VII., pp. 419, 449 *et seq.*

(*p*) *Burn* v. *Boulton* (1846), 2 C. B. 476, *per* MAULE, J., at p. 481; *Waugh* v. *Cope* (1840), 6 M. & W. 824. Payment by a debtor to a creditor of a sum "on account" amounts to an acknowledgment by the debtor that there is an account between him and the creditor on which a balance of more than the sum paid would be payable (*Friend* v. *Young*, [1897] 2 Ch. 421; see also *Re Hale, Lilley* v. *Foad*, [1899] 2 Ch. 107, C. A., *per* LINDLEY, M.R., at p. 119).

(*q*) See *Collyer* v. *Willock* (1827), 4 Bing. 313. There may be cases in which, as against a particular defendant, interest may be recoverable, although the principal is not; see title GUARANTEE, Vol. XV., p. 482, note (*d*), and *ibid.*, p. 551, note (*i*).

(*r*) It has been said that in cases of mortgages, bonds, and other securities, where the principal carries interest but the interest does not, the rule is that payments made are presumed to be paid in respect of interest before principal (*Bower* v. *Marris* (1841), Cr. & Ph. 351, 355; see *Thompson* v. *Hudson* (1870), L. R. 10 Eq. 497); but this rule is not applicable in the case of interest due to bankers on an overdrawn account, when according to the practice of bankers interest is from time to time converted into principal (*Parr's Banking Co.* v. *Yates*, [1898] 2 Q. B. 460).

SECT. 7.
Part Payment and Payment of Interest.

When a breach of trust has been committed by improper investment on mortgage, payment by the trustees to the beneficiaries of the interest on the mortgage will not prevent the statute running in respect of their liability (*s*). Where there is one debt and one or more securities for it, if it is clearly shown that the subject-matter is the same, a payment of interest on the whole sum will, it seems, take the debt and all the securities out of the statute (*t*).

Appropriation.

114. With regard to payment whether of principal or of interest, if more than one debt is shown to have been due at the time of the payment, the payment is only effective if made on account of all the debts or if appropriated by the debtor to any one or more of the debts (*a*). This appropriation need not be proved by any express declaration of the debtor at the time of payment, but any expressions used by him either before or after that time, or any other circumstances from which it may be inferred that the payment was intended to be appropriated to any particular debt or debts, or was made on account of all collectively, will be sufficient for this purpose (*b*). In the absence of any evidence no inference can be drawn that the payment was made on account either of any particular debts or on account of all (*c*).

Presumption that payment is of debt unbarred.

If at the time when the payment was made some of the debts were barred and some were not, the payment can, in the absence of any other evidence, be attributed only to those debts which were not barred (*d*).

If the debtor makes no appropriation at the time of payment, the creditor may appropriate the payment to any of the debts (*e*), but such an appropriation cannot operate as a part payment so as to take a debt out of the statute (*f*). The rule that in the absence of appropriation by the debtor or the creditor a payment is presumed to be in discharge of the earliest of several debts (*g*) has no operation as regards the taking of such debt out of the statute (*h*).

(*s*) *Re Somerset, Somerset* v. *Poulett* (*Earl*), [1894] 1 Ch. 231, C. A.; see *Re Fountaine, Re Dowler, Fountaine* v. *Amherst* (*Lord*), [1909] 2 Ch. 382, C. A.; *Sims* v. *Brutton* (1850), 5 Exch. 802.

(*t*) *Dowling* v. *Ford* (1843), 11 M. & W. 329. The defendant in this case was a surety, as against whom payment by the principal debtor would not now be effective; see p. 73, *post*. *Brandram* v. *Wharton* (1818), 1 B. & Ald. 463, so far as it is inconsistent with *Dowling* v. *Ford*, *supra*, must be considered overruled.

(*a*) *Wycombe Union Guardians* v. *Eton Union Guardians* (1857), 1 H. & N. 687; *Re Rainforth, Gwynn* v. *Gwynn*, (1879) 49 L. J. (CH.) 5, C. A.

(*b*) *Waters* v. *Tompkins* (1835), 2 Cr. M. & R. 723, 726; *Walker* v. *Butter* (1856), 6 E. & B. 506; *Bevan* v. *Gething* (1842), 3 Q. B. 740; *Dixon* v. *Holdroyd* (1857), 7 E. & B. 903; see *Re Rainforth, Gwynn* v. *Gwynn, supra*.

(*c*) *Burn* v. *Boulton* (1846), 2 C. B. 476, *per* TINDAL, C.J., at p. 485.

(*d*) *Mills* v. *Fowkes* (1839), 5 Bing. (N. C.) 455; *Nash* v. *Hodgson* (1855), 6 De G. M. & G. 474, C. A.; *Re Boswell, Merritt* v. *Boswell*, [1906] 2 Ch. 359, 366; compromised on appeal, [1907] 2 Ch. 331, C. A.

(*e*) See title CONTRACT, Vol. VII., p. 450, and p. 41, *ante*.

(*f*) See *Re Boswell, Merritt* v. *Boswell, supra; Re McHenry, McDermott* v. *Boyd* (1894), 71 L. T. 146, C. A.; *Waller* v. *Lacy* (1840), 1 Man. & G. 54; *Smith* v. *Betty*, [1903] 2 K. B. 317, C. A.; compare *Eyre* v. *Coen* (1898), 33 I. L. T. 59; and see title CONTRACT, Vol. VII., pp. 449—451.

(*g*) See titles BANKERS AND BANKING, Vol. I., p. 586; CONTRACT, Vol. VII., p. 450.

(*h*) See cases cited in note (*d*), *supra*.

SECT. 7.
Part Payment and Payment of Interest.

Payment into court.

115. Payment into court by a debtor in an action by the creditor is not sufficient to take the rest of the debt out of the statute; it is equivalent to saying that the amount paid in is due and no more (*i*); it is also ineffectual for the same reason as an acknowledgment made after action brought (*k*).

Payment under or on eve of bankruptcy.

A payment of a dividend on a debt made in a bankruptcy or under an inspectorship deed is not such a part payment as to imply a promise to pay the remainder (*l*). A payment on account of a debt made on the eve of the bankruptcy of the debtor is a good payment so as to revive the debt, if the debt has up to that time been treated by the parties as subsisting; but a payment at such a time, on account of a debt which has been treated as dead and gone, if made fraudulently with the object of giving the creditor a share of the debtor's estate in the bankruptcy, will not avail to revive the debt as against the other creditors (*m*).

Mode of payment.

116. It is not necessary that the payment should be actually made in money, for any arrangement between the parties intended to have the effect of discharging *pro tanto* the party indebted will have the same effect as a payment of money (*n*). The existence of such an agreement is a question of fact, and may be proved by implication or course of dealing or subsequent ratification as well as by express agreement (*o*). The delivery of goods to a creditor (*p*) or his agent (*q*), or the maintenance of the child of the creditor (which is, in fact, the supply of goods to the child on behalf of the father (*r*)), has been held sufficient. Where there are debts due on both sides, and the accounts are gone through by the parties and a balance struck, this in effect constitutes a payment to the amount of the smaller debt (*a*). But it is the striking of the balance that constitutes the payment; not the mere existence or even statement in writing of cross demands (*b*).

Giving a bill or note.

The acceptance by the debtor of a bill drawn upon him by a

(*i*) *Long* v. *Greville* (1824), 3 B. & C. 10; *Reid* v. *Dickons* (1833), 5 B. & Ad. 499.

(*k*) See p. 59, *ante*.

(*l*) *Davies* v. *Edwards* (1851), 7 Exch. 22; *Re Levey and Robson, Ex parte Topping* (1865), 34 L. J. (BCY.) 44; see *Taylor* v. *Hollard*, [1902] 1 K. B. 676, *per* JELF, J., at p. 680; and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 202, 284.

(*m*) *Re Lane, Ex parte Gaze* (1889), 23 Q. B. D. 74, *per* CAVE, J., at p. 77.

(*n*) *Maber* v. *Maber* (1867), L. R. 2 Exch. 153.

(*o*) See *Worthington* v. *Grimsditch* (1845), 7 Q. B. 479; *Beamish* v. *Whitney*, [1908] 1 I. R. 38.

(*p*) *Moore* v. *Strong* (1835), 1 Bing. (N. C.) 441; *Hooper* v. *Stephens* (1835), 4 Ad. & El. 71; *Hart* v. *Nash* (1835), 2 Cr. M. & R. 337; *Collinson* v. *Margesson* (1858), 27 L. J. (EX.) 305.

(*q*) *Pearce* v. *Selby* (1842), 6 Jur. 896.

(*r*) *Bodger* v. *Arch* (1854), 10 Exch. 333; see *Doe* d. *Roylance* v. *Lightfoot* (1841), 8 M. & W. 553, 560; *Amos* v. *Smith* (1862), 1 H. & C. 238.

(*a*) *Ashby* v. *James* (1843), 11 M. & W. 542; *Re Hawkins, Hawkins* v. *Hawkins* (1879), 28 W. R. 240; as to the effect of a statement of account, see p. 66, *ante*.

(*b*) *Williams* v. *Griffiths* (1835), 2 Cr. M. & R. 45; *Cottam* v. *Partridge* (1842), 4 Man. &. G. 271; *Clark* v. *Alexander* (1844), 8 Scott (N. R.), 147; *Scholey* v. *Walton* (1844), 12 M. &. W. 510; see *Pott* v. *Clegg* (1847), 16 M. & W. 321; 2 Wms. Saund. 185; *Stewart* v. *Connick* (1871), 5 I. R. C. L. 562.

creditor, or the delivery to the creditor of a bill drawn by the debtor on a third person, on account of part of the debt, is also a sufficient part payment, whether the bill is paid at maturity or not; but, even if it is paid, the promise implied from the part payment is deemed to be made at the time of the delivery of the bill, and not when it is paid (*c*).

SECT. 7. Part Payment and Payment of Interest.

Proof of payment.

Indorsement on bill.

117. A parol acknowledgment by the debtor of a part payment is admissible in evidence (*d*). So also are entries made by a debtor of payment of interest (*e*). A memorandum of payment indorsed on a bill or note and signed by the debtor, or a memorandum of payment in his handwriting, is sufficient evidence of part payment (*f*). But no indorsement or memorandum of any payment written or made, upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom the payment is made, is deemed sufficient proof of such payment (*g*). This does not prevent the application of the common principle of the law of evidence that entries of payment made by deceased persons before the statutory period has expired, in account books or in any other way than upon the note or instrument creating the contract, are admissible as declarations against interest (*h*).

Declaration of deceased person against interest.

SUB-SECT. 2.—*By and to whom Effective Payment may be Made.*

Payment by agent.

118. Payment by an agent has the same effect as payment by the principal, but it is a question of fact whether the person making the payment was an agent for that purpose (*i*).

(*c*) *Gowan* v. *Forster* (1832), 3 B. & Ad. 507; *Irving* v. *Veitch* (1837), 3 M. & W. 90; *Turney* v. *Dodwell* (1854), 3 E. & B. 136; see *Sparkes* v. *Restal* (1856), 22 Beav. 587; *Re Seaber, Ex parte Peachy* (1836), 1 Deac. 551; the effect is the same if a cheque is given on one day and not paid until a later day, even though there is an agreement that the cheque should not be presented until the later date (*Marreco* v. *Richardson*, [1908] 2 K. B. 584, C. A.).

(*d*) *Cleave* v. *Jones* (1851), 6 Exch. 573, Ex. Ch., overruling *Willis* v. *Newham* (1830), 3 Y. & J. 518, and the other cases inconsistent with *Cleave* v. *Jones, supra*; see *Bevan* v. *Gething* (1842), 3 Q. B. 740; *Edwards* v. *Janes* (1855), 1 K. & J. 534; *Collinson* v. *Margeseon* (1858), 27 L. J. (EX.) 305; *Morley* v. *Finney*, [1870] W. N. 82. As to admissions from the point of view of evidence, see title EVIDENCE, Vol. XIII., pp. 456 *et seq.*

(*e*) *Cleave* v. *Jones, supra*; *Trentham* v. *Deverill* (1837), 3 Bing. (N. C.) 397; see *Re Fountaine, Re Dowler, Fountaine* v. *Amherst* (*Lord*), [1909] 2 Ch. 382, C. A. When interest on a debt due from a firm is calculated periodically in the books of the firm and carried to the capital account, this is not evidence of payment, but evidence that no payment has been made (*Jackson* v. *Ogg* (1859), John. 397).

(*f*) *Purdon* v. *Purdon* (1842), 10 M. & W. 562; *Eastwood* v. *Saville* (1842), 9 M. & W. 615.

(*g*) Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), s. 3; *Bradley* v. *James* (1853), 13 C. B. 822. "Other writing" in the above provision means a writing containing the contract by which the party is to be bound (*Bradley* v. *James, supra*). Before the Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), similar entries by a deceased payee on a note or bill made before the expiration of the statutory period were admissible (*Brigg* v. *Wilson* (1854), 5 De G. M. & G. 12, C. A.).

(*h*) *Bradley* v. *James, supra*; see title EVIDENCE, Vol. XIII., p. 561; see also *ibid.*, pp. 463 *et seq.* Such entries made after the expiration of the statutory period are not admissible; see *ibid.*, p. 464; *Briggs* v. *Wilson, supra*.

(*i*) *Rew* v. *Pettet* (1834), 1 Ad. & El. 196; *Jones* v. *Hughes* (1850), 5 Exch. 104; see *Newbould* v. *Smith* (1885), 29 Ch. D. 882; *Re Wolmershausen, Wolmershausen*

SECT. 7. Part Payment and Payment of Interest.

By receiver of mortgaged property.

A receiver of mortgaged property appointed under the Conveyancing and Law of Property Act, 1881 (*k*), is the agent of the mortgagor, and a payment by such receiver of the net rents of the property takes the mortgage debt out of the statute (*l*), but in the absence of express authority he has no power to make a part payment in respect of any other debts than those which he is by the statute directed to defray (*m*), and no part payment by him in respect of any such other debt would avail to take the rest of the debt out of the statute (*n*); nor is payment of the rents of mortgaged property by the tenant to the mortgagee in possession of itself sufficient to take the mortgage debt out of the statute (*o*).

By receiver in lunacy.

Payments by a receiver in lunacy, authorised to apply income for the maintenance of a lunatic, to guardians of the union who maintained the lunatic prevents a claim for arrears of maintenance being barred (*p*).

Payment by married woman.

119. A married woman may by part payment keep alive her debts in respect of her separate estate, whether those debts were incurred before or after marriage (*q*), and also the liability of her husband for ante-nuptial debts, provided he acquired property from or through her (*r*).

Payment to agent.

120. The payment need not be made to the plaintiff in person, but may be made to his agent (*s*) or, by agreement between the parties, to any person on the plaintiff's account. Such agreement may be proved by implication, or course of dealing, or subsequent ratification, as well as by express and previous direction, and it is a question of fact whether such agreement existed (*t*).

Payment to *cestui que trust.*

121. A *cestui que trust* is considered to be the agent of the trustee for the purpose of receiving payment (*a*). If trust money is lent to the

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v. *Wolmershausen* (1890), 62 L. T. 541; *Thorne* v. *Heard*, [1893] 3 Ch. 530; *Harding* v. *Edgecumbe* (1859), 28 L. J. (EX.) 313.

(*k*) 44 & 45 Vict. c. 41, ss. 19, 24; see title MORTGAGE.

(*l*) *Berwick & Co.* v. *Price*, [1905] 1 Ch. 632, 642.

(*m*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 24.

(*n*) See *Re Hale, Lilley* v. *Foad*, [1899] 2 Ch. 107, C. A.

(*o*) *Cockburn* v. *Edwards* (1881), 18 Ch. D. 449, C. A., overruling the *dictum* of SHADWELL, V.-C., in *Brocklehurst* v. *Jessop* (1835), 7 Sim. 438; *Harlock* v. *Ashberry* (1882), 19 Ch. D. 539, C. A.; see *Wrigley* v. *Gill*, [1906] 1 Ch. 165, C. A.

(*p*) *Wandsworth Union* v. *Worthington*, [1906] 1 K. B. 420; and as to such payments generally, see title LUNATICS AND PERSONS OF UNSOUND MIND, p. 492, *post*.

(*q*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75); *Beck* v. *Pierce* (1889), 23 Q. B. D. 316, 322, C. A.

(*r*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 14. As to the liability of a husband for such debts, see title HUSBAND AND WIFE, Vol. XVI., pp. 408—410; *Surman* v. *Wharton*, [1891] 1 Q. B. 491. Before 1870 a married woman was incapable of making a binding acknowledgment in regard to an ante-nuptial debt (*Pittam* v. *Foster* (1823), 1 B. & C. 248; *Neve* v. *Hollands* (1852), 18 Q. B. 262).

(*s*) *Evans* v. *Davies* (1836), 4 Ad. & El. 840.

(*t*) *Worthington* v. *Grimsditch* (1845), 7 Q. B. 479; *Edwards* v. *Janes* (1855), 1 K. & J. 534; *Stamford, Spalding and Boston Banking Co.* v. *Smith*, [1892] 1 Q. B. 765, 770, C. A.; see also *Hart* v. *Stephens* (1845), 6 Q. B. 937; and title HUSBAND AND WIFE, Vol. XVI., p. 329, note (*a*).

(*a*) *Megginson* v. *Harper* (1834), 2 Cr. & M. 322; see *Gleadow* v. *Atkin* (1833), 1 Cr. & M. 410; and title TRUSTS AND TRUSTEES.

SECT. 7. Part Payment and Payment of Interest.

person who is entitled to receive the interest of the fund, he must be treated as having paid himself, so as to prevent time running in his favour, while he is so entitled (*b*). But no such implication can arise, where a person covenants to transfer a sum of stock or to pay a sum of money to trustees on trust to pay the settlor the interest for his life and no stock is transferred nor money paid; in such case the trust fund never comes into existence, and the settlor cannot be supposed to have received the interest (*c*).

Payment to stranger.

122. Part payment to a stranger is of no effect. Thus where the maker of a promissory note which had been transferred by indorsement makes a payment to the original holder in ignorance of the indorsement, the payment is of no avail in an action by the indorsees to take the debt out of the statute (*d*). But if a payment is made to a person who is wrongly believed by the paying debtor to act in a representative capacity, as, for example, the administrator of an intestate, the payment enures for the benefit of the estate supposed by the debtor to be represented by the payee (*e*).

Liability of joint contractors etc. in respect of payment by one.

123. If there are two or more co-contractors or co-debtors, liable jointly only or jointly and severally, or executors or administrators, of any contractor, no such co-contractor or co-debtor, executor or administrator, is chargeable in respect of a debt by reason only of payment of any principal, interest, or other money (*f*), by any other or others of such co-contractors or co-debtors, executors or administrators (*g*). A husband and wife are not co-contractors in respect of an ante-nuptial debt of the wife's, and therefore this provision does not apply to them (*h*).

Liabilities of co-contractors *inter se.*

The above provision as to co-debtors does not affect the rights and liabilities of the co-contractors *inter se*; thus if one of several co-debtors makes a payment sufficient to take the debt out of the statute as against himself and pays the whole of the debt, he can

(*b*) *Re Dixon, Heynes* v. *Dixon*, [1899] 2 Ch. 561; affirmed, [1900] 2 Ch. 561, C. A.; see *Re England, Steward* v. *England*, [1895] 2 Ch. 820, C. A.; *Re Hawes, Re Burchell, Burchell* v. *Hawes* (1892), 62 L. J. (CH.) 463; *Topham* v. *Booth* (1887), 35 Ch. D. 607; *Mills* v. *Borthwick* (1865), 35 L. J. (CH.) 31; *Re Keays's Estate* (1869), 3 I. R. Eq. 659; *Burrell* v. *Egremont (Earl)* (1844), 7 Beav. 205.

(*c*) *Spickernell* v. *Hotham* (1854), Kay, 669, 675; see *Stone* v. *Stone* (1869), 5 Ch. App. 74.

(*d*) *Stamford, Spalding and Boston Banking Co.* v. *Smith*, [1892] 1 Q. B. 765, C. A.

(*e*) *Clark* v. *Hooper* (1834), 10 Bing. 480; *Bodger* v. *Arch* (1854), 10 Exch. 333; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 147.

(*f*) "Other money" refers to such things as notarial charges on a bill of exchange (*Gardner* v. *Brooke*, [1897] 2 I. R. 6, *per* O'BRIEN, J., at p. 13).

(*g*) Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 14; see p. 81, *post*. The provision applies, it seems, to payments made since the passing of the Act, though the debt was contracted before; see *Archer* v. *Leonard* (1863), 15 I. Ch. R. 267; *Leland* v. *Murphy* (1866), 16 I. Ch. R. 500. As to the meaning of the words "by reason only of payment" in the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 14, see *Cockrill* v. *Sparkes* (1863), 1 H. & C. 699. As to payments by one of several persons bound by several contracts, see *Re Wolmershausen, Wolmershausen* v. *Wolmershausen* (1890), 62 L. T. 541. As to acknowledgment by one of several executors being effectual to revive the debt as against the testator's estate, see p. 62, *ante*.

(*h*) *Beck* v. *Pierce* (1889), 23 Q. B. D. 316, 322, C. A.

SECT. 7. Part Payment and Payment of Interest.

recover from his co-debtors their shares of the debt, although the creditor's right against the co-debtors is barred (*i*).

Partners.

As long as a partnership exists, one partner, in making payments on account of partnership debts, may be presumed to do so as agent of the firm and therefore to bind the firm (*k*). But on the dissolution of partnership by death or otherwise the agency determines, and therefore no payments made after that time can in general affect any other party than the one who makes them (*l*), except in the case of a secret retirement (*m*).

Contractor becoming executor of deceased co-contractor.

If one co-contractor becomes the executor of a deceased co-contractor and makes payments in respect of a debt, the capacity in which the payments are made is a question of fact; *primâ facie* such payments must be considered as made in the capacity of surviving co-contractor and not of executor (*n*).

Payment by executor, heir, or devisee.

124. Payment in respect of a debt by an executor keeps up the right of the creditor to compel legatees to refund (*o*). As regards the right (*p*) of a simple contract creditor to enforce payment out of the real estate of a deceased debtor, payment by the heir or devisee will not bind the personal representative, nor will payment by the latter, if he has divested himself of such estate, bind the heir or devisee (*q*); but, if the executor is also beneficial devisee, a payment by him binds both the personal estate and the land devised to him (*r*). A payment by the devisee of the real estate of a deceased debtor or of part of it, in respect of a debt of his testator, keeps the creditor's right alive as against all persons interested in the real estate (*s*). It seems that, if the right of a simple contract creditor

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(*i*) *Gardner* v. *Brooke*, [1897] 2 I. R. 6; and as to the right of contribution, see title GUARANTEE, Vol. XV., pp. 530 *et seq.*

(*k*) *Goodwin* v. *Parton and Page* (1879), 41 L. T. 91; and see title PARTNERSHIP.

(*l*) *Thompson* v. *Waithman* (1856), 3 Drew. 628; *Bristow* v. *Miller* (1848), 11 I. L. R. 461; *Watson* v. *Woodman* (1875), L. R. 20 Eq. 721; and see cases cited in note (*n*), *infra*.

(*m*) *Re Tucker*, *Tucker* v. *Tucker*, [1894] 3 Ch. 429, C. A.

(*n*) *Atkins* v. *Tredgold* (1823), 2 B. & C. 23; *Braithwaite* v. *Britain* (1836), 1 Keen, 206, 221; *Scholey* v. *Walton* (1844), 12 M. & W. 510; *Way* v. *Bassett* (1845), 5 Hare, 55; *Fordham* v. *Wallis* (1853), 10 Hare, 217; *Brown* v. *Gordon* (1852), 16 Beav. 302; *Thompson* v. *Waithman*, *supra*; *Winter* v. *Innes* (1838), 4 My. & Cr. 101; compare *Griffin* v. *Ashby* (1845), 2 Car. & Kir. 139, *contra*. The cases on this point before the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), are still of importance, because the effect of payments by a surviving co-contractor, the representative of a deceased co-contractor, seems to be the same since, as before, the Act.

(*o*) *Fordham* v. *Wallis*, *supra*; see p. 104, *post*.

(*p*) Under the Administration of Estates Act, 1833 (3 & 4 Will. 4, c. 104); see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 246.

(*q*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 253.

(*r*) *Fordham* v. *Wallis*, *supra*; *Putnam* v. *Bates* (1826), 3 Russ. 188.

(*s*) *Re Hollingshead*, *Hollingshead* v. *Webster* (1888), 37 Ch. D. 651; *Re Chant*, *Bird* v. *Godfrey*, [1905] 2 Ch. 225. This point is not affected by the Statute of Frauds Amendment Act, 1828 (9 Geo. c. 14), as to the effect of acknowledgments (see p. 67, *ante*), or by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), as to the effect of payments; but see *Re Lacey*, *Howard* v. *Lightfoot*, [1907] 1 Ch. 330, C. A., *per* FARWELL, L.J., at p. 349; and p. 79, *post*.

against personalty is kept alive by payment of interest by executors, the indirect right against the land by means of marshalling is also kept alive (*t*).

SECT. 7. Part Payment and Payment of Interest.

SECT. 8.—*Actions of Tort by and against Personal Representatives.*

Actions by representatives.

Injuries to real estate.

125. An action may be brought by the personal representatives of a deceased person for any injury, committed within six calendar months before his death, to his real estate for which an action might have been maintained by him (*u*); but it is doubtful whether such an action can be brought for injuries to the chattels real of such a person committed during his life (*x*).

Obstructing access of light.

If a person who has obstructed the access of light to a house is sued for an injunction and for damages, and the plaintiff dies, the plaintiff's executor cannot recover more damages than those that accrued within six months of the plaintiff's death (*a*).

Disabilities.

There are, it seems, no provisions as to disabilities which are applicable to such actions, and the periods of limitation fixed are absolute (*b*).

Action against representatives.

126. The personal representatives of a deceased person may be sued within six calendar months after they have taken upon themselves the administration of the estate for any wrong done by the deceased to another in respect of his real or personal property, if committed within six calendar months before the wrongdoer's death (*c*).

Alternative remedy, for wrongfully raising coal.

If a person tortiously raises coal belonging to another and sells it more than six months before his death, and continues to raise the coal within such six months, the injured party may sue the administrator of the offender in trespass for the acts committed within six months of the death, and may also waive the tort and sue for money had and received in respect of the acts committed before that period (*d*).

(*t*) But see *Fordham* v. *Wallis* (1853), 10 Hare, 217, *per* TURNER, V.-C., at p. 230. As to marshalling, see *Busby* v. *Seymour* (1844), 7 I. Eq. R. 433; *Vickers* v. *Oliver* (1842), 1 Y. & C. Ch. Cas. 211; and title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 291—293.

(*u*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 2. Apart from statute, no action for injuries to the real estate of a deceased person could be brought; see *Phillips* v. *Homfray* (1883), 24 Ch. D. 439, 463, C. A., and title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 227 *et seq.* As to proceedings in respect of deceased's personalty, see *ibid.*, p. 226.

(*x*) *Adam* v. *Bristol* (*Inhabitants*) (1834), 2 Ad. & El. 389; 1 Williams on Executors, 10th ed., 610.

(*a*) *Jones* v. *Simes* (1890), 43 Ch. D. 607, 613; *Jenks* v. *Clifden* (*Viscount*), [1897] 1 Ch. 694; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 227.

(*b*) The Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 4, which provides for disabilities, relates, it seems, only to the actions mentioned in *ibid.*, s. 3; see p. 78, *post.*

(*c*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 2; *Re Williames, Andrew* v. *Williames* (1884), 52 L. T. 41; and see titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 313, 314; INJUNCTION, Vol. XVII., p. 253.

(*d*) *Powell* v. *Rees* (1837), 7 Ad. & El. 426. The administrator in such case may sue for money received for the whole of the coal wrongfully gotten, and by first suing in trespass by virtue of the statute he does not preclude himself

SECT. 8.
Actions of Tort by and against Personal Representatives.

Innkeeper's negligence.

Non-repair.

In accordance with the above rule, actions can be brought against the personal representatives of an innkeeper for the negligence of the latter resulting in loss of property by a guest staying at an inn (*e*); or against the personal representatives of a tenant for life for non-repair of premises which he was, by the terms of the instrument creating the tenancy, expressly bound to repair (*f*).

Part III.—Specialties.

SECT. 1.—*Periods of Limitation.*

Specialty debts.

127. The period of limitation for actions of debt upon an indenture of demise, or for actions of covenant or debt upon any bond or other specialty, or for actions of debt or *scire facias* upon a recognisance, is twenty years after the accrual of the cause of such actions (*g*).

Meaning of "specialty."

128. The liability of a shareholder, under a deed of settlement establishing a company, for his proportion of the losses of the company is a specialty (*h*); so also is the liability of a shareholder to pay calls under the Companies (Consolidation) Act, 1908 (*i*); or of a company to pay dividends which have been declared (*k*). If one co-debtor under a bond pays the whole of the debt, the liability of his co-debtor to pay his share of the debt is now, it seems, in effect a specialty by virtue of the Mercantile Law Amendment Act, 1856 (*l*). All actions grounded upon a statute

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from afterwards suing in *assumpsit* independently of the statute in respect of the earlier acts.

(*e*) *Morgan* v. *Ravey* (1861), 6 H. & N. 265; see *Erskine* v. *Adeane* (1873), 8 Ch. App. 756, 760, and title INNS AND INNKEEPERS, Vol. XVII., pp. 314 *et seq.*

(*f*) *Woodhouse* v. *Walker* (1880), 5 Q. B. D. 404; and as to liability to repair, see titles LANDLORD AND TENANT, Vol. XVIII., pp. 499, 505 *et seq.*; SETTLEMENTS.

(*g*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 3. Before this Act there was no limitation in England for these actions, but there was a presumption on the expiration of twenty years from the time when the cause of action accrued that the debts in respect of which such actions could be brought were paid, unless any acknowledgment of the debt or any part payment or payment of interest had been made (see *Sutton* v. *Sutton* (1882), 22 Ch. D. 511, C. A., *per* JESSEL, M.R., at p. 515). As to what is a specialty, see titles ACTION, Vol. I., pp. 37, 38; BONDS, Vol. III., p. 99; CONTRACT, Vol. VII., p. 332. As to recognisances, see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 321, and *passim*; and as to *scire facias*, see title CROWN PRACTICE, Vol. X., p. 18.

(*h*) *Helby's, Stokes', and Horsey's Cases* (1866), L. R. 2 Eq. 167.

(*i*) 8 Edw. 7, c. 69; see *ibid.*, ss. 14 (2), 125; *Buck* v. *Robson* (1870), L. R. 10 Eq. 629; *Peninsular Co.* v. *Fleming* (1872), 27 L. T. 93; and title COMPANIES, Vol. V., pp. 164, 423.

(*k*) *Smith* v. *Cork and Bandon Rail. Co.* (1870), 5 I. R. Eq. 65; *Re Drogheda Steam Packet Co.*, [1903] 1 I. R. 512; *Re Artisans' Land and Mortgage Corporation*, [1904] 1 Ch. 796; title COMPANIES, Vol. V., pp. 276, 724, note (*d*).

(*l*) 19 & 20 Vict. c. 97, s. 5; *Re Cochran's Estate, De Wolf* v. *Lindsell* (1868), L. R. 5 Eq. 209; see title GUARANTEE, Vol. XV., p. 511, note (*o*), and *Copis* v. *Middleton* (1823), Turn. & R. 224 (a case before the Act).

or charter which are not within the Limitation Act, 1623 (*m*), are actions on a specialty (*n*).

Actions within two Acts.

129. Some actions are within the words both of the Civil Procedure Act, 1833 (*o*), s. 3, and of the Real Property Limitation Act, 1874 (*p*), s. 8 (*q*). To this class belong actions for the recovery of a sum of money charged on land and also secured by a covenant or other specialty, and actions to enforce judgments. In such cases the latter provision (*p*) applies instead of the former (*o*), and the period of limitation is twelve years (*q*).

Some actions are within the words both of the Civil Procedure Act, 1833 (*o*), s. 3, and the Real Property Limitation Act, 1874 (*p*), s. 1. To this class belong actions for a rentcharge or rent as an inheritance which is also secured by a covenant; in these cases the period of limitation is twelve years even if the action is brought on the specialty (*r*).

Other actions are within the words both of the Civil Procedure Act, 1833 (*o*), s. 3, and of the Real Property Limitation Act, 1833 (*s*), s. 42. To this class belong actions for the recovery of arrears of rent or of interest charged upon or payable out of any land or rent and also secured by a covenant or other specialty. In such cases the provisions of the Civil Procedure Act, 1833 (*o*), s. 3, apply, if an action is brought on the specialty, and the period of limitation is twenty years (*t*).

SECT. 2.—*When Time begins to Run.*

Time runs from accrual of cause of action.

Breach of covenant.

Surety.

130. The point from which time limited by the Civil Procedure Act, 1833 (*o*), s. 3, is to be calculated is the accrual of the cause of action (*u*). Thus in the case of a covenant or bond the time runs not from the date of the instrument, but from the breach of the covenant or of the condition of the bond (*v*). If a surety covenants jointly with a mortgagor and also separately to pay the mortgage debt with interest on demand, in the case of the principal debtor

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(*m*) 21 Jac. 1, c. 16; see p. 40, *ante*.

(*n*) *Cork and Bandon Rail. Co.* v. *Goode* (1853), 13 C. B. 826, 835. An action by an officer of the Goldsmiths' Company under the Gold and Silver Wares Act, 1844 (7 & 8 Vict. c. 22), s. 3, to recover penalties is, it seems, either an action on a statute, and so within the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 3 (see p. 174, *post*) (*Robinson* v. *Currey* (1881), 7 Q. B. D. 465, C. A., *per* LUSH, L.J., at p. 475), or is not within any Statute of Limitations (*ibid.*, *per* BRAMWELL, L.J., at p. 472); see p. 175, *post*. As to actions by or against the Crown, see p. 175, *post*; as to actions on penal statutes, see p. 174, *post*; as to actions founded on an equitable right, see p. 169, *post*. As to actions on an instrument executed in a country where there is no distinction between specialty and simple contract, see title CONFLICT OF LAWS, Vol. VI., p. 306.

(*o*) 3 & 4 Will. 4, c. 42.

(*p*) 37 & 38 Vict. c. 57.

(*q*) See p. 82, *post*.

(*r*) *Shaw* v. *Crompton*, [1910] 2 K. B. 370.

(*s*) 3 & 4 Will. 4, c. 27; see p. 104, *post*.

(*t*) *Paget* v. *Foley* (1836), 2 Bing. (N. C.) 679; see p. 97, *post*.

(*u*) See the cases decided under the Limitation Act, 1623 (21 Jac. 1, c. 16), cited p. 42, *ante*.

(*v*) *Tuckey* v. *Hawkins* (1847), 4 C. B. 655; *Barber* v. *Shore's Heir and Terretenants* (1839), 1 Jebb & S. 610; *Gilman* v. *Chute* (1847), 11 I. L. R. 442; *Kennedy* v. *Whaley* (1848), 12 I. L. R. 54; and see title BONDS, Vol. III., p. 100.

SECT. 2. When Time begins to Run.

no demand is necessary, and the time begins to run in his favour at once, but in the case of the surety time does not run in his favour until demand has been made (*w*). If the breach is a continuing one, a fresh cause of action arises at every moment of time during which the breach continues (*x*); and therefore, where a tenant covenants to keep the demised premises in repair, and neglects to do so, time does not run so long as they continue out of repair during the tenancy, even though they are entirely destroyed (*y*). Where, however, on the sale of property the vendor covenants that he has a good title to transfer, while in fact he has not a good title, the breach of the covenant is at the time of the sale, and there is no continuing breach; but if the vendor covenants for quiet enjoyment, there is no breach of that covenant till there is an interference with the enjoyment of the purchaser or those claiming through him (*z*). If the transferors of shares in a company are, under the company's deed of settlement, released from all liabilities in respect of the shares after the transfer, time begins to run, in respect of such liabilities, from the date of the transfer (*a*).

Continuing breach.

Covenant for title.

Liability of transferors of shares.

Death of plaintiff or defendant.

131. On the death of a plaintiff or defendant a fresh action may be commenced by or against, as the case may be, the representatives of the deceased within a year from probate of his will or grant of administration (*b*).

SECT. 3.—*Disabilities.*

Disability of plaintiff.

132. If any person entitled to any of the actions mentioned in the Civil Procedure Act, 1833 (*c*), s. 3, or to a *scire facias* upon a recognisance is, at the time when the cause of action accrued, under age or *non compos mentis*, the statute does not begin to run until such person is of full age or of sound mind (*d*). If any person against whom there is any such cause of action is at the time of the

Absence beyond the seas.

(*w*) *Re Brown's (J.) Estate, Brown* v. *Brown*, [1893] 2 Ch. 300; and see title GUARANTEE, Vol. XV., p. 488.

(*x*) *Maddock* v. *Mallet* (1860), 12 I. C. L. R. 173, 193, Ex. Ch.; *Spoor* v. *Green* (1874), L. R. 9 Exch. 99. As to the cause of action arising on successive breaches of a bond or covenant to secure, *e.g.*, an annuity not charged on land, see *Manning* v. *Phelps* (1854), 10 Exch. 59; title BONDS, Vol. III., p. 100. As to annuities charged on land, see p. 115, *post.*

(*y*) *Maddock* v. *Mallet, supra; Morrogh* v. *Alleyne* (1873), 7 I. R. Eq. 487.

(*z*) *Spoor* v. *Green, supra; Turner* v. *Moon*, [1901] 2 Ch. 825, 828; see title SALE OF LAND; and compare title LANDLORD AND TENANT, Vol. XVIII., p. 527.

(*a*) *Helby's, Stokes', and Horsey's Cases* (1866), L. R. 2 Eq. 167.

(*b*) *Sturgis* v. *Darell* (1860), 6 H. & N. 120, Ex. Ch.; this is the effect of the equitable construction of the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 6, the provisions of which are similar to those of the Limitation Act, 1623 (21 Jac. 1, c. 16), s. 4; see note (*f*), p. 55, *ante.*

(*c*) 3 & 4 Will. 4, c. 42.

(*d*) *Ibid.*, s. 4, which originally provided for two other disabilities of plaintiffs—coverture and absence beyond the seas. As to coverture, see Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 1 (2), 25, and p. 56, *ante.* As to absence of a plaintiff beyond the seas, see Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 10, and p. 56, *ante.* The cases as to disabilities decided under the Limitation Act, 1623 (21 Jac. 1, c. 16) (see p. 56, *ante*), would seem to be applicable to disabilities under the above provision. As to the effect of acknowledgment in case of disability, see p. 81, *post.*

accrual of the cause of action beyond the seas (*e*), the statute does not run against the person entitled to bring the action until the person liable to be sued returns from beyond the seas (*f*).

SECT. 4.—*Effect of Acknowledgment.*

Acknowledgment in writing or by payment.

133. If any acknowledgment is made by writing signed by the party liable by virtue of an indenture of demise, specialty or recognisance, or by part payment or part satisfaction on account of any principal or interest then due thereon, the creditor may bring his action for the money remaining unpaid and so acknowledged to be due within twenty years after acknowledgment (*g*).

But an acknowledgment can only be effective where the sum to be recovered is a definite sum, and cannot be effective where the claim is for unliquidated damages (*h*); nor is every payment of principal necessarily an acknowledgment that more is due (*i*).

By whom acknowledgment must be made.

134. The acknowledgment must be made by the party liable or his agent; this includes not only any person who is liable under the specialty, but also any persons who can be called upon to pay the debt (*k*).

Acknowledgment by agent.

An acknowledgment by an agent is on the same footing with one by the party liable (*l*). If a mortgagor assigns the equity of redemption and the assignee pays interest on the mortgage, the assignee is an agent of the mortgagor for this purpose (*m*).

Acknowledgment by payment.

An acknowledgment by payment must, like an acknowledgment in writing, be made by the party liable or his agent (*n*). If in a suit for partnership accounts a receiver is appointed and makes payments to one of the partners on account of a debt due to them from another of the partners under a covenant in a partnership deed, the payments not being authorised by the terms of the receiver's appointment, and not proved to be sanctioned by the partner who owes the debt, the receiver is not the agent of the latter for the purpose of making the payments (*o*).

(*e*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 7; see pp. 56, 61, *ante*.

(*f*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 4.

(*g*) *Ibid.*, s. 5. As to the effect of disabilities, see p. 81, *post*. For a form of acknowledgment, see Encyclopædia of Forms and Precedents, Vol. I., p. 188.

(*h*) *Blair* v. *Ormond* (1851), 17 Q. B. 423, 436; and see p. 60, *ante*.

(*i*) *Ashlin* v. *Lee* (1875), 44 L. J. (CH.) 174, 376, C. A. The rules for determining whether a payment has that effect, and also on account of what debt it is made, are the same as those that govern actions which are within the Limitation Act, 1623 (21 Jac. 1, c. 16); see p. 67, *ante*.

(*k*) *Re Lacey, Howard* v. *Lightfoot*, [1907] 1 Ch. 330, C. A., *per* BUCKLEY, L.J., at p. 352. A person who as devisee or heir is liable to be sued for the debt of a testator (see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 252) is a person liable within the meaning of the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 5, although he is not personally liable; see *Re Lacey, Howard* v. *Lightfoot, supra*, at pp. 345, 352; compare *Re England, Steward* v. *England*, [1895] 2 Ch. 820, C. A.

(*l*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 5.

(*m*) *Forsyth* v. *Bristowe* (1853), 8 Exch. 716; see *Dibb* v. *Walker*, [1893] 2 Ch. 429; *Bradshaw* v. *Widdrington*, [1902] 2 Ch. 430, C. A.

(*n*) *Forsyth* v. *Bristowe, supra*; *Roddam* v. *Morley* (1857), 1 De G. & J. 1, 6; *Coope* v. *Creswell* (1866), 2 Ch. App. 112, 124; *Dibb* v. *Walker, supra*, at p. 435; *Re England, Steward* v. *England, supra*.

(*o*) *Whitley* v. *Lowe* (1858), 25 Beav. 421. *Quære* whether the result would

SECT. 4.
Effect of Acknowledgment.

To whom an acknowledgment may be made.

135. An acknowledgment in writing in order to be sufficient to take a debt out of the statute (*p*) need not amount to a promise (*q*). Any admission, even if not made to the creditor or his agent, is sufficient (*r*); thus, an admission of an executor in administration proceedings instituted by a residuary legatee that a debt is due to a creditor (*s*), and, it seems, an admission made by a bankrupt in his statement of accounts or in his examination, if the bankruptcy were annulled (*t*), would be sufficient.

An acknowledgment by payment must, it seems, from the very nature of payment, be to the person entitled or his agent (*u*).

An acknowledgment of a mortgage debt charged on land made after the mortgagee's right against the land has been barred has no effect in reviving the mortgagee's remedy on the covenant in the mortgage deed (*v*).

Proof.

The ordinary rules of evidence apply to the manner of proving an acknowledgment (*w*).

Indorsement or memorandum of payment.

The question whether an indorsement or memorandum of payment made by the payee on a bond or other specialty is admissible as evidence of payment depends upon the ordinary rules of evidence (*a*). If made before the period of limitation has elapsed, it is an entry against the interest of the person making it, and is, therefore, admissible in evidence after his death, though its effect then is in favour of his representatives. If made after the lapse of the period of limitation, it is an entry in his own favour, and,

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have been different if the receiver had been authorised by the court; compare *Re Hale, Lilley* v. *Foad*, [1899] 2 Ch. 107, C. A.; and see p. 74, *ante*.

(*p*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42).

(*q*) *Moodie* v. *Bannister* (1859), 4 Drew. 432; see *Howcutt* v. *Bonser* (1849), 3 Exch. 491; *Forsyth* v. *Bristowe* (1853), 8 Exch. 716. The law is otherwise in the case of the Limitation Act, 1623 (21 Jac. 1, c. 16); see p. 63, *ante*. In cases under the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), an acknowledgment or part payment cannot operate as a new promise, for a promise by specialty cannot be supported by a promise not by specialty or by any implication of a promise from a payment on account, and its real effect is to give a further time during which the action on the specialty can be brought.

(*r*) The Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 5, differs from the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 42 (see p. 103, *post*), and the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8 (see p. 92, *post*), in that it contains no provision as to the person to whom the acknowledgment is to be made, whereas the two last-mentioned enactments provide that the acknowledgment is to be given to the person entitled to the payment or his agent.

(*s*) *Moodie* v. *Bannister, supra*; see *Read* v. *Price*, [1909] 1 K. B. 577, 583; affirmed, [1909] 2 K. B. 724, C. A.; and compare p. 62, *ante*.

(*t*) Compare p. 63, *ante*; and as to the effect of admissions in bankruptcy on the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8, see p. 93, *post*.

(*u*) *Re Lacey, Howard* v. *Lightfoot*, [1907] 1 Ch. 330, 345, C. A.; see p. 72, *ante*.

(*v*) *Beamish* v. *Whitney*, [1909] 1 I. R. 360; but see *Waters* v. *Lloyd*, [1911] 1 I. R. 153. As to the effect of payment of interest, or part payment of principal, by the mortgagor in preserving the mortgagee's right against the land, see p. 146, *post*.

(*w*) See *Read* v. *Price*, [1909] 2 K. B. 724, C. A; and see title EVIDENCE, Vol. XIII., pp. 518 *et seq.*

(*a*) Lord Tenterden's Act (Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), s. 3 (see p. 71, *ante*)) has no application to debts governed by the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42).

SECT. 4. Effect of Acknowledgment.

therefore, not admissible (*b*). If it bears no date, the date may be proved *aliunde* (*c*).

Acknowledgments by joint obligors

136. An acknowledgment in writing by one of several persons liable, whether jointly or successively, takes a debt out of the statute as regards the person who makes the acknowledgment, and also as regards the other persons liable jointly or successively (*d*).

Part payment by joint obligors.

In the case, however, of two or more co-contractors or co-debtors, liable jointly only or jointly and severally, or of the executors or administrators of any contractor, a payment by one of such persons does not take the case out of the statute as against the others (*e*). When several are at the same time jointly interested in the real estate of a debtor, a payment by a devisee of part of such estate will not keep the debt out of the statute as against a devisee of another part, except in cases where the debt is charged on land (*f*). But the case is different with persons who are successively liable; a payment, therefore, by a tenant for life of the real estate of a specialty debtor takes the debt out of the statute as against the devisee in remainder (*g*).

Successive liability.

Disability of person entitled to action.

137. If a person entitled to bring an action is under age or of unsound mind at the time when the person liable makes an

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(*b*) See p. 71, *ante; Searle* v. *Barrington* (*Lord*) (1731), 2 Stra. 826, H. L.; *Gleadow* v. *Atkin* (1833), 1 Cr. & M. 410, 421; *Turner* v. *Crisp* (1740), 2 Stra. 827; *Smith* v. *Battens* (1834), 1 Mood. & R. 341; and see title EVIDENCE, Vol. XIII., pp. 464, 561.

(*c*) *Briggs* v. *Wilson* (1854), 5 De G. M. & G. 12, 20, C. A. *Quære* whether, if it bears a date, that fact is evidence without other proof that it was made at that date; see 1 Taylor, Law of Evidence, 10th ed., 491; see *Briggs* v. *Wilson, supra; Glynn* v. *Bank of England* (1750), 2 Ves. Sen. 38; *Rose* v. *Bryant* (1809), 2 Camp. 321; *Gale* v. *Capern* (1834), 1 Ad. & El. 102; *Smith* v. *Battens* (1834), 1 Mood. & R. 341; *Newbould* v. *Smith* (1885), 29 Ch. D. 882; and compare p. 59, *ante*. See also title CONTRACT, Vol. VII., p. 526.

(*d*) *Roddam* v. *Morley* (1857), 1 De G. & J. 1; *Read* v. *Price*, [1909] 2 K. B. 724, 732, C. A., affirming S. C., [1909] 1 K. B. 577; compare p. 73, *ante*. The decisions to the contrary effect (*Dickenson* v. *Teasdale* (1862), 1 De G. J. & Sm. 52; *Coope* v. *Cresswell* (1866), 2 Ch. App. 112) have been frequently dissented from and are now not to be regarded as authorities; see *Read* v. *Price, supra; Dibb* v. *Walker*, [1893] 2 Ch. 429. In *Read* v. *Price*, [1909] 1 K. B. 577, CHANNELL, J., held that an executor of one of several joint obligors did not become jointly liable with the surviving obligors, and that an acknowledgment by him, though affecting his testator's estate, had no effect on their liability; but no opinion was expressed on this point by the Court of Appeal; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 252, 253, 308.

(*e*) Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 14; *Read* v. *Price, supra*.

(*f*) See *Re Lacey, Howard* v. *Lightfoot*, [1907] 1 Ch. 330, C. A., *per* FARWELL, L.J., at p. 349. The Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 14 (see p. 73, *ante*), does not apply to the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8 (see p. 92, *post*). It seems that in the case of money charged on land a payment by a devisee of part of an estate will preserve the right of the creditor to resort to land not charged (*Re Lacey, Howard* v. *Lightfoot, supra*); see *Re Chant, Bird* v. *Godfrey*, [1905] 2 Ch. 225; *Pears* v. *Laing* (1871), L. R. 12 Eq. 41; *Dibb* v. *Walker*, [1893] 2 Ch. 429; *Leahy* v. *De Moleyns*, [1896] 1 I. R. 206; and p. 74, *ante*. As to devises of land in general, see title WILLS.

(*g*) See *Re Lacey, Howard* v. *Lightfoot, supra*, at p. 349; *Roddam* v. *Morley, supra; Re Hollingshead, Hollingshead* v. *Webster* (1888), 37 Ch. D. 651, 657.

SECT. 4. Effect of Acknowledgment.

Absence of person liable.

acknowledgment by writing or payment, or if the person who makes the acknowledgment is at the time of making it beyond the seas, the statute does not run, until the person entitled has ceased to be under disability, or the person who makes the acknowledgment has returned from beyond the seas (*h*). If the person entitled dies under disability, or the person liable makes an acknowledgment abroad and dies without returning, the same rules apply as in like cases under the Limitation Act, 1623 (*i*).

Part IV.—Money Charged upon or Payable out of Land or Rent, or Secured by a Judgment, and Legacies, and Personal Estate of Intestates.

SECT. 1.—*Principal Moneys.*

SUB-SECT. 1.—*Money Charged on Land or Rent.*

Period of limitation.

138. An action or other proceeding, whether founded on a legal or equitable right (*k*), to recover any sum of money secured by any lien or mortgage, or otherwise charged upon or payable out of land or rent, must be brought within twelve years next after a present right to receive the same has accrued to some person capable of giving a discharge (*l*).

(*h*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 5. As to disabilities and absence beyond the seas, see p. 56, *ante*.

(*i*) 21 Jac. 1, c. 16; see p. 57, *ante*. As to the absence of one of several joint debtors beyond the seas at the time of an acknowledgment, see *Roddam* v. *Morley* (1857), 1 De G. & J. 1; the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 11; and p. 57, *ante*.

(*k*) The Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8, relates to any "action or suit or other proceeding at law or in equity." The words "at law or in equity" are out of place in the section, as they follow "charged upon or payable out of any land or rent," but they are to be read as if they followed the words "no action or other proceeding shall be brought"; see *Sutton* v. *Sutton* (1882), 22 Ch. D. 511, 516, C. A. The word "suit" refers to proceedings in equity: all such proceedings are now called "actions" (see the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 100), a term which formerly was only used of proceedings in the courts of common law; see title ACTION, Vol. I., p. 3.

(*l*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8. As to acknowledgments, see p. 92, *post*. The Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8, has taken the place of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 40, which is repealed (see Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 9), and has substituted a period of limitation of twelve years for twenty, but in other respects the sections are identical in form. *Mutatis mutandis* decisions under the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 40, are applicable to the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8. Before the passing of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), there was no limit of time to the recovery of the money charged, *i.e.*, so far as it was claimed out of the land. The fact of

SECT. 1. Principal Moneys.

Effect of trust.

In the case of money charged on land, the fact that it is also secured by an express trust does not prevent the right to recover it from being barred by the lapse of twelve years (*m*). The right to a sum of money to be raised under a conveyance of land to trustees for a term of years, upon trust to raise a specific sum, is barred at the expiration of twelve years from the date when the sum of money can be raised (*n*). When land is conveyed to trustees for a term of years upon trust to raise two sums of money, and the right to one sum is barred, the fact that the trustees are entitled to enter and raise the other sum does not enable them also to raise the sum which is barred (*n*).

Proceedings to recover land.

139. This limitation relates only to the recovery of money, and therefore does not affect any proceeding which a mortgagee has a right to take for obtaining possession of the land itself (*o*).

Action on covenant in mortgage deed.

Mortgagor and surety.

140. The limitation of twelve years applies to an action on a covenant by a mortgagor in a mortgage deed, or on a collateral bond by the mortgagor securing the mortgage debt (*p*). But if in a mortgage deed the mortgagor and a surety jointly and severally covenant for the repayment of the mortgage debt, this limitation, though it applies to an action on the covenant against the mortgagor, does not, it seems, apply to

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its being so charged did not, however, prevent the effect of the Limitation Act, 1623 (21 Jac. 1, c. 16) (see p. 39, *ante*), in limiting such personal remedies for the debt as fell within the provisions of that Act (see *Toplis* v. *Baker* (1789), 2 Cox, Eq. Cas. 118, 123; *Brocklehurst* v. *Jessop* (1835), 7 Sim. 438; *Barnes* v. *Glenton*, [1899] 1 Q. B. 885, C. A.). As to the meaning of "land or rent," see p. 106, *post*. As to real property generally, see title REAL PROPERTY AND CHATTELS REAL. As to liens and mortgages generally, see, respectively, titles MORTGAGE; LIEN, pp. 1 *et seq.*, *ante*.

(*m*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 10; see *Re Stephens, Warburton* v. *Stephens* (1889), 43 Ch. D. 39, 43; *Re Nugent's Trusts* (1885), 19 L. R. Ir. 140; and p. 103, *post*. This provision alters the law as laid down in previous cases (see *Burrowes* v. *Gore* (1858), 6 H. L. Cas. 907, 961).

(*n*) *Williams* v. *Williams, Re Hartley, Williams* v. *Jones*, [1900] 1 Ch. 152; see *Humble* v. *Humble* (1857), 24 Beav. 535; *Snow* v. *Booth* (1856), 8 De G. M. & G. 69, C. A.; *Lawton* v. *Ford* (1866), L. R. 2 Eq. 97; *Re Bermingham's Estate* (1870), 5 I. R. Eq. 147.

(*o*) *Doe* d. *Jones* v. *Williams* (1836), 5 Ad. & El. 291, 296; *Re Seager's Estate, Seager* v. *Aston* (1857), 26 L. J. (CH.) 809; *Re Conlan's Estate* (1892), 29 L. R. Ir. 199; see *Pugh* v. *Heath* (1882), 7 App. Cas. 235, affirming S. C. (1881), 6 Q. B. D. 345, C. A.; *Wrixon* v. *Vize* (1842), 3 Dr. & War. 104; *Dearman* v. *Wyche* (1839), 9 Sim. 570; *Du Vigier* v. *Lee* (1843), 2 Hare, 326; *Beamish* v. *Whitney*, [1908] 1 I. R. 38; *Hugill* v. *Wilkinson* (1888), 38 Ch. D. 480. For the limitation of the right of the mortgagee against the land, see p. 145, *post*. A claim by a legal mortgagee, for payment of principal and interest due on his mortgage, brought in an action for the administration of the real and personal estate of a deceased owner of the equity of redemption is a proceeding within the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8 (*Waters* v. *Lloyd*, [1911] 1 I. R. 153, C. A.).

(*p*) *Sutton* v. *Sutton* (1882), 22 Ch. D. 511, C. A.; see *Kibble* v. *Fairthorne*, [1895] 1 Ch. 219; *Fearnside* v. *Flint* (1883), 22 Ch. D. 579, 581; title BONDS, Vol. III., p. 100. Where a person covenanted with trustees for the payment of a sum of money after his death and charged certain land with the payment, and no money was raised or interest paid, it was held that the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8, applied, and that the claim under the covenant was barred at the expiration of twelve years from the covenantor's death (*Re England, Steward* v. *England*, [1895] 2 Ch. 820, C. A.).

SECT. 1. Principal Moneys.

an action against the surety (*q*). If the remedy against a surety remains unbarred, while that against the mortgagor is barred, the surety is, it seems, entitled to recover from the mortgagor as the principal debtor the amount which the surety may be compelled to pay in satisfaction of the debt (*r*).

Action for rent.

141. The limitation of twelve years has no application to an action for rent due under a covenant in an indenture of demise (*s*), nor to a covenant in a mining lease to pay rents and royalties (*t*); in such cases the period of limitation is twenty years (*a*). The limitation of twelve years applies, however, to an action for a rent-charge due under a covenant (*b*).

Simple contract debt charged on land.

142. The personal remedy on a simple contract debt charged on land is still governed by the Limitation Act, 1623 (*c*), and the period of limitation is six years from the accrual of the cause of action, but the remedy against the land is governed by the Real Property Limitation Act, 1874 (*d*), and the period of limitation is twelve years (*e*).

Land tax.

143. The limitation of twelve years applies to the yearly sums chargeable under the Land Tax Redemption Act, 1802 (*f*), in favour of a lessee who has redeemed the land tax (*g*), and to the charge in respect of paving expenses on property under the Public Health Act, 1875 (*h*).

Paving expenses.

Lien.

144. The limitation of twelve years applies to the lien of a vendor of land for his purchase-money (*i*).

(*q*) *Re Frisby, Allison* v. *Frisby* (1889), 43 Ch. D. 106, C. A., in which case this was the opinion of BOWEN, L.J., and KAY, J., COTTON, L.J., being of the contrary opinion, and FRY, L.J., expressing no opinion on the point. As against the surety the limitation is twenty years, by virtue of the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42); see p. 76, *ante;* and as to a bond executed by the surety only, see title BONDS, Vol. III., p. 100, note (*l*). See also *Re Wolmershausen, Wolmershausen* v. *Wolmershausen* (1890), 62 L. T. 541.

(*r*) See *Gardner* v. *Brooke*, [1897] 2 I. R. 6; and see title GUARANTEE, Vol. XV., pp. 529, 530.

(*s*) *Lewis* v. *Graham* (1885), 80 L. T. Jo. 66; *Donegan* v. *Neill* (1885), 16 L. R. Ir. 309 (decided under the Common Law Procedure Amendment (Ireland) Act, 1853 (16 & 17 Vict. c. 113), s. 20, which corresponds to the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 32), s. 3; and see title LANDLORD AND TENANT, Vol. XVIII., p. 488.

(*t*) *Darley* v. *Tennant* (1885), 53 L. T. 257; and see title MINES, MINERALS, AND QUARRIES.

(*a*) Under the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 3; see p. 76, *ante.*

(*b*) *Shaw* v. *Crompton*, [1910] 2 K. B. 370. As to rentcharges generally, see title RENTCHARGES AND ANNUITIES.

(*c*) 21 Jac. 1, c. 16; see p. 39, *ante.*

(*d*) 37 & 38 Vict. c. 57, s. 8.

(*e*) *Re Stephens, Warburton* v. *Stephens* (1889), 43 Ch. D. 39; *Barnes* v. *Glenton*, [1899] 1 Q. B. 885, C. A.

(*f*) 42 Geo. 3, c. 116, s. 123; see title LAND TAX, Vol. XVIII., p. 325, note (*x*).

(*g*) *Skene* v. *Cook*, [1902] 1 K. B. 682, C. A.

(*h*) 38 & 39 Vict. c. 55, s. 257; see *Hornsey Local Board* v. *Monarch Investment Building Society* (1889), 24 Q. B. D. 1, C. A.; and title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 225, 226.

(*i*) *Toft* v. *Stephenson* (1851), 1 De G. M. & G. 28, C. A. As to such lien, see titles LIEN, pp. 1 *et seq., ante;* SALE OF LAND.

SUB-SECT. 2.—*Money Secured by a Judgment.*

SECT. 1. Principal Moneys.

Money secured by judgment.

145. Any proceeding to recover money secured by any judgment must be brought within twelve years after a present right to receive it has accrued to some person capable of giving a discharge (*j*).

Judgment.

146. The limitation applies to any final judgment for the payment of a specific sum of money whether in law or in equity (*k*), and is not confined to a judgment which is a charge on the land, but refers to judgments generally (*l*), although, it seems, it is limited to an English judgment (*m*). The limitation extends to all proceedings of whatever kind for enforcing judgment, including a petition in bankruptcy (*n*), an administration action brought by a judgment creditor (*o*), and execution of any description (*p*).

SUB-SECT. 3.—*Legacies and Personal Estate of Intestates.*

Legacies.

147. Any proceeding to recover a legacy must be brought within twelve years after a present right to receive it has accrued to some person capable of giving a discharge (*q*). The limitation applies to all legacies, whether charged on land or not (*r*), including annuities if charged on personalty only, or on land outside England or Ireland (*s*), and also to a residue bequeathed by will or a share of such residue (*a*).

Effect of a trust.

148. In the case of a legacy charged on land an express trust does not prevent time running (*b*). But in the case of a legacy not charged on land, the fact that it is secured by an express trust prevents time running (*c*), and if such a legacy, or if residue of personal estate, has been bequeathed to executors on trust, and the character of executors merges in that of trustees, the statutory

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(*j*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8.

(*k*) *Dunne* v. *Doyle* (1860), 10 I. Ch. R. 502; see Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 100.

(*l*) See titles EXECUTION, Vol. XIV., p. 6; JUDGMENTS AND ORDERS, Vol. XVIII., p. 219; *Evans* v. *O'Donnell* (1886), 18 L. R. Ir. 170, C. A.; *Johnson* v. *Lowry*, [1900] 1 I. R. 316; *Re Tynte, Ex parte Tynte* (1880), 15 Ch. D. 125.

(*m*) As to actions founded on foreign judgments, see p. 39, *ante*.

(*n*) *Re Tynte, Ex parte Tynte, supra*.

(*o*) *Sherwood* v. *Hannan* (1886), 17 L. R. Ir. 270, C. A.; and see 18 L. R. Ir. 170, 173.

(*p*) See *Jay* v. *Johnstone*, [1893] 1 Q. B. 25, 189, C. A.; *Evans* v. *O'Donnell supra*; *Taylor* v. *Hollard*, [1902] 1 K. B. 676; *O'Hara* v. *Creagh* (1841), Long. & T. 65; but see p. 89, *post*. As to garnishee proceedings, see *Fellows* v. *Thornton* (1884), 14 Q. B. D. 335; title EXECUTION, Vol. XIV., p. 95. After six years from judgment execution can only be issued with the leave of the court; see title EXECUTION, Vol. XIV., p. 7.

(*q*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8.

(*r*) *Sheppard* v. *Duke* (1839), 9 Sim. 567.

(*s*) *Re Ashwell's Will* (1859), John. 112; see *Dower* v. *Dower* (1885), 15 L. R. Ir. 264; title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 264. An annuity given by will which, though payable out of personalty, is also charged on realty in England or Ireland is not a legacy within the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8, but is "rent," and is governed by *ibid.*, s. 1 (*Dower* v. *Dower, supra*); see p. 115, *post*.

(*a*) *Prior* v. *Horniblow* (1836), 2 Y. & C. (EX.) 200; *Christian* v. *Devereux* (1841), 12 Sim. 264; see *Adams* v. *Barry* (1845), 2 Coll. 285.

(*b*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 10; see note (*m*), p. 83, *ante*.

(*c*) See p. 83, *ante*, and p. 167, *post*.

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limitation (*d*) ceases to apply in those cases which are not governed by the Trustee Act, 1888 (*e*). The character of executor merges in that of trustee, if the executor does any act which amounts to an assent to the legacy so bequeathed (*f*), or if he separates it from the assets (*g*), and, in the case of a residue, if it is ascertained without more specific appropriation, but not until it has been ascertained (*h*). If a legacy is bequeathed *simpliciter* and not to the executor upon trust, but he by an act of his own constitutes himself trustee for the legatee, and is not within the protection of the Trustee Act, 1888 (*i*), the legatee will not be barred by lapse of time (*k*). Unless the legacy is vested in the executor on express trusts, the statute will run in his favour; an implied or constructive trust will not prevent the statute from running (*l*).

Personal estate of intestate.

149. An action to recover the personal estate or any share of the personal estate of an intestate, possessed by the legal personal representative of the intestate, must be brought within twenty years after a present right to receive the estate has accrued to some person capable of giving a discharge (*m*). This limitation applies

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(*d*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8; see p. 82, *ante*.

(*e*) 51 & 52 Vict. c. 59, s. 8; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 265; TRUSTS AND TRUSTEES; and p. 167, *post*.

(*f*) *Byrchall* v. *Bradford* (1822), Madd. & G. 13, 235; *Dix* v. *Burford* (1854), 19 Beav. 409; see *Brougham* (*Lord*) v. *Poulett* (*Lord W.*) (1855), 19 Beav. 119, 133, 134.

(*g*) *Phillipo* v. *Munnings* (1837), 2 My. & Cr. 309; see *Harcourt* v. *White* (1860), 28 Beav. 303; *Cadbury* v. *Smith* (1869), L. R. 9 Eq. 37; *O'Reilly* v. *Walsh* (1872), 6 I. R. Eq. 555; affirmed on appeal, 7 I. R. Eq. 167.

(*h*) *Willmott* v. *Jenkins* (1838), 1 Beav. 401; *Ex parte Dover* (1834), 5 Sim. 500; *Davenport* v. *Stafford* (1851), 14 Beav. 319, 331; *Dinsdale* v. *Dudding* (1842), 1 Y. & C. Ch. Cas. 265; *Freeman* v. *Dowding* (1856), 2 Jur. (N. S.) 1014; *Downes* v. *Bullock* (1858), 25 Beav. 54; *Re Smith, Henderson-Roe* v. *Hitchins* (1889), 42 Ch. D. 302.

(*i*) 51 & 52 Vict. c. 59.

(*k*) *Tyson* v. *Jackson* (1861), 30 Beav. 384.

(*l*) *Re Davis* (*Jane*), *Re Davis* (*T. H.*), *Evans* v. *Moore*, [1891] 3 Ch. 119, C. A.; *Re Rowe, Jacobs* v. *Hind* (1889), 58 L. J. (CH.) 703, C. A.; *Re Barker, Buxton* v. *Campbell*, [1892] 2 Ch. 491; *Re Lacy, Royal General Theatrical Fund Association* v. *Kydd*, [1899] 2 Ch. 149; *Re Mackay, Mackay* v. *Gould*, [1906] 1 Ch. 25; see *Re M'Causland's Trusts*, [1908] 1 I. R. 327. As to an executor's position with regard to undisposed-of residue, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 284. As to an executor *de son tort*, see *ibid.*, pp. 147 *et seq.*, and *Doyle* v. *Foley*, [1903] 2 I. R. 95.

(*m*) Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), s. 13. As to acknowledgments, see p. 92, *post*. The Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), made no provision for the case of the personal estate of an intestate. The Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), s. 13, rectified the omission and made the period of limitation the same as in the case of a legacy under the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), *i.e.*, twenty years. The Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), s. 13, is not affected by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 9; see *Sutton* v. *Sutton* (1882), 22 Ch. D. 511, 517, C. A. The Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), s. 13, and the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8, are *in pari materiâ* and to be construed together, although the limitation in one case is twenty and in the other is twelve years (*Re Johnson, Sly* v. *Blake* (1885), 29 Ch. D. 964, 970). The Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), applies to cases of intestates who died before, as well as to those who died after, the passing of the Act (*Re Jennens, Willis* v. *Howe* (*Earl*) (1880), 50 L. J. (CH.) 4; *Re Johnson, Sly* v. *Blake*, *supra*; and see *Willis* v. *Beauchamp* (*Earl*) (1886), 11 P. D. 59, C. A.)

to assets retained by the administrator and not distributed (*n*), and, it seems, to the case of a testator who has not disposed of the whole of his property.

Claims for general administration.

A claim by next of kin for general administration of the estate of an intestate is barred at the end of twenty-one years from the death of the intestate (*o*), but, with respect to assets of the intestate received by an administrator within twenty years of the commencement of the action, the claim of the next of kin to administration, limited to such assets, is not barred (*p*).

SUB-SECT. 4.—*When Time begins to Run.*

(i.) *In General.*

When time begins to run.

150. The period of limitation of twelve years (*q*) is reckoned from the time when a present right to receive the money has accrued to some person capable of giving a discharge for the same.

Present right to receive.

The concurrence of two events is therefore necessary—(1) the existence of a present right to receive the money, and (2) the existence of a person capable of giving a discharge for it. A present right to receive does not, it seems, in this provision mean a present right to enforce payment (*r*).

(ii.) *Money Charged on Land.*

When right accrues.

151. The right of a vendor of land to receive his purchase-money, which is secured by his lien, does not accrue (*a*) until the time for completion arrives, or until the title is accepted, if that is subsequent to the time fixed for completion (*b*).

(*n*) *Re Johnson, Sly* v. *Blake* (1885), 29 Ch. D. 964, *per* CHITTY, J., at p. 973, disapproving of the *dictum* to the contrary of Lord ROMILLY, M.R., in *Reed* v. *Fenn* (1866), 35 L. J. (CH.) 464.

(*o*) *Re Johnson, Sly* v. *Blake, supra.* The additional year at the end of twenty years is conceded in conformity with the general rule that an executor or administrator is allowed in an administration case one year to complete the administration of the estate (*ibid.*, at p. 970); and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 262, 285. As to proceedings by or against the Crown, or a nominee of the Crown, see *ibid.*, p. 187.

(*p*) *Re Johnson, Sly* v. *Blake, supra.*

(*q*) See Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8; and see p. 82, *ante.*

(*r*) See *Hornsey Local Board* v. *Monarch Investment Building Society* (1889), 24 Q. B. D. 1, C. A., *per* Lord ESHER, M.R., at p. 6, and *per* LINDLEY, L.J., at p. 9; but see *Re Pardoe, McLaughlin* v. *Penny*, [1906] 1 Ch. 265, *per* KEKEWICH, J., at p. 269 (reversed on another point, [1906] 2 Ch. 340, C. A.). The words "present right to receive" are, it has been said, different in meaning from and apparently used in contrast to the expression "accrual of a cause of action," which is the point from which time begins to run under the Limitation Act, 1623 (21 Jac. 1, c. 16), and the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42) (*ibid.*). As to the rule under those statutes, see pp. 42, 77, *ante.*

(*a*) *I.e.*, within the meaning of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8; see the text, *supra.*

(*b*) *Toft* v. *Stevenson* (1854), 5 De G. M. & G. 735, C. A. No Statute of Limitation is applicable to a charge on personal estate, whether by way of vendor's lien or otherwise, and the right, under such a charge, of the person entitled is not barred by lapse of time (*Re Stucley, Stucley* v. *Kekewich*, [1906] 1 Ch. 67, C. A.); see *Levy* v. *Stogdon*, [1898] 1 Ch. 478; affirmed, [1899] 1 Ch. 5, C. A. (purchaser's lien for deposit paid on a contract for the sale of stock); *Glyn* v. *Hood* (1859), 1 De G. F. & J. 334, C. A.; *Re Lowes' Settlement* (1861), 30 Beav. 95. As

SECT. 1. **Principal Moneys.**

Tenant for life of incumbered property.

If the tenant for life of an incumbered estate fails to pay the interest on the incumbrances, and a part of the incumbered property is sold to satisfy the interest, the remainderman is entitled to a charge on the life estate, but he has no present right to receive the money till the death of the tenant for life (*c*).

Devisees of residue.

If the whole of a testator's real estate is subject to a charge and a part of the real estate is specifically devised to one person and the residue is devised to other persons, and the charge is paid out of the proceeds of the sale of the residue, the devisees of the residue are entitled to a contribution from the specific devisees, even although the residue is subject to a trust for the payment of the testator's debts, and time runs against this right to contribution from the payment of the charge out of the residue (*d*).

Mortgage of reversionary interest.

If the deed mortgaging a reversionary interest in real estate contains a covenant to pay the mortgage debt, time runs against the mortgagee's right on the covenant from the date when the mortgage money became payable, and at the expiration of twelve years from that date such right is barred, although the reversion has not then fallen into possession (*e*).

Right of administrator.

If a sum of money charged on land becomes payable to the estate of an intestate in the interval between his death and the grant of administration, it seems that time runs against the administrator from the date when the sum of money or legacy becomes payable, although administration is not granted till after that date (*f*).

Money payable to trustees.

152. Trustees have by statute (*g*) the power of giving receipts which are a sufficient discharge of any person liable to pay. If, therefore, money is charged on land in favour of trustees upon trust for certain persons for life with remainder over, time runs from the date when the money becomes payable (*h*). But if the

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to sums which are a charge on premises by statute, such as paving expenses, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 224.

(*c*) *Kirwan* v. *Kennedy* (1869), 3 I. R. Eq. 472; and see title LIEN, p. 23, *ante*. As to devises of real estate generally, see title WILLS.

(*d*) *Re Allen, Bassett* v. *Allen*, [1898] 2 Ch. 499.

(*e*) *Kirkland* v. *Peatfield*, [1903] 1 K. B. 756. If there is no covenant to pay, the personal remedy against the mortgagor to recover the mortgage money is barred at the expiration of six years from the date when the mortgage debt became due; see p. 39, *ante;* and as to a mortgagee's right against the land, see p. 145, *post;* as to his remedies generally, see title MORTGAGE.

(*f*) This seems to be the result of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 6 (see p. 122, *post*), which applies to all charges on land for all the purposes of the Act (*Re Williams, Davies* v. *Williams* (1886), 34 Ch. D. 558), and, therefore, applies to the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8, which has taken the place of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 40; see p. 82, *ante*. If this is so, time may begin to run in this case, although no present right to receive the money or legacy has accrued to a person capable of giving a discharge for the same (Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8), for the money etc. may have become payable before the grant of administration. Compare the different rule under the Limitation Act, 1623 (21 Jac. 1, c. 16), and the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42); see p. 82, *ante*.

(*g*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 36.

(*h*) The law was different before the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), in cases where the trustees had no power to give receipts (*M'Carthy* v. *Daunt* (1848), 11 I. Eq. R. 29; see *Carroll* v. *Hargrave* (1870), 5 I. R. Eq. 123). As to the general powers of trustees, see title TRUSTS AND TRUSTEES.

trustees do not act, and no trustees are appointed in their place, time does not run as regards the remainder until the determination of the life interests (*i*).

(iii.) *Judgment Debts.*

Judgment.

153. A present right to receive a judgment debt arises generally, when the judgment is recovered, but if the judgment debt is only payable subsequently to the recovery of the judgment, time does not run against the judgment debtor, until the judgment debt becomes payable. Thus, where a judgment is entered on a *post obit* bond, time does not run against the judgment until the occurrence of the death upon which the bond becomes payable (*k*). In certain cases execution can only issue under an order of the court (*l*), but an order of this kind does not, it seems, give a new present right to receive the judgment debt, so as to make the statute begin to run afresh (*m*).

Action on a judgment.

The recovery of a judgment debt in an action of debt on the original judgment will not extend the time for bringing any proceedings on the original judgment (*n*), but the new judgment creates a new judgment debt, and proceedings may be taken on it independently.

(iv.) *Legacies and Personal Estate of Intestates.*

Legacy.

154. In the case of a legacy, if there are assets, time begins to run from the date when a present right to receive the legacy has accrued (*o*). If the legacy is payable on the happening of some future event, time does not run against the legatee until the event happens (*p*).

Residue.

155. When the residuary legatee is capable of ascertaining what is the clear residue, and requiring payment of the amount (*q*),

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(*i*) *Carroll* v. *Hargrave* (1870), 5 I. R. Eq. 123.

(*k*) *Barber* v. *Shore's Heir and Terre-tenants* (1839), 1 Jebb & S. 610; *Gilman* v. *Chute* (1847), 11 I. L. R. 442; *Tuckey* v. *Hawkins* (1847), 4 C. B. 655; *Kennedy* v. *Whaley* (1848), 12 I. L. R. 54; see p. 82, *ante*. So when a party is entitled to execution upon a judgment of assets *in futuro* (see R. S. C., Ord. 42, r. 23 (c)) time does not run until there are assets. As to enforcement fo judgments generally, see title JUDGMENTS AND ORDERS, Vol. XVIII., p. 219.

(*l*) See title EXECUTION, Vol. XIV., p. 7.

(*m*) *Evans* v. *O'Donnell* (1885), 16 L. R. Ir. 445, *per* O'BRIEN, J., at p. 452; 18 L. R. Ir. 170, C. A. *Evans* v. *O'Donnell*, *supra*, was followed by the Irish Court of Appeal in *Johnson* v. *Lowry*, [1900] 1 I. R. 316, C. A., where it was held that when a judgment creditor registered a judgment as a mortgage against the lands of the judgment debtor under the Judgment Mortgage (Ireland) Act, 1850 (13 & 14 Vict. c. 29), s. 7, the statute began to run from the date of the judgment and not from the date of the registration.

(*n*) *Watters* v. *Lidwill* (1847), 9 I. L. R. 362; *Kealy* v. *Bodkin* (1847), 9 T. L. R. 383.

(*o*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 264, note (*s*).

(*p*) *Prior* v. *Horniblow* (1836), 2 Y. & C. (EX.) 200; *Rudd* v. *Rudd*, [1895] 1 I. R. 15, C. A. If a gift to a legatee is only absolute if he dies without issue, time does not run against him during his life (*Lord* v. *Lord* (1857), 3 Jur. (N. S.) 485). As to annuities bequeathed by will, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 264; compare *Edwards* v. *Warden* (1876), 1 App. Cas. 281. As to an annuity charged also on land, see p. 83, *ante*, and p. 115, *post*.

(*q*) *Prior* v. *Horniblow*, *supra*.

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time begins to run against him, that is, in ordinary cases, at the end of one year from the testator's death. But a residuary legatee may have a right to require payment to him of part of the assets at one time and part at another. If a sum has been set apart to satisfy an annuity, he has no right to the sum until the annuity ceases, and, so long as the annuity lasts, time will not run against the right to obtain payment of a sum so set aside (*r*). But the mere existence of an annuity for a long period cannot keep alive the right of a residuary legatee to a general account and administration of the testator's assets, as distinguished from the the right to recover particular assets; as against the general right to administration, time runs from the end of the year after the testator's decease (*s*). Time does not run against the right of a residuary legatee to recover particular assets which have actually come into the executor's hands, until the assets have come into the executor's hands, and a residuary legatee has at any time a right to an inquiry whether any assets of the testator have come into the executor's hands within twelve years of the bringing of the action (*t*).

General administration.

Pecuniary legacies.

156. Until there are assets applicable in due course of administration for the payment of a pecuniary legacy, the legatee cannot be said to have a present right to receive it (*a*). If, more than twelve years after the testator's death, a legatee claims payment on the death of an annuitant under the will, then, provided the annuity had priority over the legacy, the legatee will be barred, unless he proves that there were no other assets available for the payment of the legacy till within twelve years of the claim (*b*); if the annuity had no such priority, the legatee will be barred, because he had a right to make the annuity abate in his favour (*c*).

Reversionary legacies.

157. Where a legacy is demonstrative and directed to be paid out of a reversionary fund, and the legatee has no right to require a sale of the fund while it is reversionary, time does not begin to run till

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(*r*) *Bright* v. *Larcher* (1859), 27 Beav. 130; 4 De G. & J. 608, C. A. The observation of ROMILLY, M.R. (S. C. 27 Beav. 130, at p. 135), that "in every case where a fund is set apart to satisfy an annuity, there is a trust of the fund set apart in favour of the residuary legatee" is, it is submitted, inaccurate; the case is not within the principle of *Phillipo* v. *Munnings* (1837), 2 My. & Cr. 309 (see p. 86, *ante*).

(*s*) See *Re Johnson, Sly* v. *Blake* (1885), 29 Ch. D. 964; *Re Ludlam, Ludlam* v. *Ludlam* (1890), 63 L. T. 330; and, as to the parties to proceedings for administration, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 337.

(*t*) *Adams* v. *Barry* (1845), 2 Coll. 285; *Binns* v. *Nichols* (1866), L. R. 2 Eq. 256; *Reed* v. *Fenn* (1866), 35 L. J. (CH.) 464; *Re Johnson, Sly* v. *Blake, supra; Re Ludlam, Ludlam* v. *Ludlam, supra;* and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 264.

(*a*) *Faulkner* v. *Daniel* (1843), 3 Hare, 199, 212; *Ravenscroft* v. *Frisby* (1844), 1 Coll. 16; see *Proud* v. *Proud* (1862), 11 W. R. 101.

(*b*) *Bright* v. *Larcher, supra.*

(*c*) *Rogers* v. *Millicent* (1780), 2 Dick. 570; *Wroughton* v. *Colquhoun* (1847), 1 De G. & Sm. 357; *Carr* v. *Ingleby* (1831), 1 De G. & Sm. 362; *Long* v. *Hughes* (1831), 1 De G. & Sm. 364; *Ashburnham* v. *Ashburnham* (1848), 16 Sim. 186; see *Wright* v. *Callender* (1852), 2 De G. M. & G. 652, C. A.; *Todd* v. *Bielby* (1859), 27 Beav. 353; *Potts* v. *Smith* (1869), L. R. 8 Eq. 683; *Carmichael* v. *Gee* (1880), 5 App. Cas. 588; *Re Cottrell, Buckland* v. *Bedingfield*, [1910] 1 Ch. 402.

the reversion falls in (*d*); but if the legatee can require the sale of the fund before it falls into possession, time runs against him from the date when he could enforce the sale and the satisfaction of the legacy out of the proceeds (*e*). Where the legacy is given generally, and the only assets applicable for payment of the legacy are reversionary or contingent funds, time will not begin to run against the legatee until the funds fall in (*f*).

Legatee also executor.

158. Where the person entitled to receive the legacy is also the executor who is liable to pay it, the statute will not run, so long as the two characters are thus united; and if, after it has begun to run, the same union takes place, the statute ceases to have any operation, as the legacy is in the hands entitled to receive it (*g*).

Next of kin. Intestacy.

159. The principles with regard to time running between an executor and residuary legatee (*h*) apply equally as between an administrator and the next of kin (*i*), and also, therefore, as between an executor and the next of kin with regard to residue undisposed of (*k*).

SUB-SECT. 5.—*Disabilities.*

Disabilities.

160. Although there is no express exception in favour of disabilities in the Real Property Limitation Act, 1874 (*l*), s. 8 the imposition of the condition precedent to the commencement of the running of time under that provision, namely, that there should be a person in existence who is capable of giving a discharge, practically provides for two disabilities, namely, infancy and lunacy (*m*). If the person entitled to the money is an infant or *non compos mentis*, he is incapable of giving a discharge (*n*).

Infancy and lunacy.

Successive disabilities.

A succession of these two disabilities, in the case of the same

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(*d*) *Earle* v. *Bellingham* (No. 2) (1857), 24 Beav. 448; *Re Seager's Estate, and Seager* v. *Aston* (1857), 26 L. J. (CH.) 809; *Re Ludlam, Ludlam* v. *Ludlam* (1890), 63 L. T. 332; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 264, 275.

(*e*) *Re Owen*, [1894], 3 Ch. 220.

(*f*) *Re Blachford, Blachford* v. *Worsley* (1884), 27 Ch. D. 676; *Re Johnson, Sly* v. *Blake* (1885), 29 Ch. D. 964.

(*g*) *Binns* v. *Nichols* (1866), L. R. 2 Eq. 256; *Re Blachford, Blachford* v. *Worsley supra; Re Pardoe, McLaughlin* v. *Penny*, [1906] 1 Ch. 265.

(*h*) See p. 89, *ante*.

(*i*) *Re Johnson, Sly* v. *Blake, supra;* see *Martin* v. *Beauchamp* (*Earl*), [1888] W. N. 247; title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 285.

(*k*) See *Reed* v. *Fenn* (1866), 35 L. J. (CH.) 464; title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 284.

(*l*) 37 & 38 Vict. c. 57.

(*m*) See *Hornsey Local Board* v. *Monarch Investment Building Society* (1889), 24 Q. B. D. 1, C. A.

(*n*) See *Piggott* v. *Jefferson* (1841), 12 Sim. 26; Sugden on the Statutes relating to Real Property, 2nd ed., 129. As to the general incapacity of infants and of persons *non compos mentis*, see, respectively, titles INFANTS AND CHILDREN, Vol. XVII., pp. 46 *et seq.*; LUNATICS AND PERSONS OF UNSOUND MIND, pp. 396 *et seq.*, *post*. As to convicts, see Forfeiture Act, 1870 (33 & 34 Vict. c. 23); and p. 53, *ante*. Under the old law a husband had a right to receive; but by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, the wife is capable of giving a discharge; see title HUSBAND AND WIFE, Vol. XVI., pp. 321 *et seq.*

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persons, or of persons successively entitled, prevents time beginning to run (*o*).

No provision is made for the disability of persons liable to pay money (*a*).

SUB-SECT. 6.—*Acknowledgments and Payments.*

(i.) *In General.*

Effect of acknowledgments and payments.

161. In the case of a sum of money to which the Real Property Limitation Act, 1874 (*b*), s. 8, applies, if some part of the principal money, or some interest thereon, has been paid, or some acknowledgment of the right thereto has been given in writing, signed by the person by whom the money is payable or his agent, to the person entitled thereto or his agent, an action to recover such money may be brought within twelve years after such payment or acknowledgment or the last of such payments or acknowledgments, if more than one (*c*).

To be effective the payment or acknowledgment must, it seems, at all events where the money is charged on land, be made within twelve years after the accrual of the present right to receive (*d*).

The above enactment has received a very liberal construction (*e*).

(ii.) *Acknowledgments in Writing.*

Acknowledgment in will.

162. An acknowledgment of a debt in the will of the debtor is sufficient to take the debt out of the statute (*f*); and an admission

(*o*) See p. 57, *ante*. Where money is payable to several persons jointly and one or more of them is under either of the two above-mentioned disabilities, then if, as in the case of partners or executors or otherwise, a discharge can be given without the concurrence of those under disability, time, it seems, would run as against all, but otherwise it would not run against any, until all are free from disability; the above-mentioned rule as to successive disabilities would in this case extend to successive disabilities affecting the different persons to whom money is jointly payable.

(*a*) *Boldero* v. *Halpin, Ex parte Hawes* (1870), 19 W. R. 320; see *Brockwell* v. *Bullock* (1889), 22 Q. B. D. 567, C. A.; and p. 170, *post*.

(*b*) 37 & 38 Vict. c. 57.

(*c*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8; compare pp. 58, 67, 79, *ante*. For forms of acknowledgment, see Encyclopædia of Forms and Precedents, Vol. I., pp. 189—195.

(*d*) *Hervey* v. *Wynn* (1905), 22 T. L. R. 93; *Gregson* v. *Hindley* (1846), 10 Jur. 383; *Homan* v. *Andrews* (1850), 1 I. Ch. R. 106; see *Becher* v. *Delacour* (1881), 11 L. R. Ir. 187; *Beamish* v. *Whitney*, [1908] 1 I. R. 38. For decisions to the contrary effect, see *Harty* v. *Davis* (1850), 13 I. L. R. 23; *Re Clifden (Lord), Annaly* v. *Agar-Ellis*, [1900] 1 Ch. 774; *Kibble* v. *Fairthorne*, [1895] 1 Ch. 219, 224; but it seems that these decisions are not to be followed, in any case where the money is charged on land (*Sutton* v. *Sutton* (1882), 22 Ch. D. 511, C. A.). The principles stated in the text, *supra*, are not affected by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 14 (see p. 81, *ante*), which does not apply to the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8; therefore a payment or acknowledgment by a co-debtor will prevent the latter provision running against his co-debtor; see *Re Frisby, Allison* v. *Frisby* (1889), 43 Ch. D. 106, C. A.; *Re Powers, Lindsell* v. *Phillips* (1885), 30 Ch. D. 291, C. A.; *Lewin* v. *Wilson* (1886), 11 App. Cas. 639, P. C.; *Re Seager's Estate, and Seager* v. *Aston* (1857), 26 L. J. (CH.) 809; *Bailie* v. *Irwin*, [1897] 2 I. R. 614; see *Brew* v. *Brew*, [1899] 2 I. R. 163; *Re Kingston's (Earl) Estate* (1869), 3 I. R. Eq. 485.

(*e*) *Blair* v. *Nugent* (1846), 3 Jo. & Lat. 658, 673; and as to payment of interest on a judgment, see *Williams* v. *Welch* (1846), 3 Dow. & L. 565.

(*f*) *Millington* v. *Thompson* (1852), 3 I. Ch. R. 236; see *Scott* v. *Synge* (1891), 27 L. R. Ir. 560, C. A.; compare pp. 58, 62, *ante*.

of a debt by a bankrupt in his balance-sheet, statement of affairs, or examination is, it seems, a sufficient acknowledgment, and may be set up by the creditor in an independent action, but not in the bankruptcy proceedings themselves (*g*).

Bankrupt's balance-sheet.

If the tenant for life of a fund subject to legacies becomes a lunatic, and the fund is transferred into court and invested in an account which is called the account of the lunatic and of the legatees, this acts as an acknowledgment by the lunatic of the claim of the legatees (*h*). But the report of a master of the court in an action in which a debtor is a defendant is not a sufficient acknowledgment, the master not being the agent of the debtor (*i*).

Acknowledgment by the court.

Master's report.

In the case of a lien on land, the person by whom the money is payable is the person entitled to the land on which the charge is sought to be fixed, and who will lose the land if he does not pay the charge (*k*).

Lien.

An acknowledgment by the agent of trustees under a will, by which property bought by the testator, but not paid for, is devised, will keep alive the vendor's lien as against the *cestui que trust* (*l*); and an acknowledgment of a debt by a trustee to whom lands are devised on trust to pay debts is sufficient to take the debt out of the statute (*m*).

Acknowledgment by trustees.

163. The acknowledgment need not state the amount of the debt alleged to be due (*n*); and, therefore, an acknowledgment which merely refers to the debt in question is sufficient (*o*), and parol evidence is admissible to show that the debt referred to, but not correctly described, in the acknowledgment is the one sought to be recovered (*p*).

Amount need not be stated

Parol evidence to explain acknowledgment.

(*g*) See *Barrett* v. *Birmingham* (1842), 4 I. Eq. R. 537; *Morrogh* v. *Power* (1842), 5 I. L. R. 494; *Dugdale* v. *Vize* (1843), 5 I. L. R. 568; *Hanan* v. *Power* (1845), 8 I. L. R. 505; *Re Clendinning, Ex parte Anderson* (1859), 9 I. Ch. R. 284; *Re West's Estate* (1879), 3 L. R. Ir. 77; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 71. In *Hervey* v. *Wynn* (1905), 22 T. L. R. 93, SWINFEN EADY, J., doubted whether a statutory declaration by a mortgagor as to a mortgage debt made in proceedings on a petition for an inquiry in lunacy with reference to the soundness of mind of the mortgagee was a sufficient acknowledgment on the ground that it was not made to the person entitled.

(*h*) *Re Walker* (1871), 7 Ch. App. 120.

(*i*) *Hill* v. *Stawell* (1840), 2 I. L. R. 302; and see p. 189, *post*. In *Barrett* v. *Birmingham, supra*, at p. 546, O'LOGHLEN, M.R., doubted the correctness of the decision in *Hill* v. *Stawell, supra*, but, it is submitted, without good reason, and there is no inconsistency between the decision in *Hill* v. *Stawell, supra*, and that in *Barrett* v. *Birmingham, supra*. The creditor in *Hill* v. *Stawell, supra*, was not a party to the suit; see *Wrixon* v. *Vize* (1842), 3 Dr. & War. 104, 123.

(*k*) *Toft* v. *Stephenson* (1851), 1 De G. M. & G. 28, C. A., *per* Lord CRANWORTH, L.C., at p. 40.

(*l*) *Toft* v. *Stephenson, supra*.

(*m*) *St. John (Lord)* v. *Boughton* (1838), 9 Sim. 219. As to an acknowledgment by the agent of the owner of the equity of redemption, see *Waters* v. *Lloyd*, [1911] 1 I. R. 153, C. A.; and p. 94, *post*.

(*n*) *St. John (Lord)* v. *Boughton, supra*, at p. 225.

(*o*) *Jortin* v. *South-Eastern Rail. Co.* (1855), 6 De G. M. & G. 270, C. A.

(*p*) *Hanan* v. *Power, supra*; *Dugdale* v. *Vize, supra*.

SECT. 1.

Principal Moneys.

(iii.) *Payments.*

Payment must be made by person liable to pay.

164. The Real Property Limitation Act, 1874 (*q*), s. 8, does not define by whom or to whom a payment should be made (*r*), but it means that the payment must be made by the person liable to pay (*s*). The payment must be made either by the debtor himself or by someone directly or indirectly authorised to act on his behalf, or by someone who, as owner of land which is charged with the debt, makes a payment in respect of the debt in order to preserve his interest in the land: payment by a stranger without the authority of the debtor is only a voluntary present of a sum of money to the creditor (*t*).

If a mortgagee of a contingent reversionary interest in land and of a policy of insurance receives from the insurance office the surrender value of the policy, this is not a payment within the statute (*a*); but the payment of premiums on a policy effected for the benefit of creditors may be a sufficient payment to take the debt and interest out of the statute (*b*).

Receipt of rent by mortgagee in possession.

Payment of rent by receiver.

Payment by one of two mortgagors.

By person entitled to make a tender of mortgage debt.

165. If a mortgagee enters into possession and receives the rent of mortgaged real estate, the payment of rent by the tenant is not a payment within the statute (*c*); but payment of the net rents to the mortgagee by a receiver of mortgaged property appointed under the Conveyancing and Law of Property Act, 1881 (*d*), is sufficient to take the debt out of the statute (*e*).

Payment by one of two mortgagors who covenant jointly and severally to pay the mortgage debt prevents the statute from running in favour of the other mortgagor (*f*).

Payments made by a person who under the terms of a mortgage contract is entitled to make a tender, and from whom the mortgagee is bound to accept a tender, for the defeasance or redemption of the mortgage (*g*), and payment of interest by a person who, as

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(*q*) 37 & 38 Vict. c. 57.

(*r*) See *Brew* v. *Brew*, [1899] 2 I. R. 163, 166.

(*s*) *Chinnery* v. *Evans* (1864), 11 H. L. Cas. 115; *Homan* v. *Andrews* (1850), 1 I. Ch. R. 106; *Harlock* v. *Ashberry* (1882), 19 Ch. D. 539, C. A.; *Newbould* v. *Smith* (1885), 29 Ch. D. 882.

(*t*) See *Homan* v. *Andrews*, *supra*, at p. 112; *Chinnery* v. *Evans*, *supra*; *Stamford, Spalding and Boston Banking Co.* v. *Smith*, [1892] 1 Q. B. 765, C. A., *per* Lord HERSCHELL, at p. 769; *Alston* v. *Mineard* (1906), 51 Sol. Jo. 132; and see p. 73, *ante*; but compare *Vincent* v. *Willington* (1842), Long. & T. 456.

(*a*) *Re Clifden* (*Lord*), *Annaly* v. *Agar-Ellis*, [1900] 1 Ch. 774, in which BYRNE, J., refused to follow *Re Conlan's Estate* (1892), 29 L. R. Ir. 199 (where the facts were very similar); see *Staley* v. *Barrett* (1856), 26 L. J. (CH.) 321, C. A.; *Re Irwin*, [1907] 1 I. R. 357.

(*b*) *Scott* v. *Synge* (1891), 27 L. R. Ir. 560, C. A.; see *Re Greene's Estate* (1884), 13 L. R. Ir. 461, C. A.

(*c*) *Harlock* v. *Ashberry* (1882), 19 Ch. D. 539, C. A.

(*d*) 44 & 45 Vict. c. 41, ss. 19, 24. See title MORTGAGE.

(*e*) *Berwick & Co.* v. *Price*, [1905] 1 Ch. 632; see *Chinnery* v. *Evans*, *supra* where payment by a receiver appointed under an Irish statute (stat. (1771) 11 & 12 Geo. 3, c. 10) was held to be payment by the agent of the mortgagor; and compare p. 72, *ante*.

(*f*) *Bailie* v. *Irwin*, [1897] 2 I. R. 614; and see note (*d*), p. 92, *ante*.

(*g*) *Lewin* v. *Wilson* (1886), 11 App. Cas. 639, P. C.

between himself and the mortgagor, is bound to pay it, although he is under no contract with the mortgagee to do so (*h*), are payments sufficient to prevent the statute from running; but payment by a mortgagor after he has assigned the property charged does not prevent time running in favour of the assignee (*i*).

Payment by principal or surety.

166. The payment of interest by the principal debtor prevents the statute from running in favour of the surety (*k*), and payment of interest by a surety prevents the statute from running in favour of the principal debtor (*l*). Where the owner of lands is liable to indemnify the owner of other lands against a charge thereon, a payment by the person liable to indemnify, if made on account of such charge, will keep the charge alive against the other lands (*m*).

Payment by administrator.

167. Part payment by an administrator to one of the next of kin out of a particular asset which has fallen in within twenty years will not revive the right to sue for general administration which was barred by statute at the time of payment (*n*).

Payment by compulsion of law.

168. A payment by compulsion of law out of the property of a debtor is sufficient to prevent the statute from running in his favour (*o*). Thus payment of part of a debt by a sheriff out of the proceeds of an execution levied under a judgment (*p*), and part payment made under an order of court, out of a fund belonging to the debtor which is in court, are sufficient (*q*). But part payment under a judgment in an action on a judgment will not prevent the statute from running against the original judgment debt (*r*).

(*h*) *Bradshaw* v. *Widdrington*, [1902] 2 Ch. 430, C. A.

(*i*) *Newbould* v. *Smith* (1886), 33 Ch. D. 127, C. A.; affirmed on other grounds (1889), 14 App. Cas. 423; see *Lyall* v. *Fluker*, [1873] W. N. 208.

(*k*) *Re Powers, Lindsell* v. *Phillips* (1885), 30 Ch. D. 291, C. A.; *Re Frisby, Allison* v. *Frisby* (1889), 43 Ch. D. 106, C. A.; *Lewin* v. *Wilson* (1886), 11 App. Cas. 639, P. C.

(*l*) *Re Seager's Estate, and Seager* v. *Aston* (1857), 26 L. J. (CH.) 809; see p. 92, *ante*.

(*m*) *Homan* v. *Andrews* (1850), 1 I. Ch. R. 106.

(*n*) *Re Johnson, Sly* v. *Blake* (1885), 29 Ch. D. 964 (under the Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), s. 13); see p. 90, *ante*, and title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 285.

(*o*) *Brew* v. *Brew*, [1899] 2 I. R. 163; *Cronin* v. *Dennehy* (1869), 3 I. R. C. L. 289.

(*p*) *Brew* v. *Brew, supra*; see *Chinnery* v. *Evans* (1864), 11 H. L. Cas. 115, 125. In *Brew* v. *Brew, supra, Morgan* v. *Rowlands* (1872), L. R. 7 Q. B. 493, was distinguished as being under another statute (Limitation Act, 1623 (21 Jac. 1, c. 16)), the rules as to acknowledgment under which are different from those under the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57) s. 8; see p. 92, *ante*.

(*q*) *Cronin* v. *Dennehy, supra*, decided under the Common Law Procedure Amendment (Ireland) Act, 1853 (16 & 17 Vict. c. 113), s. 23, the provisions of which on this point are to the same effect as those of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 40.

(*r*) *Taylor* v. *Hollard*, [1902] 1 K. B. 676; see *Brew* v. *Brew, supra*; but see *Harlock* v. *Ashberry* (1882), 19 Ch. D. 539, C. A., *per* Lord ESHER, M.R., at p. 548; and compare *Thwaites* v. *M'Donough* (1839), 2 I. Eq. R. 97.

SECT. 1. Principal Moneys.

Constructive payment.

169. When the person entitled to the interest on money charged on land is also entitled to the income of the land, payment of the interest will be presumed and time will not run (*s*); but the fact that a mortgagee of land is himself the owner of an undivided portion of the mortgaged land does not give rise to such constructive payment of interest as to prevent the statute from running in favour of the owner of the remaining portion (*t*).

One debt, several securities.

170. If several estates are comprised in one mortgage, a payment, on account of the debt, out of the rents of one of them keeps the security alive against the others, even if they have passed into the hands of *bonâ fide* purchasers for value (*a*).

Effect of payment by part or limited owner.

The same principle applies where the fee simple of a single estate after being mortgaged is divided into particular interests and a payment or acknowledgment is made by the owner of one particular interest, or where a devisee of part of a testator's land, or a person having a partial interest in such land or part of it, makes a payment or acknowledgment in respect of a debt of the testator, although such debt is not expressly charged on the land (*b*). Thus payment of interest on a mortgage debt by a devisee of the mortgaged lands keeps alive the right of the mortgagee to resort to the residuary personal estate or the other real estate of the testator in the event of the security of the mortgaged lands proving insufficient (*c*); and if the tenant for life of the real estate of a testator or of part of it makes a payment on account of a debt of the testator, such payment will keep the debt alive as against the persons interested in remainder (*d*). But payment of interest by a tenant for life on a charge made, when the statutory period has previously expired without any payment being made, does not revive the charge as against the remainderman (*e*).

Payment of interest on statute-barred debt.

(*s*) *Burrell* v. *Egremont* (*Earl*) (1844), 7 Beav. 205; *Topham* v. *Booth* (1887), 35 Ch. D. 607; *Re Hawes, Re Burchell, Burchell* v. *Hawes* (1892), 62 L. J. (CH.) 463 (where the principle was applied to a married woman entitled to a charge on land of her husband); see note (*b*), p. 73, *ante*.

(*t*) *Re Finnegan's Estate*, [1906] 1 I. R. 370; see *Re England, Steward* v. *England*, [1895] 2 Ch. 820, C. A.; *Re Allen, Bassett* v. *Allen*, [1898] 2 Ch. 499.

(*a*) *Chinnery* v. *Evans* (1864), 11 H. L. Cas. 115, where the payment was made by a receiver appointed over several estates, but who entered into possession of one estate only; see *Re Greene's Estate* (1884), 13 L. R. Ir. 461, C. A. *Chinnery* v. *Evans, supra;* and, as to mortgages generally, title MORTGAGE.

(*b*) As regards acknowledgments under the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 3, see cases cited note (*d*), p. 81, *ante*.

(*c*) *Re Lacey, Howard* v. *Lightfoot*, [1907] 1 Ch. 330, C. A.; *Leahy* v. *De Moleyns*, [1896] 1 I. R. 206, C. A. (cited with approval by VAUGHAN WILLIAMS, L.J., in *Re Lacey, Howard* v. *Lightfoot, supra*); and compare p. 74, *ante*. The decision in *Dickenson* v. *Teasdale* (1862), 1 De G. J. & Sm. 52, to the contrary effect cannot now be regarded as an authority on this point; see *Re Lacey, Howard* v. *Lightfoot, supra*.

(*d*) *Pears* v. *Laing* (1871), L. R. 12 Eq. 41; *Roddam* v. *Morley* (1857), 1 De G. & J. 1; see *Re Hollingshead, Hollingshead* v. *Webster* (1888), 37 Ch. D. 651; *Re Chant, Bird* v. *Godfrey*, [1905] 2 Ch. 225; *Barclay* v. *Owen* (1889), 60 L. T. 220; *Chinnery* v. *Evans, supra; Dibb* v. *Walker*, [1893] 2 Ch. 429; compare *Ames* v. *Mannering* (1859), 26 Beav. 583; and see p. 74, *ante*.

(*e*) *Becher* v. *Delacour* (1880), 11 L. R. Ir. 187.

SECT. 2.—*Arrears of Rent, of Interest Charged on Land or in respect of a Legacy, and of Dower.*

SECT. 2. Arrears of Rent etc.

SUB-SECT. 1.—*Arrears of Rent or Interest.*

(i.) *In General.*

171. The period of limitation for the recovery of arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy or any damages in respect of such arrears of rent or interest, is six years after the arrears have become due; and this period applies whether the arrears are sought to be recovered by distress or by an action founded on a legal or equitable right (*f*).

Period of limitation for arrears of rent or interest.

There is here no provision, express or implied, for disabilities (*g*).

Disabilities.

172. Some actions for arrears of rent and interest are within the terms both of the Limitation Act, 1623 (*h*), s. 3, and of the Real Property Limitation Act, 1833 (*i*), s. 42. To this class belong actions for arrears of rent reserved without specialty (*k*) and actions for use and occupation. The time limited by both statutes is the same, but the Real Property Limitation Act, 1833 (*i*), s. 42, makes no allowance for disabilities which are provided for by the Limitation Act, 1623 (*l*). The Real Property Limitation Act, 1833 (*i*), is not intended to take away from debtors any rights or to give any additional rights to creditors (*m*).

Simple contract debts charged on land.

It seems that in actions which fall within both statutes allowance should be made for disabilities (*n*).

Disability.

173. Some cases (*o*) are within the words both of the Civil Procedure Act, 1833 (*p*), s. 3, and of the Real Property Limitation Act, 1833 (*q*), s. 42. In this class of cases, such as actions for rent or royalties due under a covenant in an indenture of demise (*a*), the rule is that in an action on the covenant, or in an action of

Action for rent secured by a specialty

(*f*) Real Property Limitation Act, 1833 (3 & 4 Will. 3, c. 27), s. 42.

(*g*) See *De Beauvoir* v. *Owen* (1850), 5 Exch. 166, 182, Ex. Ch.; *Conolly* v. *Gorman*, [1898] 1 I. R. 20, C. A.; but see *Nixon* v. *Darley* (1868), 2 I. R. C. L. 467; and p. 91, *ante*.

(*h*) 21 Jac. 1, c. 16; see p. 38, *ante*.

(*i*) 3 & 4 Will. 4, c. 27.

(*k*) As to rent reserved under a specialty, see p. 77, *ante*.

(*l*) 21 Jac. 1, c. 16; see *ibid.*, s. 7; stat. (1705) 4 & 5 Ann. c. 3, s. 19; and p. 56, *ante*.

(*m*) *Barnes* v. *Glenton*, [1899] 1 Q. B. 885, 891, C. A.

(*n*) The Limitation Act, 1623 (21 Jac. 1, c. 16), only applies to proceedings by way of action; the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), applies to proceedings by way of distress which are not within the Limitation Act, 1623 (21 Jac. 1, c. 16).

(*o*) See p. 77, *ante*.

(*p*) 3 & 4 Will. 4, c. 42; see p. 76, *ante*.

(*q*) 3 & 4 Will. 4, c. 27. The difficulty of reconciling the two statutes is increased by the fact that they were both passed in the same session of Parliament, and that the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), although passed after the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), came into operation before it.

(*a*) See *Darley* v. *Tennant* (1885), 53 L. T. 257; *Donegan* v. *Neill* (1885),

SECT. 2. Arrears of Rent etc.

debt grounded upon a specialty, twenty years' arrears are recoverable (*b*), but that in all other proceedings by the creditor, such as distress, the Real Property Limitation Act, 1833 (*c*), s. 42, applies and only six years' arrears are recoverable (*d*).

Debt secured by specialty and also charged on land.

174. Some cases are within the words of the Civil Procedure Act, 1833 (*e*), s. 3, the Real Property Limitation Act, 1874 (*f*), s. 8, and the Real Property Limitation Act, 1833 (*g*), s. 42, namely, where interest or an annuity is charged on land and is also secured by specialty. To this class belong actions for interest due under a covenant in a mortgage deed, or for arrears of an annuity charged on land and secured by a covenant in a deed (*h*). The rule in these cases is that in an action on the covenant the period of limitation fixed by the Real Property Limitation Act, 1874 (*f*), applies and twelve years' arrears are recoverable, but that in all other proceedings by the creditor, such as a foreclosure action in the case of a mortgage, and distress where the deed granting the annuity gives a power of distress, the Real Property Limitation Act, 1833 (*g*), s. 42, applies, and only six years' arrears are recoverable (*i*).

Rentcharge secured by covenant.

175. A case may be within the words of the Civil Procedure Act, 1833 (*e*), s. 3, the Real Property Limitation Act, 1874 (*f*), s. 1, and the Real Property Limitation Act, 1833 (*g*), s. 42. Such is the case

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16 L. R. Ir. 309. It seems that an action against a surety who covenants to pay a mortgage debt and interest is not within the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 42, as the debt of the surety is not charged on his land (*Re Powers, Lindsell* v. *Phillips* (1885), 30 Ch. D. 291, C. A.; but see *Re Frisby, Allison* v. *Frisby* (1889), 43 Ch. D. 106, C. A.).

(*b*) See p. 77, *ante*.

(*c*) 3 & 4 Will. 4, c. 27.

(*d*) *Paget* v. *Foley* (1836), 2 Bing. (N. C.) 679; see *Hartshorne* v. *Watson* (1838), 4 Bing. (N. C.) 178; *Darley* v. *Tennant* (1885), 53 L. T. 257; *Donegan* v. *Neill* (1885), 16 L. R. Ir. 309; *Re Dillons, minors, Ex parte Warburton* (1847), 10 I. Eq. R. 206; *Humfrey* v. *Gery* (1849), 7 C. B. 567; compare *Thomas* v. *Sylvester* (1873), L. R. 8 Q. B. 368; *Christie* v. *Barker* (1884), 53 L. J. (Q. B.) 537, C. A.; *Searle* v. *Cooke* (1890), 43 Ch. D. 519. C. A.; *Re Lougher, Ex parte Bayly* (1852), 22 L. J. (BCY.) 26, C. A.

(*e*) 3 & 4 Will. 4, c. 42; see p. 76, *ante*.

(*f*) 37 & 38 Vict. c. 57; see p. 82, *ante*.

(*g*) 3 & 4 Will. 4, c. 27; see p. 97, *ante*.

(*h*) Generally speaking, the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8, applies to principal money due, the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 42, to interest and rent; but there are cases where interest and rent are within the former provision.

(*i*) *Sutton* v. *Sutton* (1882), 22 Ch. D. 511, C. A.; *Fearnside* v. *Flint* (1883), 22 Ch. D. 579; *Re England, Steward* v. *England*, [1895] 2 Ch. 820, C. A.; *Strachan* v. *Thomas* (1840), 12 Ad. & El. 536, 558; *Manning* v. *Phelps* (1854), 10 Exch. 59; *Re Nugent's Trusts* (1885), 19 L. R. Ir. 140; *Hunter* v. *Nockolds* (1850), 1 Mac. & G. 640; *Sinclair* v. *Jackson* (1853), 17 Beav. 405; *Hughes* v. *Kelly* (1843), 5 I. Eq. R. 286; *Thompson* v. *Hurly*, [1905] 1 I. R. 588; and see title DISTRESS, Vol. XI., p. 159. In *Strachan* v. *Thomas, supra*, which was decided when the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 40, was in force, it was held that twenty years' arrears of interest could be recovered in an action on a covenant to secure an annuity charged on land, but the effect of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8, and of *Sutton* v. *Sutton, supra*, is, it seems, to reduce the period of limitation in such a case to twelve years; compare *Shaw* v. *Crompton*, [1910] 2 K. B. 370.

of a rentcharge where there is a covenant to pay, and here the rule is the same as in cases mentioned in the preceding paragraph (*k*).

Interest due under judgment, lien, or legacy.

176. There are some cases which are within the words both of the Real Property Limitation Act, 1874 (*l*), s. 8, and the Real Property Limitation Act, 1833 (*m*), s. 42. To this class belong proceedings to recover interest due under a judgment or lien, or in respect of a legacy. It seems that in such cases the Real Property Limitation Act, 1833 (*m*), s. 42, applies, and that only six years' arrears are recoverable (*n*).

(ii.) *Arrears of Rent.*

Meaning of "rent."

177. The words "arrears of rent" (*o*) mean rent of every kind (*p*), and include not only rent reserved, but also rent as an incorporeal hereditament and every kind of rentcharge (*q*), a yearly sum chargeable on land for the benefit of a lessee who has redeemed the land tax thereon (*r*), a gross sum of money charged on land and payable by periodical instalments (*s*), and an annuity charged on land or on land and personalty (*t*). The word "rent" in the phrase "charged upon or payable out of any land or rent" means rent existing as an incorporeal hereditament and not rent reserved (*a*).

Rent recoverable by remainder-man against mortgagee in possession.

If the mortgagee of a life estate enters into possession, and remains in possession after the death of the tenant for life, the

(*k*) *Shaw* v. *Crompton*, [1910] 2 K. B. 370.
(*l*) 37 & 38 Vict. c. 57; see p. 82, *ante*.
(*m*) 3 & 4 Will. 4, c. 27.
(*n*) See p. 97, *ante*; *Toft* v. *Stevenson* (1854), 5 De G. M. & G. 735, C. A.
(*o*) See Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 42, p. 97, *ante*.
(*p*) See Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 1; see p. 107, *post*; but not arrears of tithe rentcharge; see note (*q*), *infra*, and p. 109, *post*.
(*q*) *Strachan* v. *Thomas* (1840), 12 Ad. & El. 536, 558; *Hunter* v. *Nockolds* (1850), 1 Mac. & G. 640; *Humfrey* v. *Gery* (1849), 7 C. B. 567 (a fee farm rent); *James* v. *Salter* (1837), 3 Bing. (N. C.) 544; *Irish Land Commission* v. *Grant* (1885), 10 App. Cas. 14; *Jones* v. *Withers* (1896), 74 L. T. 572. In Ireland the provision has been held to apply to tithe rentcharge (*Conolly* v. *Gorman*, [1898] 1 I. R. 20, C. A.). In England only two years' arrears of tithe rentcharge can be recovered (Tithe Act, 1891 (54 & 55 Vict. c. 8), s. 10 (2)).
(*r*) See Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 123; *Skene* v. *Cook*, [1902] 1 K. B. 682; and title LAND TAX, Vol. XVIII., p. 326.
(*s*) *Uppington* v. *Tarrant* (1861), 12 I. Ch. R. 262.
(*t*) *Roch* v. *Callen* (1848), 6 Hare, 531; *Francis* v. *Grover* (1845), 5 Hare, 39; *Ferguson* v. *Livingston* (1846), 9 I. Eq. R. 202; *Re Ashwell's Will* (1859), John. 112; *Re Nugent's Trusts* (1885), 19 L. R. Ir. 140. If an annuity is charged on personalty only, twelve years' arrears may be recovered (*Re Ashwell's Will*, *supra*; see *Roch* v. *Callen*, *supra*, and p. 85, *ante*); unless it is also secured by specialty, in which case twenty years' arrears may be recovered (*Francis* v. *Grover*, *supra*; and see p. 77, *ante*); see *Paget* v. *Foley* (1836), 2 Bing. (N. C.) 679. The right of an annuitant to resort to the *corpus* is not within the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 42 (*Re Belton's Estate*, [1894] 1 I. R. 537). As to annuities charged on land and also secured by specialty, see p. 77, *ante*. As to annuities generally, see title RENTCHARGES AND ANNUITIES. As to interest due to a surety on a contract of indemnity, see *Scottish Provident Institution* v. *Conolly* (1893), 31 L. R. Ir. 329.
(*a*) See p. 107, *post*.

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remainderman in an action of the nature of an equitable ejectment against the mortgagee cannot recover more than six years' arrears of rent (*b*).

Relief against forfeiture.

178. A lessee is not entitled to relief against forfeiture for non-payment of rent, or to have proceedings stayed in an action to enforce such forfeiture, unless he pays all arrears of rent due (*c*).

Renewal of lease.

If a lease contains a covenant for perpetual renewal, it seems that the lessee is only entitled to renewal on payment of all moneys due under the lease that have not been paid, no regard being had to lapse of time or any Statute of Limitation (*d*).

(iii.) *Arrears of Interest Charged on Land or in respect of a Legacy.*

"Money charged upon land."

179. The words "money charged upon or payable out of any land or rent" (*e*) are to be read exactly as if the cases of mortgage, judgment and lien had been enumerated as in the Real Property Limitation Act, 1874 (*f*), s. 8 (*g*).

Judgments.

180. As regards judgment debts, no more than six years' arrears of interest can be recovered, whether the interest is directly secured by the judgment or given by statute (*h*).

Mortgages within the statute.

181. A mortgage of a reversionary interest in the proceeds of the sale of land devised upon an absolute trust for conversion is within the statute (*i*); but a mortgage of a reversionary interest in the residuary personal estate of a testatrix, which was invested on mortgage of real estate, is not (*j*).

Money charged on reversion.

182. If money is charged on a reversion in land, not more than six years' arrears of interest can be recovered, before the reversion falls into possession, by any proceeding other than an action on a covenant to pay (*k*).

(*b*) *Hickman* v. *Upsall* (1876), 4 Ch. D. 144, C. A.

(*c*) See title LANDLORD AND TENANT, Vol. XVIII., pp. 544, 545. The Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 14 (8), has no application, and it does not appear that any Statute of Limitation applies. There is no direct authority on this point in England; but see *Croft* v. *London and County Banking Co.* (1885), 14 Q. B. D. 347, C. A. As to Ireland, see *Percival* v. *Dunne* (1858), 9 I. C. L. R. 422. The court may impose terms as a condition of relief to underlessees; see title LANDLORD AND TENANT, Vol. XVIII., p. 546.

(*d*) *Courtenay* v. *Parker* (1864), 16 I. Ch. R. 320; but see Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47), s. 16; *Eyre* v. *Coen* (1898), 33 I. L. T. 59.

(*e*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 42; see p. 97, *ante*.

(*f*) 37 & 38 Vict. c. 57.

(*g*) *Henry* v. *Smith* (1842), 4 I. Eq. R. 502; see *Kirkland* v. *Peatfield*, [1903] 1 K. B. 756; see p. 85, *ante*.

(*h*) Judgments Act, 1837 (1 & 2 Vict. c. 110), s. 17; *O'Kelly* v. *Bodkin* (1841), 3 I. Eq. R. 390; *Henry* v. *Smith*, *supra*; *Foley* v. *Dumas* (1839), Smythe, 178; *Re Fitzgerald, M'Donnell* v. *Fitzgerald*, [1897] 1 I. R. 556; and see title JUDGMENTS AND ORDERS, Vol. XVIII., p. 209.

(*i*) *I.e.*, the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 42; see *Bowyer* v. *Woodman*, *Ex parte Clarke* (1867), L. R. 3 Eq. 313.

(*j*) *Smith* v. *Hill* (1878), 9 Ch. D. 143. There is no Statute of Limitation which applies while the interest is reversionary (*ibid.*). As to a mortgage of personalty, see *Clarkson* v. *Henderson* (1880), 14 Ch. D. 348; and see p. 173, *post*. As to mortgages generally, see title MORTGAGE.

(*k*) *Vincent* v. *Going* (1844), 7 I. Eq. R. 463; *Sinclair* v *Jackson* (1853),

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Mortgage with no covenant to pay interest.

183. If land is conveyed by a mortgage deed to hold until the mortgage debt with interest is repaid, but there is no covenant to pay the debt and interest, only six years' arrears of interest are recoverable (*l*). The result is the same if the covenant in a mortgage deed to pay principal does not in terms extend to the payment of interest, and interest is only recoverable in an action on the covenant by way of damages.

Foreclosure actions.

Petition for payment out of court.

184. In a foreclosure action the mortgagee can only recover six years' arrears of interest, even if there is a covenant in the mortgage deed to pay interest (*m*). The same rule applies to analogous proceedings taken by a mortgagee to recover interest, such as a petition or other proceeding to obtain out of court the proceeds of the sale of the mortgaged property (*n*), but not when the proceedings are taken by the mortgagor or debtor and the mortgagee is simply resisting (*o*).

Redemption actions.

In a redemption action a mortgagor can only redeem on payment of all arrears of interest (*p*). If the proceeds of the sale of mortgaged

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Beav. 405; see *Humble* v. *Humble* (1857), 24 Beav. 535, 539; *Smith* v. *Hill* (1878), 9 Ch. D. 143. The decision of WOOD, V.-C., to the contrary effect in *Wheeler* v. *Howell* (1857), 3 K. & J. 198, is not to be regarded as an authority; see *Re Turner, Turner* v. *Spencer* (1894), 43 W. R. 153; *Re Lambert's Estate*, [1906] 1 I. R. 220, C. A.

(*l*) *Hodges* v. *Croydon Canal Co.* (1840), 3 Beav. 86.

(*m*) *Sinclair* v. *Jackson* (1853), 17 Beav. 405; *Hughes* v. *Kelly* (1843), 5 I. Eq. R. 286; *Hunter* v. *Nockolds* (1850), 1 Mac. & G. 640; *Round* v. *Bell* (1861), 31 L. J. (CH.) 127; *Re Lloyd, Lloyd* v. *Lloyd*, [1903] 1 Ch. 385, 401, C. A.; see *Thwaites* v. *M'Donough* (1839), 2 I. Eq. R. 97. In a foreclosure action the specialty debt will not be tacked so as to allow of the recovery of twelve years' arrears (*Lowthian* v. *Hasel* (1790), 3 Bro. C. C. 162), except as against the heirs of the mortgagor when the heirs are bound by the specialty (*Elvy* v. *Norwood* (1852), 5 De G. & Sm. 240). As to foreclosure, see, further, title MORTGAGE.

(*n*) *Re Stead's Mortgaged Estates* (1876), 2 Ch. D. 713; and see title MORTGAGE.

(*o*) *Re Lloyd, Lloyd* v. *Lloyd, supra*; approving of *Edmunds* v. *Waugh* (1866), L. R. 1 Eq. 418, and *Re Marshfield, Marshfield* v. *Hutchings* (1887), 34 Ch. D. 721, distinguishing *Re Stead's Mortgaged Estates* (1876), 2 Ch. D. 713, and overruling *Re Slater's Trusts* (1879), 11 Ch. D. 227, and, in part, *Bowyer* v. *Woodman, Ex parte Clarke* (1867), L. R. 3 Eq. 313; see *Re Belton's Estate*, [1894] 1 I. R. 537.

(*p*) *Re Lloyd, Lloyd* v. *Lloyd, supra*; *Dingle* v. *Coppen, Coppen* v. *Dingle*, [1899] 1 Ch. 726. *Re Lloyd, Lloyd* v. *Lloyd, supra*, only applies when the mortgage is a subsisting mortgage and has not been barred by the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 34 (*Re Hazeldine's Trusts*, [1908] 1 Ch. 34, C. A.); see p. 155, *post*. It only applies to proceedings in the nature of a redemption action (*Re Owen Lewis' Estate*, [1903] 1 I. R. 348). Questions have arisen as to the right of the mortgagee in a redemption action to tack a specialty debt as against the heirs of the mortgagor who are bound by the specialty (see *Elvy* v. *Norwood, supra*), but in consequence of the decision in *Re Lloyd, Lloyd* v. *Lloyd, supra*, these cases, it seems, are now of little practical importance. As to the right of a plaintiff, in an action in which only six years' arrears are recoverable out of the land, to recover out of the land the difference between six and twelve years' arrears, where the plaintiff can recover such difference by a personal action against a third person and the third person can recover it by way of indemnity out of the land, see *Harrisson* v. *Duignan* (1842), 2 Dr. & War. 295; *Byrne* v. *Duignan* (1845), 3 Jo. & Lat. 116; *Willson* v. *Leonard* (1840), 3 Beav. 373. If land is charged with a debt but there is no right of foreclosure and the debt is statute-barred, and the land is in the hands of a trustee who enters into possession in

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premises have been paid into court, and the mortgagor or his representatives apply for payment of the surplus after satisfaction of the mortgage debt and interest, such proceedings are analogous to a redemption action, and the application will only be granted on the mortgagor paying all arrears of interest (*q*).

Sale by mortgagee.

If a mortgagee sells the mortgaged property under a power of sale, he is entitled to retain all arrears of interest (*r*).

Ejectment by mortgagee.

185. In ejectment by a mortgagee against a mortgagor the court has statutory (*s*) power to stay proceedings and compel the reconveyance of the mortgaged lands to the mortgagor upon payment into court of all the principal moneys and interest due upon the mortgage and of costs. In such cases all arrears of interest would, apparently, have to be paid by the mortgagor as in a redemption action.

Mortgagee in possession.

In accounts between a mortgagor and mortgagee in possession the mortgagee is, it seems, bound to account for all rents and profits received during the time of his possession, however long that may be (*a*), so that all interest accrued due during that time would have to be brought into account; but if, on deducting the rents and profits from the amount due, more than six years' arrears of interest appear unsatisfied, only six years' arrears would be treated as due in a foreclosure action, but all the arrears of interest unpaid would be treated as due in a redemption action (*b*).

Arrears recoverable by puisne mortgagee when land has been in possession of prior incumbrancer.

186. If a prior incumbrancer has been in the possession of any land or in receipt of the profits thereof within one year next before an action is brought by a person entitled to a subsequent incumbrance on the same land, the person entitled to such subsequent incumbrance may recover the arrears of interest which have become due during the whole time that such prior incumbrancer was in such possession, although such time may have exceeded the term of six years (*c*). But arrears of interest due for a period preceding the possession of the prior incumbrancer are not recoverable by virtue of this provision (*d*). If a claim is brought by a person entitled to an incumbrance against a reversioner, the possession of a person entitled to an incumbrance on the estate of a tenant for life of the

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the interest of the persons entitled to the land, and who is entitled in his own right to the debt on which nothing has been paid, a reconveyance of the land may be ordered by the trustee to the persons entitled without requiring the payment of the debt (*Shea* v. *Moore*, [1894] 1 I. R. 158, C. A.).

(*q*) *Edmunds* v. *Waugh* (1866), L. R. 1 Eq. 418; *Re Lloyd, Lloyd* v. *Lloyd*, [1903] 1 Ch. 385, C. A. As to the practice in Ireland, see *Re Blennerhassett's Estate*, [1911] 1 I. R. 16, C. A.

(*r*) *Re Marshfield, Marshfield* v. *Hutchings* (1887), 34 Ch. D. 721.

(*s*) Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 219, 220; see title MORTGAGE.

(*a*) *Hood* v. *Easton* (1856), 2 Jur. (N. S.) 729.

(*b*) See p. 101, *ante*. As to arrears of jointure due to a jointress who takes possession, see *Battersby* v. *Rochfort* (1847), 10 I. Eq. R. 439.

(*c*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 42. The term "incumbrancer" here includes a judgment creditor (*Henry* v. *Smith* (1842), 2 Dr. & War. 381, 390).

(*d*) *Montgomery* v. *Southwell* (1843), 2 Con. & Law. 263.

land, during the life of such tenant, does not bring the case within the provision (*e*).

An agreement between a puisne incumbrancer and a prior incumbrancer in possession that the later charge shall have precedence over the earlier does not exclude the puisne incumbrancer from the benefit of the proviso, if he has no right to take possession of the land (*f*). If the owner of incumbered land takes an assignment of an incumbrance to a trustee for himself, then, although he is in possession, neither he nor his trustee is an incumbrancer within the meaning of the above provision, and a subsequent incumbrancer will not in such case have the benefit of it (*g*).

Effect of a trust.

187. If personal property is vested in trustees to secure an annuity or a legacy, the case is taken out of the Real Property Limitation Act, 1833 (*h*), s. 42 (*i*), but a trust to secure an annuity charged on land or rent does not keep alive a right to recover arrears which would have been barred had there been no such trust (*j*).

(iv.) *Dower.*

Arrears of dower.

188. No arrears of dower can be recovered by any action for a longer period than six years (*k*).

SUB-SECT. 2.—*Acknowledgments.*

Acknowledgment in writing.

189. If an acknowledgment in writing of the arrears to which the Real Property Limitation Act, 1833 (*l*), s. 42, applies (*m*) is given to the person entitled to the arrears or his agent (*n*), signed by the person by whom the arrears are payable or his agent, all arrears in respect of which the acknowledgment is given are recoverable, if sued for within six years after it is given (*o*), even, it would seem, if they accrued more than six years before the

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(*e*) *Vincent* v. *Going* (1844), 1 Jo. & Lat. 697; see *Smith* v. *Hill* (1878), 9 Ch. D. 143.

(*f*) *Drought* v. *Jones* (1840), 2 I. Eq. R. 303.

(*g*) *Chinnery* v. *Evans* (1864), 11 H. L. Cas. 115.

(*h*) 3 & 4 Will. 4, c. 27.

(*i*) See *Re Blachford, Blachford* v. *Worsley* (1884), 27 Ch. D. 676; and p. 85, *ante.*

(*j*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 10; see *Hughes* v. *Coles* (1884), 27 Ch. D. 231; *Re Montalt's (Earl) Estate,* [1909] 1 I. R. 390; *Re Drake's Estate,* [1909] 1 I. R. 136; and p. 141, *post.* As to the law before the Act, see *Cox* v. *Dolman* (1852), 2 De G. M. & G. 592; *Snow* v. *Booth* (1856), 8 De G. M. & G. 69, C. A. As to annuities generally, see title RENT-CHARGES AND ANNUITIES.

(*k*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 41; *Bamford* v. *Bamford* (1846), 5 Hare, 203.

(*l*) 3 & 4 Will. 4, c. 27.

(*m*) See p. 97, *ante.*

(*n*) See *Holland* v. *Clarke* (1842), 1 Y. & C. Ch. Cas. 151.

(*o*) With the exception of the points mentioned in this sub-section, the provisions of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8, and of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 42, as to acknowledgments, are so nearly alike that the same rules of construction apply, and the cases as regards acknowledgment decided under the first-named provision apply to questions arising under the other; see *Re Fitzmaurices, minors* (1864), 15 I. Ch. R. 445; and see p. 92, *ante.*

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acknowledgment, and even if it is given after the commencement of proceedings to recover the arrears (*p*).

Part payment.

There is no provision in the Real Property Limitation Act, 1833 (*q*), s. 42, as to part payment of interest (*r*), and part payment of an instalment of interest or rent does not prevent the operation of this statutory provision as to the balance (*s*).

Acknowledgment by first mortgagor.

An acknowledgment by a mortgagor that more than six years' arrears of interest are due on a first mortgage does not affect a puisne incumbrancer, and such incumbrancer is entitled in a foreclosure suit by the first mortgagee to redeem the first mortgage on payment of six years' arrears only (*t*).

By one of two executors.

An acknowledgment by one of two executors and devisees in trust of real estate, against the wishes of the other, that more than six years' arrears of interest are due on a mortgage, is not valid as against the estate (*u*).

Part V.—Land or Rent.

SECT. 1.—*General Effect of the Real Property Limitation Acts,* 1833 *and* 1874, *as regards Land and Rent.*

Period of limitation.

190. The period of limitation for proceedings for the recovery of land and of such incorporeal hereditaments as, for this purpose, are on the same footing as land, which in the statutes (*a*) are included in the term "rent," is twelve years from the time when the right first accrued (*b*).

Right of entry.

No mere entry on land nor continual claim made on or near it can keep alive a right of entry which would otherwise be barred (*c*). All remedies for recovering land or rent which formerly existed in cases where the right of entry is gone are done away with by the

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(*p*) *Tristram* v. *Harte* (1841), Long. & T. 186. As to an acknowledgment by the court on behalf of a lunatic, see *Re Walker* (1871), 7 Ch. App. 120. For forms of acknowledgments see Encyclopædia of Forms and Precedents, Vol. I., pp. 192, 195.

(*q*) 3 & 4 Will. 4, c. 27.

(*r*) As to other provisions relating to payment, see pp. 67, 79, 92 *et seq., ante.*

(*s*) *Astbury* v. *Astbury*, [1898] 2 Ch. 111, 115. Payment of an annuity may prevent the annuity being barred under the Real Property Limitation Acts, 1833 (3 & 4 Will. 4, c. 27) and 1874 (37 & 38 Vict. c. 57), and yet only six years' arrears may be recoverable because of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 42 (see *Francis* v. *Grover* (1845), 5 Hare, 39).

(*t*) *Bolding* v. *Lane* (1863), 1 De G. J. & Sm. 122; see *Chinnery* v. *Evans*, (1864), 11 H. L. Cas. 115, 135; *Lewin* v. *Wilson* (1886), 11 App. Cas. 639, 645, P. C.; *Astbury* v. *Astbury, supra.*

(*u*) *Astbury* v. *Astbury, supra.*

(*a*) *I.e.*, Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27); Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57); see p. 107, *post.*

(*b*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1, which was substituted for the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 2, under which the period of limitation was twenty years. As to claims by the Crown, which is not bound, see p. 159, *post.* The Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), came into force on the 1st January, 1879.

(*c*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), ss. 10, 11; see p. 130, *post.*

SECT. 1.
General Effect of the Real Property Limitation Acts.

abolition of real actions (*d*). No right of entry or action can be now taken away by any other means than lapse of time (*e*).

When a sufficient period has elapsed to bar the right of entry, action, or distress, the title in respect of which the right existed is simultaneously extinguished (*f*).

Extinguishment of title.

191. The time within which a right can be enforced is extended in certain cases of disability, but in no case is the period of limitation to exceed thirty years (*g*).

Disabilities.

Limitations are provided for the claims of mortgagors where the mortgagees are in possession (*h*), and for the claims of persons entitled to estates tail, or remainders expectant on such estates (*i*).

Mortgagors.

Estates tail.

Proceedings in equity.

192. Proceedings in equity are limited to the same period as actions at law, subject to exceptions in certain cases of fraud and trust (*j*).

Spiritual courts.

Proceedings in any spiritual court to recover property must be brought within the same periods as proceedings in the civil courts (*k*).

Church property.

Special limitations are provided for claims of spiritual and eleemosynary corporations sole to church property and advowsons (*l*).

Adverse possession.

193. The Real Property Limitation Act, 1833 (*m*), put an end to the doctrine of adverse possession in reference to questions arising under that Act, and, except in relation to landlord and

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(*d*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 36, which is repealed by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59), but the repeal (see *ibid.*, s. 4 (4)) is not to revive or restore any usage, practice, procedure, or other matter or thing not existing or in force at the passing of the Act; and see title ACTION, Vol. I., pp. 33, 34. No descent cast, discontinuance, nor warranty will now defeat any right of entry (*ibid.*, s. 39). As to the meaning of "descent cast," see Co. Litt. 237 b; Roscoe on Real Actions, 81—87; of "discontinuance," see Co. Litt. 325 a, 3 a, 7 b; Roscoe on Real Actions, 43—53; *Doe* d. *Cooper* v. *Finch* (1832), 1 Nev. & M. (K. B.) 130; of "warranty," see Co. Litt. 365 a, 393 b; Bac. Abr., tit. Warranty.

(*e*) Fines were abolished by the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74); see title REAL PROPERTY AND CHATTELS REAL,

(*f*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 34; see p. 155, *post*. The right of a lord of the manor to seize *quousque* is a right of entry within the meaning of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27); see title COPYHOLDS, Vol. VIII., p. 58.

(*g*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), ss. 3, 5; see pp. 133, 134, *post*.

(*h*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 7. As to the claims of mortgagees, see p. 145, *post*.

(*i*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), ss. 21, 22; Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 6; see p. 135, *post*.

(*j*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), ss. 24—27; see title EQUITY, Vol. XIII., pp. 166, 167, 175, and p. 169, *post*. Suits in equity had not been expressly mentioned in previous Statutes of Limitation.

(*k*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27, s. 43; and see title ECCLESIASTICAL LAW, Vol. XI., pp. 589, 590. As to the jurisdiction of the ecclesiastical courts, see *ibid.*, p. 512; and title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 152. Tithes have now been commuted (see p. 109, *post*), and cannot now be the subject of suits in the ecclesiastical courts.

(*l*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), ss. 29—33.

(*m*) 3 & 4 Will. 4, c. 27.

SECT. 1. General Effect of the Real Property Limitation Acts.

tenant (*n*), mortgagors and mortgagees (*o*), advowsons (*p*), and trusts (*q*), the only question under the Statutes of Limitation in force with regard to land or rent is whether twelve years have elapsed since the claimant's right accrued, whatever be the nature of the possession of the present holder (*r*).

SECT. 2.—*Definitions.*

SUB-SECT. 1.—"*Land.*"

"Land."

Tithes.

194. "Land" in the Real Property Limitation Acts, 1833 and 1874 (*s*), includes manors, messuages, and all other corporeal hereditaments whatsoever, tithes, other than tithes belonging to a spiritual or eleemosynary corporation sole, and any share, estate or interest in such hereditaments or any of them, whether such interest is a freehold or chattel interest, and whether freehold or copyhold or held according to any other tenure (*a*).

Exceptions.

Advowsons.

"Land" does not include any incorporeal hereditaments, except those tithes which do not belong to spiritual or eleemosynary corporations sole (*b*), nor an advowson in gross, and an action for the foreclosure or redemption of the mortgage of an advowson is not within any Statute of Limitations (*c*).

(*n*) See p. 127, *post.*

(*o*) See p. 145, *post.*

(*p*) See p. 153, *post.*

(*q*) See p. 125, *post.*

(*r*) *Nepean* v. *Doe* d. *Knight* (1837), 2 M. & W. 894; 2 Smith, L. C., 11th ed., 558, 657, Ex. Ch. As to adverse possession before the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), see *Taylor* d. *Atkyns* v. *Horde* (1757), 1 Burr. 60, H. L., and notes to 2 Smith, L. C., 11th ed., 649; *Scott* v. *Nixon* (1843), 3 Dr. & War. 388, 405; *O'Sullivan* v. *M'Sweeny* (1839), 2 I. L. R. 89, 94; *Doe* d. *Jones* v. *Williams* (1836), 5 Ad. & El. 291, 296; *Culley* v. *Doe* d. *Taylerson* (1840), 11 Ad. & El. 1008, 1025. But see pp. 125, 128, 148, 154.

(*s*) 3 & 4 Will. 4, c. 27; 36 & 37 Vict. c. 57.

(*a*) Real Property Limitation Act, 1833, (3 & 4 Will. 4, c. 27), s. 1. As to the meaning of the terms "freehold" and "chattel interest," see title REAL PROPERTY AND CHATTELS REAL. As to the meaning of "land," compare title LANDLORD AND TENANT, Vol. XVIII., pp. 411, 412.

(*b*) In *Mellish* v. *Brooks* (1840), 3 Beav. 22, it was held that turnpike tolls (see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 62) were not land within the meaning of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 42, and the decision is applicable to the whole of that Act and to the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57). "Land" in the Real Property Limitation Acts, 1833 (3 & 4 Will. 4, c. 27) and 1874 (37 & 38 Vict. c. 57), includes minerals, and a right to mineral strata by lapse of time can only be gained under these Acts; see *Wilkinson* v. *Proud* (1843), 11 M. & W. 33. As to the meaning of tithes in these Acts, see *Ely* (*Dean*) v. *Bliss* (1852), 2 De G. M. & G. 459; *Ely* (*Dean*) v. *Cash* (1846), 15 M. & W. 617; *Shannon* (*Lord*) v. *Hodder* (1837), 2 I. L. R. 223; *Shannon* (*Lord*) v. *Stoughton* (1841), 3 I. L. R. 521, Ex. Ch.; *Sheil* v. *Incorporated Society for the Promotion of English Protestant Schools in Ireland* (1847), 10 I. Eq. R. 411; see also *Bunbury* v. *Fuller* (1853), 9 Exch. 111. The Tithe Act, 1832 (2 & 3 Will. 4, c. 100), which deals with the time required for the exemption or discharge of land from tithes, is unaffected by the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27); and see title ECCLESIASTICAL LAW, Vol. XI., p. 744; *Sheil* v. *Incorporated Society for the Promotion of English Protestant Schools in Ireland, supra.* As to tithes generally, see title ECCLESIASTICAL LAW, Vol. XI., pp. 742 *et seq.*

(*c*) *Brooks* v. *Muckleston*, [1909] 2 Ch. 519, 522. As to the effect of delay in such a case, see p. 173, *post.*

An action brought by a widow to obtain an assignment of dower is not an action to recover land within the above provision (*d*).

SUB-SECT. 2.—"*Rent.*"

"Rent."

195. Certain incorporeal hereditaments are included in the Real Property Limitation Acts, 1833 and 1874 (*e*), under the word "rent," which extends to all heriots and all services and suits for which a distress may be made, and all annuities and periodical sums charged upon or payable out of any land in England or Ireland, except moduses or compositions belonging to a spiritual or eleemosynary corporation sole (*f*).

"Rent" is frequently used in the Real Property Limitation Acts, 1833 and 1874 (*g*), in close conjunction with "land" ("land or rent"), and when so used does not mean rent reserved on leases for years (*h*), but rent existing as an inheritance distinct from the land (*i*). Thus, a person entitled to the reversion expectant on the determination of a lease may distrain for the rent thereby reserved at any time during the existence of the lease, although no payment of such rent has been made for more than twelve years (*j*); and this is the case also with regard to penal rents (*k*).

In some places in the Real Property Limitation Act, 1833 (*l*), the word "rent" is used in the sense of rent reserved, and sometimes (*m*) is thus used in the same section as rent, that is, rent existing as an inheritance distinct from the land, but when rent is used in conjunction with the word "land" ("land or rent"), it always means rent existing as an inheritance and nothing else.

In the Real Property Limitation Act, 1833 (*n*), s. 42, "rent" means both rent existing as an inheritance and rent reserved; hence, although no length of time will bar the right to recover rent reserved by a lease, so long as the lease under which it is reserved exists,

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(*d*) *Williams* v. *Thomas*, [1909] 1 Ch. 713, C. A., overruling *Marshall* v. *Smith* (1865), 5 Giff. 37. No Statute of Limitation applies to such an action. As to dower generally, see title REAL PROPERTY AND CHATTELS REAL; see also title HUSBAND AND WIFE, Vol. XVI., pp. 407, 448; and compare p. 103, *ante*.

(*e*) 3 & 4 Will. 4, c. 27; 37 & 38 Vict. c. 57.

(*f*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 1. An annuity charged on land in any other country than England or Ireland is not within the Real Property Limitation Acts, 1833 (3 & 4 Will. 4, c. 27), and 1874 (37 & 38 Vict. c. 57) (*Pitt* v. *Dacre* (*Lord*) (1876), 3 Ch. D. 295).

(*g*) 3 & 4 Will. 4, c. 27, ss. 3, 4, 7—9, 12—14, 18, 20—22, 24—26, 29, 34, 42; 37 & 38 Vict. c. 57, ss. 1—3, 5—8, 10.

(*h*) See title LANDLORD AND TENANT, Vol. XVIII., pp. 464 *et seq.*

(*i*) *Grant* v. *Ellis* (1841), 9 M. & W. 113; *Donegan* v. *Neill* (1885), 16 L. R. Ir. 309; compare p. 99, *ante*.

(*j*) *Grant* v. *Ellis*, *supra*; *Baines* v. *Lumley* (1868), 16 W. R. 674; see *Crosbie* v. *Sugrue* (1845), 9 I. L. R. 17; *Parke* v. *M'Loughlin* (1851), 1 I. C. L. R. 186; *Spratt* v. *Sherlock* (1853), 3 I. C. L. R. 69. The opinion to the contrary expressed in *Doe* d. *Mannion* v. *Bingham* (1841), 3 I. L. R. 456, is not now to be regarded as authoritative. As to the effect of payment of rent to a person wrongfully claiming the reversion, see p. 128, *post*.

(*k*) *Daly* v. *Bloomfield* (*Lord*) (1842), 5 I. L. R. 65.

(*l*) 3 & 4 Will. 4, c. 27.

(*m*) See, *e.g.*, *ibid.*, ss. 8, 9.

(*n*) 3 & 4 Will. 4, c. 27; limiting the amount of arrears of rent recoverable.

SECT. 2. Definitions.

yet the amount of arrears recoverable is limited in the same way as arrears of rent existing as an inheritance (*o*).

The limitation prescribed by the Real Property Limitation Act, 1874 (*p*), s. 1, applies not only as between persons claiming an estate or interest in the rent as an inheritance, but also as between the owner of such rent and the owner of the land out of which it issues, and therefore such rent will become extinguished by non-payment (*q*).

Heriots.

196. Although heriots (*r*) are expressly mentioned in the interpretation clause of the Real Property Limitation Act, 1833 (*s*), as included in the word "rent," yet they are not within those provisions which bar and extinguish the right of a person entitled (*t*). Rents which are payable at greater intervals than twenty years are, it seems, within the same class, and are not within the definition (*u*).

Reliefs.

197. Reliefs, it seems, are not "suits and services" within the word "rent" as defined by the Real Property Limitation Act, 1833 (*a*), and, as they are payable on events which occur at uncertain intervals, they are not "periodical sums of money" within the definition of rent (*b*).

Quit-rents.

198. Quit-rents, whether arising out of freehold (*c*) or out of copyhold (*d*) lands, are within the definition of rent. So also are

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(*o*) See pp. 97, 99, *ante*.

(*p*) 37 & 38 Vict. c. 57.

(*q*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1; Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 34; *De Beauvoir* v. *Owen* (1850), 5 Exch. 166, Ex. Ch.; *James* v. *Salter* (1837), 3 Bing. (N. C.) 544; *Manning* v. *Phelps* (1854), 10 Exch. 59; see *Dower* v. *Dower* (1885), 15 L. R. Ir. 264; *Re Drake's Estate*, [1909] 1 I. R. 136; *Re Maunsell's Estate*, [1911] 1 I. R. 271. But, as to an annuity charged on land and secured by an express trust, see p. 141, *post*.

(*r*) As to the nature and incidents of heriots, see title COPYHOLDS, Vol. VIII., pp. 37 *et seq.*; 1 Scriven on Copyholds, 370—375, 3rd ed., 438, 6th ed. 211, 7th ed., 245; 2 Watkins on Copyholds, 167, 4th ed., 191; Sugden on the Statutes relating to Real Property, 2nd ed., 18; *Chichester* (*Earl*) v. *Hall* (1851), 17 L. T. (o. s.) 121.

(*s*) 3 & 4 Will. 4, c. 27, s. 1, see p. 107, *ante*.

(*t*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 34; Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1. *Zouche* (*Lord*) v. *Dalbiac* (1875), L. R. 10 Exch. 172, expressly decides that the taking of a heriot due by custom is not within the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 2 (now the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1). As to heriot service, the right to recover a particular heriot by distress or action may be barred under the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 42, within six years of its becoming due (see pp. 97, 99, *ante*); but see *Zouche* (*Lord*) v. *Dalbiac*, *supra*, at p. 180. It is doubtful whether heriots of any kind are within the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1, or the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), ss. 3, 34, 42 (*Zouche* (*Lord*) v. *Dalbiac*, *supra*; *Owen* v. *De Beauvoir* (1847), 16 M. & W. 547, 566); and see title COPYHOLDS, Vol. VIII., p. 45. It was held under stat. (1540) 32 Hen. 8, c. 2, that neither heriots nor any accidents, services which might not become due within the time limited by that Act were included within its provisions (*Bevil's Case* (1575), 4 Co. Rep. 8a, 10 b; Co. Litt. 115 a).

(*u*) See *Zouche* (*Lord*) v. *Dalbiac*, *supra*, *per* KELLY, C.B., at p. 178.

(*a*) 3 & 4 Will. 4, c. 27, s. 1.

(*b*) As to the nature of reliefs, see title COPYHOLDS, Vol. VIII., p. 45.

(*c*) *Owen* v. *De Beauvoir*, *supra*; *Chichester* (*Earl*) v. *Hall*, *supra*.

(*d*) *Howitt* v. *Harrington* (*Earl*), [1893] 2 Ch. 497.

SECT. 2. Definitions.

such services, due for the holding of land, as cleaning the parish church, or ringing the church bell at stated times, these being services for the omission of which a distress might be made (*e*).

Various services.

199. A tithe rentcharge (*f*), except one belonging to a spiritual or eleemosynary corporation sole (*g*), is, subject to the provisions of the Tithe Act, 1836 (*h*), within the Real Property Limitation Acts, 1833 and 1874 (*i*), and not only do the latter apply as between rival claimants to a tithe rentcharge in lay hands, but such tithe rentcharge is liable to be extinguished by non-receipt for twelve years (*k*).

Tithe rentcharge.

SUB-SECT. 3.—"*Person.*"

200. "Person" in the definition clause of the Real Property Limitation Act, 1833 (*l*), includes a body politic, corporate or collegiate, and a class of creditors or other persons. The poor of a parish constitute a "class of persons" within the meaning of that Act (*m*).

"Person."

"Person through whom another person is said to claim" means any person, by, through, or under, or by the act of whom the person so claiming, became entitled to the interest claimed, as heir, issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming or some person through whom he claims became entitled as lord by escheat (*n*).

Person through whom another claims.

SECT. 3.—*Periods of Limitation.*

201. No person can make an entry or distress or bring an action to recover any land or rent (*o*), except within twelve years

Twelve years' limitation.

(*e*) *Doe* d. *Edney* v. *Benham* (1845), 7 Q. B. 976; Co. Litt. 96 b; see *Doe* d. *Robinson* v. *Hinde* (1843), 2 Mood. & R. 441.

(*f*) See title ECCLESIASTICAL LAW, Vol. XI., pp. 742 *et seq.*

(*g*) See p. 106, *ante*, and p. 152, *post.*

(*h*) 6 & 7 Will. 4, c. 71.

(*i*) 3 & 4 Will. 4, c. 27; 37 & 38 Vict. c. 57.

(*k*) *Irish Land Commission* v. *Grant* (1884), 10 App. Cas. 14; *Irish Land Commission* v. *Ryan*, [1900] 2 I. R. 565, C. A.; see *Irish Land Commission* v. *Junkin* (1888), 24 L. R. Ir. 40. *Sheil* v. *Incorporated Society for the Promotion of English Protestant Schools in Ireland* (1847), 10 I. Eq. R. 411, to the contrary effect, is not to be regarded as an authority. As to tithes in the City of London, see title ECCLESIASTICAL LAW, Vol. XI., pp. 745, 753.

(*l*) 3 & 4 Will. 4, c. 27.

(*m*) *St. Mary Magdalen College, Oxford* (*President etc.*) v. *A.-G.* (1857), 6 H. L. Cas. 189. The overseers of a parish may as trustees acquire by the statute a title to land over which the inhabitants of the parish for the statutory period have exercised rights of ownership (*Haigh* v. *West*, [1893] 2 Q. B. 19, C. A.). See *Wimbledon and Putney Commons Conservators* v. *Nicol* (1894), 10 T. L. R. 247.

(*n*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 1. "Appointee" means here appointee under a general power of appointment, not, it seems, an appointee under a special power of appointment, when the power of appointment is not in substance created by the appointor himself (*Re Devon's* (*Earl*) *Settled Estates, White* v. *Devon* (*Earl*), *Re Steer, Steer* v. *Dobell*, [1896] 2 Ch. 562, 570).

(*o*) As to the meaning of these words, see pp. 106, 107, *ante.*

SECT. 3. Periods of Limitation.

next after the time at which the right to make such entry or distress or to bring such action has first accrued to some person through whom he claims, or, if such right has not accrued to any person through whom he claims, within twelve years next after the time at which the right to make such entry or distress or to bring such action has first accrued to him (*p*).

SECT. 4.—*When Time begins to Run* (*q*).

SUB-SECT. 1.—*Dispossession or Discontinuance of Possession by Rightful Owner.*

(i.) *Land.*

Time runs from dispossession or discontinuance.

202. If a person claiming land, or some person through whom he claims, has been in possession or in receipt of the profits of such land (*r*), and has, while entitled thereto, been dispossessed or has discontinued such possession or receipt, his right is to be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits were received (*a*).

What constitutes dispossession or discontinuance.

203. Dispossession is where a person comes in and puts another out of possession; discontinuance of possession is where the person in possession goes out and another person takes possession (*b*).

Dispossession.

The true test whether a rightful owner has been dispossessed or not is whether ejectment will lie at his suit against some other person (*c*). The rightful owner is not dispossessed, so long as he has all the enjoyment of the property that is possible (*d*); and

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(*p*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1. As to the meaning of "person through whom he claims," see p. 109, *ante*.

(*q*) The time at which the right to make an entry etc. accrues is defined in certain cases in the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), ss. 3—8, and in the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 2. The Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 3, consists of five branches, the first of which deals with dispossession or discontinuance of possession by the rightful owner (see the text, *infra*), the second and third with wrongful possession on death of or alienation by the rightful owner (see p. 114, *post*), the fourth (as enlarged by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 2) with future estates (see p. 116, *post*), and the fifth with forfeitures and breaches of condition (see p. 121, *post*).

(*r*) As to receipt of rent being "receipt of profits," see p. 113, *post*. For the definition of "land," see p. 106, *ante*.

(*a*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 3; see *Owen* v. *De Beauvoir* (1847), 16 M. & W. 547, 564.

(*b*) *Rains* v. *Buxton* (1880), 14 Ch. D. 537, *per* FRY, J., at p. 540; *Littledale* v. *Liverpool College*, [1900] 1 Ch. 19, C. A.

(*c*) As to what the plaintiff in such an action must allege and prove, see *Dawkins* v. *Penrhyn* (*Lord*) (1878), 4 App. Cas. 51; *Danford* v. *McAnulty* (1883), 8 App. Cas. 456; *Taylor* d. *Atkyns* v. *Horde* (1757), 1 Burr. 60, H. L.; *Nepean* v. *Doe* d. *Knight* (1837), 2 M. & W. 894, and the notes in 2 Smith, L. C., 11th ed., 648; *Poole* v. *Griffith* (1864), 15 I. C. L. R. 239, 271, 286, Ex. Ch.; Cole, Law and Practice in Ejectment, 6. As to the action of ejectment, see title ACTION, Vol. I., pp. 34, 46. As to the enforcement of a judgment for the recovery of possession of land, see title EXECUTION, Vol. XIV., p. 76. As to actions by landlord against tenant for recovery of land, see title LANDLORD AND TENANT, Vol. XVIII., pp. 558, 559.

(*d*) *Tottenham* v. *Byrne* (1861), 12 I. C. L. R. 376; *Reilly* v. *Thompson* (1877),

SECT. 4.
When Time begins to Run.

where land is not capable of use and enjoyment, there can be no dispossession by mere absence of use and enjoyment. To constitute dispossession acts must have been done inconsistent with the enjoyment of the soil by the person entitled for the purposes for which he had a right to use it (*e*).

Legal requirements of discontinuance.

Mere going out of possession is not enough: in order that the statute may operate there must be not only going out of possession on the part of the owner, but also actual exclusive possession for the statutory period by someone else to be protected (*f*). If a person enters on the land of another and, before he has acquired a title under the statute, abandons possession, no one else then taking possession, the rightful owner is in the same position as if no intrusion had taken place (*g*). Further, the discontinuance of possession must be by a person entitled to such possession (*h*).

Land of a corporation.

204. The mere fact that land is taken under the Lands Clauses Consolidation Act, 1845 (*i*), for the purposes of a public undertaking, and is not superfluous land, does not prevent a person, who has exclusive possession of such land for the statutory period, from acquiring title under the statute (*k*); and the fact that a

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11 I. R. C. L. 238, 247, 251; *Leigh* v. *Jack* (1879), 5 Ex. D. 264, C. A.; *Re Duffy's Estate*, [1897] 1 I. R. 307, C. A.

(*e*) *Leigh* v. *Jack*, *supra*, *per* COTTON, L.J., at p. 274, and *per* BRAMWELL, L.J., at p. 273; see *Re Duffy's Estate*, *supra*; *Re Vernon's Estate*, [1901] 1 I. R. 1. As examples of what acts do and what do not amount to dispossession, see *Norton* v. *London and North Western Rail. Co.* (1879), 13 Ch. D. 268, C. A., *per* JAMES, L.J., at p. 271, n., overruling *Searby* v. *Tottenham Rail. Co.* (1868), L. R. 5 Eq. 409; *Littledale* v. *Liverpool College*, [1900] 1 Ch. 19, C. A.; *Kynoch, Ltd.* v. *Rowlands* (1911), 55 Sol. J. 617 (strip of land); *Marshall* v. *Taylor*, [1895] 1 Ch. 641, C. A. (hedge and ditch); *Seddon* v. *Smith* (1877), 36 L. T. 168, C. A.; *Haigh* v. *West*, [1893] 2 Q. B. 19, C. A. (road); *Smith* v. *Stocks* (1869), 38 L. J. (Q. B.) 306 (gravel pit); *Beaufort* (*Duke*) v. *Aird*, (1904), 20 T. L. R. 602; *Philpot* v. *Bath* (1905), 21 T. L. R. 634, C. A.; compare *Lord Advocate* v. *Young*, *North British Rail. Co.* v. *Young* (1887), 12 App. Cas. 544, 553; *Lord Advocate* v. *Blantyre* (*Lord*) (1879), 4 App. Cas. 770, 791; *Re Vernon's Estate*, [1901] 1 I. R. 1; *Van Diemen's Land Co.* v. *Table Cape Marine Board*, [1906] A. C. 92, P. C. (foreshore); *Phillipson* v. *Gibbon* (1871), 6 Ch. App. 428; *Waddington* v. *Naylor* (1889), 60 L. T. 480; *Stedman* v. *Smith* (1847), 8 E. & B. 1 (wall); *Bobbett* v. *South Eastern Rail. Co.* (1882), 9 Q. B. D. 424; see S. C., [1882] W. N. 92, C. A. (coal siding on railway land); *Hindson* v. *Ashby*, [1896] 1 Ch. 78, 87; [1896] 2 Ch. 1, C. A. (dry river bed); *Foster* v. *Warblington Urban Council*, [1906] 1 K. B. 648, 671, C. A. (oyster beds).

(*f*) *M'Donnell* v. *M'Kinty* (1847), 10 I. L. R. 514; *Smith* v. *Lloyd* (1854), 9 Exch. 562, 572; *Agency Co.* v. *Short* (1888), 13 App. Cas. 793, P. C.; *Gibson* v. *Wise* (1887), 35 W. R. 409.

(*g*) *Agency Co.* v. *Short*, *supra*; see *Willis* v. *Howe* (*Earl*), [1893] 2 Ch. 545 C. A.; *Re Duffy's Estate*, *supra*.

(*h*) The discontinuance of an estate tail worked by the tortious feoffment of a tenant in tail was not a discontinuance of possession by the person through whom the issue in tail claimed within the meaning of the statute (see p. 109, *ante*), so as to make time begin to run against the issue from such feoffment (*Rimington* v. *Cannon* (1852), 12 C. B. 18, 33, Ex. Ch.; see *Abergavenny* (*Earl*) v. *Brace* (1872), L. R. 7 Exch. 145; *Bobbett* v. *South Eastern Rail. Co.* (1882), 9 Q. B. D. 424).

(*i*) 8 & 9 Vict. c. 18.

(*k*) *Bobbett* v. *South Eastern Rail. Co.*, *supra*; *Norton* v. *London and North Western Rail. Co.*, *supra*; *Midland Railway* v. *Wright*, [1901] 1 Ch. 738.

SECT. 4. When Time begins to Run.

corporation is prohibited by a local Act from letting or selling any part of an estate except on the fulfilment of certain conditions does not prevent the statute from operating against the corporation (*l*).

Dispossession of subsoil.

205. The exclusive occupation of a space underground, though without knowledge of the owner of the land, will give a good title under the statute (*m*).

Possession of mines.

A person may be in possession of mines without any user of them, while another person is in possession of the surface (*n*). An owner of land who sells it, reserving the minerals, though he gives up possession of the surface, remains in possession of the mines; in such case non-user is of itself no abandonment of possession, and, no matter how long such mines remain unworked by the owner, the right is unbarred so long as they are not worked by anyone else (*o*). If, however, the owner of the surface or a stranger works the minerals, that amounts to an actual possession by the person working them and a dispossession of the owner of the minerals (*p*). But persons, by working part of mines or opening a particular quarry, do not necessarily have possession of the continuous field of minerals or quarries of which the part worked forms a portion (*q*). The mere wrongful taking of minerals does not amount to taking possession of the mine. If a mine is dissevered from the surface and held by a different owner, no presumption of possession of the whole of the mine arises from the fact of possession of a part (*r*). It is, it seems, in each case a question of fact to what extent, by actual working of the mines, possession has been gained on the one side and lost on the other.

Where there has been no severance of title to the minerals,

Possession for the statutory period of the surface of land over a tunnel belonging to and used by a railway company gives to the occupier of the surface a title to the surface and so much of what is beneath as is necessary for the enjoyment of the surface, subject to the right of the railway company to the tunnel and so much of the underlying, overlying, and nearlying strata as is necessary for the due and proper enjoyment of the tunnel (*Midland Railway* v. *Wright*, [1901] 1 Ch. 738). As to "superfluous lands," see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 26 *et seq.*

(*l*) *Brighton Corporation* v. *Brighton Guardians* (1880), 5 C. P. D. 368.

(*m*) *Rains* v. *Buxton* (1880), 14 Ch. D. 537; *Bevan* v. *London Portland Cement Co.* (1892), 67 L. T. 615.

(*n*) See title MINES, MINERALS, AND QUARRIES.

(*o*) *M'Donnell* v. *M'Kinty* (1847), 10 I. L. R. 514; *Smith* v. *Lloyd* (1854), 9 Exch. 562; *Keyse* v. *Powell* (1853), 2 E. & B. 132; see *Seaman* v. *Vawdrey* (1810), 16 Ves. 390; *Adair* v. *Shaftoe* (undated), cited by Lord ELDON, L.C., in *Norway* v. *Rowe* (1812), 19 Ves. 144, at p. 156; *Hodgkinson* v. *Fletcher* (1781), 3 Doug. (K. B.) 31; *Low Moor Co.* v. *Stanley Coal Co.* (1876), 34 L. T. 186, C. A.

(*p*) *Rich* d. *Cullen* (*Lord*) v. *Johnson* (1740), 2 Stra. 1142. As to minerals under copyhold land, see title COPYHOLDS, Vol. VIII., pp. 22 *et seq.*; *Keyse* v. *Powell*, *supra*.

(*q*) *M'Donnell* v. *M'Kinty*, *supra*; *Dartmouth* (*Earl*) v. *Spittle* (1871), 24 L. T. 67; *Low Moor Co.* v. *Stanley Coal Co.*, *supra*; compare *Wild* v. *Holt* (1842), 9 M. & W. 672; *Lord Advocate* v. *Wemyss*, [1900] A. C. 48, 68.

(*r*) *Dartmouth* (*Earl*) v. *Spittle*, *supra*, *per* PIGOTT, B., at p. 68; *Thompson* v. *Hickman*, [1907] 1 Ch. 550; *Glyn* v. *Howell*, [1909] 1 Ch. 666; see *Ashton* v. *Stock* (1877), 6 Ch. D. 719.

possession of the surface for the statutory period gives a title to the minerals (*s*).

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206. If a person enters into possession of land under a lease which is absolutely void and pays no rent, this is a discontinuance by the owner of the land, and the statute will run against the owner from the time that the possession under the void lease begins (*t*).

Entry under void lease.

207. The seizure *quousque* of copyholds by a lord of a manor (*a*) is a dispossession of the person entitled to be admitted (*b*).

Seizure *quousque*.

208. An owner who actually occupies land is in possession of it. If he does not actually occupy it, but puts someone else in to occupy it for him without creating any kind of tenancy, then the owner is equally in possession (*c*); and he is also in possession and in receipt of the profits of the land, if he farms it by a bailiff (*d*).

What constitutes possession.

209. The receipt of rent payable by any tenant from year to year or other lessee is as against such tenant or lessee or any person claiming under him, but subject to the lease, to be deemed the receipt of the profits of the land for the purposes of the Real Property Limitation Acts, 1833 and 1874 (*e*); and receipt of the profits of the land is, throughout these Acts (*e*), treated as equivalent to actual possession (*f*). If a mortgagee of land on lease receives the rent reserved for twelve years, the mortgagor's right to redeem will be barred, and the mortgagee will gain a title to the reversion as against the tenant who makes the payment (*g*).

Receipt of profits of land.

(ii.) *Rent.*

210. If a person claiming rent, or some person through whom he claims, has, in respect of the estate or interest claimed, been in receipt of such rent and has, while entitled thereto, discontinued such receipt, the right is deemed to have first accrued at the last time at which any rent was so received (*h*). A distress made

Discontinuance of receipt of rent.

(*s*) *Seddon* v. *Smith* (1877), 36 L. T. 168, C. A.

(*t*) *Magdalen Hospital* (*President and Governors*) v. *Knotts* (1879), 4 App. Cas. 324.

(*a*) See title COPYHOLDS, Vol. VIII., p. 57; and see *ibid.*, pp. 52, 58.

(*b*) *Walters* v. *Webb* (1870), 5 Ch. App. 531.

(*c*) See *Peakin* v. *Peakin*, [1895] 2 I. R. 359.

(*d*) See Sugden on the Statutes relating to Real Property, 2nd ed., 47; *Grant* v. *Ellis* (1841), 9 M. & W. 113, 128.

(*e*) 3 & 4 Will. 4, c. 27; 37 & 38 Vict. c. 57; see Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 35, and see Sugden on the Statutes relating to Real Property, 2nd ed., 47. For the definition of "rent," see p. 107, *ante*.

(*f*) A demise at will reserving rent is, it is submitted, a lease within the meaning of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 35 (see the text, *supra*), and consequently, it seems, payment of rent to the reversioner would preserve his title from being barred by the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 7; see p. 123, *post*.

(*g*) *Ward* v. *Carttar* (1865), L. R. 1 Eq. 29; *Markwick* v. *Hardingham* (1880), 15 Ch. D. 339, C. A.

(*h*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 3. Rent here means rent as an inheritance and not rent reserved; see p. 107, *ante*. This provision, in the case of the discontinuance of receipt of rent makes the

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subsequent to the extinguishment of rent is unlawful: in every case in which rent is extinguished by the operation of the statute, no arrears accruing due before the day on which the extinguishment takes effect can be recovered after that day, because the rent is extinguished as from the day on which the statute began to run, not as from the last day of the statutory period of limitation (*i*).

To constitute a discontinuance of the receipt of rent, there must be an omission by the person entitled in not applying for the rent or neglecting to enforce his remedies with knowledge that payment has not been made (*k*).

Payment by owner of part of land subject to rentcharge.

Where land subject to a rentcharge is divided and comes into the occupation of different persons, and the rentcharge is paid by the occupier of one part of the land, and the occupier of another part does not make any payment or acknowledgment and is not distrained on for more than twelve years, there is no dispossession of the owner of the rentcharge as regards the part in respect of which no payment has been made by the occupier, for a rentcharge is entire and issues out of all and every portion of the premises charged (*l*).

SUB-SECT. 2.—*Death of or Alienation by Rightful Owner.*

Death of rightful owner while in possession.

211. Where the person claiming land or rent claims the estate or interest of some deceased person, who has continued in possession or in receipt of the profits of the land, or in receipt of the rent in respect of the same estate or interest, until the time of his death, and has been the last person entitled to such estate or interest who has been in such possession or receipt, the right of the person claiming is deemed to have first accrued at the time of such death (*m*).

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time begin to run before any right to make an entry or distress or to bring an action has actually accrued (*Owen* v. *De Beauvoir* (1847), 16 M. & W. 547; *De Beauvoir* v. *Owen* (1850), 5 Exch. 166, Ex. Ch.). In that case (where the period was twenty years) the last payment of the rent was on 15th January, 1825; six years' arrears up to Michaelmas, 1844, were distrained for on 13th May, 1845. It was held that the distress was unlawful. As to disabilities, see p. 133, *post;* as to acknowledgments of title, see p. 131, *post;* as to express trusts, see p. 139, *post.*

(*i*) In *Owen* v. *De Beauvoir, supra,* PARKE, B., at p. 568, and in *De Beauvoir* v. *Owen, supra,* PATTESON, J., at p. 177, give as the reason for their judgments that "rent service" having become extinguished, no tenure in respect of the rent existed at the time of the distress. In the case of a rentcharge or rent sec, where the right of distress depends on either contract or statute (see Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28), s. 5; Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 44; title DISTRESS, Vol. XI., p. 120), it might be argued that this reasoning does not apply, but it seems that the principle laid down in *Owen* v. *De Beauvoir, supra,* applies to every kind of rent as an inheritance; see *Re Maunsell's Estate,* [1911] 1 I. R. 271. As to rentcharges generally, see title RENTCHARGES AND ANNUITIES.

(*k*) *Adnam* v. *Sandwich* (*Earl*) (1877), 2 Q. B. D. 485 (where payment by a vendor of the land charged preserved the right against the land); see *Dublin* (*Archbishop*) v. *Coote and Trimleston* (*Lord*) (1849), 12 I. Eq. R. 251. As to tithe rentcharge, see *Irish Land Commission* v. *Junkin* (1888), 24 L. R. Ir. 40; *Irish Land Commission* v. *Ryan,* [1900] 2 I. R. 565, C. A.; and p. 109, *ante.*

(*l*) *Woodcock* v. *Titterton* (1864), 12 W. R. 865; *Conolly* v. *Gorman,* [1898] 1 I. R. 20, C. A.; and see title RENTCHARGES AND ANNUITIES.

(*m*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 3, 2nd branch. This branch applies to persons deriving title under a deceased person whether

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If the owner of land dies intestate, and after his death the rents arising out of the land are collected by a person who purports to act as the agent for the heir, the statute will not run against the heir so long as the agent receives the rents as agent (*n*). If the owner of land dies having devised it by will and the tenant pays the rent to a person in the belief that such person is acting for the true owner, and such person, knowing of such belief, accepts the rent, and the true owner in a reasonable time adopts and ratifies the acts of such person in receiving the rent, there is no dispossession of the true owner (*o*).

Receipt of rents by person acting as agent.

212. Where the person claiming land or rent claims in respect of an estate or interest in possession granted, appointed, or otherwise assured, by any instrument other than a will, to him or some person through whom he claims, by a person who was, at the time of the assurance, in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument has been in such possession or receipt, then the right is deemed to have first accrued at the time at which the person claiming, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument (*p*).

Alienation by rightful owner.

213. The preceding provisions do not control the operation of the Real Property Limitation Act, 1874 (*q*), s. 1, and every case which plainly falls within the clear and unambiguous words thereof is governed by its provisions, although such a case may not come within the provisions of the Real Property Limitation Act, 1833 (*r*), s. 3. Thus, if an annuity charged on land is given by will, and the annuitant receives no payment in respect of the annuity for more than twelve years after the accrual of his right to enforce payment of the first instalment of the annuity out of the land, he is barred, although he does not come within the provisions of the

Real Property Limitation Act, 1874, s. 1, explained but not controlled by Real Property Limitation Act, 1833, s. 3.

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by devise or otherwise. For the case where a settlor is out of possession at the time of his death, see p. 117, *post*. For the definitions of "land" and "rent," see pp. 106, 107, *ante*.

(*n*) *Lyell* v. *Kennedy*, *Kennedy* v. *Lyell* (1889), 14 App. Cas. 437. Neither the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1, nor the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 3, has any application to such a case.

(*o*) *Lyell* v. *Kennedy*, *Kennedy* v. *Lyell*, *supra*; *M'Auliffe* v. *Fitzsimons* (1889), 26 L. R Ir. 29.

(*p*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 3, 3rd branch. Time does not run unless there has been both absence of possession by the person who has the right, and actual possession by someone else to be protected (see cases cited in note (*f*), p. 111, *ante*). So if a person who formerly owned both the surface of land and the minerals beneath grants the minerals to someone else and retains possession of the surface, and neither the grantee nor anyone else works the minerals, time, it is conceived, would not run against the grantee (but see *Keyse* v. *Powell* (1853), 2 E. & B. 132).

(*q*) 37 & 38 Vict. c. 57; see p. 109, *ante*.

(*r*) 3 & 4 Will. 4, c. 27; see *James* v. *Salter* (1837), 3 Bing. (N. C.) 544; *Magdalen Hospital* (*Governors*) v. *Knotts* (1878), 8 Ch. D. 709, 727, C. A.; *Pugh* v. *Heath* (1882), 7 App. Cas. 235; *Irish Land Commission* v. *Junkin* (1886), 24 L. R. Ir. 40

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Real Property Limitation Act, 1833, s. 3 (*s*). The same principle applies where a rentcharge is created by deed (*t*).

SUB-SECT. 3.—*Future Estates.*

(i.) *In General.*

When the right accrues. General rule.

214. When the estate or interest claimed is an estate or interest in reversion or remainder or other future estate or interest (*a*), and no person has obtained the possession or receipt of the profits of the land or the receipt of rent in respect of such estate or interest, the right of the person claiming is deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession (*b*), by the determination of any estate or estates in respect of which such land has been held, or the profits thereof or such rent has been received, notwithstanding that the person claiming such land or rent, or some person through whom he claims, has at any time previous to the creation of the estate or estates which have determined been in the possession or receipt of the profits of such land or in receipt of such rent (*c*).

(*s*) 3 & 4 Will. 4, c. 27; see *Re Drake's Estate*, [1909] 1 I. R. 136; *James* v. *Salter* (1837), 3 Bing. (N. C.) 544; *Langton* v. *Langton* (1854), 18 Jur. 928. If there is a right to recover the annuity by action (see *Thomas* v. *Sylvester* (1873), L. R. 8 Q. B. 368), time begins to run from the first instalment becoming due; if the only right is to distrain, time will run when the right to distrain first accrues; this may be at a later time than that at which the first instalment becomes due; see *James* v. *Salter*, *supra*, at p. 555. As to an annuity charged on land and secured by express trust, see p. 141, *post*.

(*t*) As to particular estates in land created by will or deed, see *James* v. *Salter*, *supra*, at p. 554; Sugden on the Statutes relating to Real Property, 2nd ed., 22.

(*a*) Future estates, whether created by deed or will, are governed by the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 3, 4th branch; by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 2 (which is substituted for and is an enlargement of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 5); and by the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 20.

(*b*) *Ibid.*, s. 3, 4th branch. "Rent" here and in the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 2, means rent existing as an inheritance and not rent reserved; see p. 107, *ante*. The Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 3, 4th branch, includes future estates of all kinds, including executory limitations (*James* v. *Salter*, *supra*). As to future estates and interests generally, see titles REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS; WILLS.

(*c*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 2. This clause of *ibid.*, s. 2, takes the place of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 5. The Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 2, overrides the provisions of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 3, 4th branch. As to the meaning of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 5, which corresponds to the first part of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 2, see Sugden on the Statutes relating to Real Property, 2nd ed., 43; 1 Hayes, Introduction to Conveyancing, 5th ed., 255; 2 Smith, L. C., 11th ed., 668; *Doe* d. *Hall* v. *Moulsdale* (1847), 16 M. & W. 689. As to the effect, as against devisees in remainder of a mortgagor, of the mortgagee going into possession, see p. 149, *post;* as to mortgage of a reversionary interest, see p. 146, *post;* as to a legacy charged on a reversionary interest, see p. 90, *ante*.

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Effect of settlement by person out of possession.

215. The person entitled to a future estate has a new right at the time when the preceding estate determines, so that, if the owner of an estate grants or devises out of it a particular estate with a remainder following, and the owner of the particular estate takes possession before the time has run against the right of the grantor, the right of the persons entitled in remainder accrues and can be enforced at the determination of the particular estate, even if the grantor had discontinued possession before the time of his grant or death (*d*). Though time may be running against the settlor when the settlement is made, yet the fact that the grantee of a particular estate takes possession under the settlement revests the title of all persons entitled to remainders under the settlement, as well as that of the settlor and his heirs in reversion. If, however, twelve years elapse after the dispossession of the grantor without entry into possession by the grantee of the particular estate, the persons entitled in reversion or remainder will be barred. For after time has once begun to run, a person cannot by putting his estate into settlement raise up new rights and give new claims to persons deriving under the settlement (*e*). The effect of the statute must always be determined with reference to the actual state of the title when time begins to run, and, when time has once commenced to run, no subsequent alteration in the title will postpone the bar (*f*).

Effect of owner of particular estate being out of possession.

216. If the person last entitled to any particular estate on which any future estate or interest was expectant (*g*) was not in possession at the time when his interest determined, no entry nor distress is to be made, and no action is to be brought by any person becoming entitled in possession to a future estate or interest, but within twelve years from the time when the right to make an entry or distress or to bring an action first accrued to the person whose interest so determined, or within six years from the time when the estate of the person becoming entitled in possession has become vested in possession, whichever of these two periods is the longer (*h*).

(*d*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 3, 4th branch; Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 2.

(*e*) *Stackpoole* v. *Stackpoole* (1843), 4 Dr. & War. 320, *per* SUGDEN, L.C., at p. 347. As to the case where the settlor is in possession at his death, see p. 113, *ante*.

(*f*) 1 Hayes, Introduction to Conveyancing, 5th ed., 257; Sugden on the Statutes relating to Real Property, 2nd ed., 38. If the rightful owner seised in fee is dispossessed, the person in actual possession for the statutory period must, at the end of such period, be safe from the claims of the rightful owner and all persons claiming under him; consequently, a title depending upon the statute may be forced upon a purchaser; see *Scott* v. *Nixon* (1843), 3 Dr. & War. 388; *Games* v. *Bonnor* (1884), 54 L. J. (CH.) 517, C. A.; 1 Dart, Vendors and Purchasers, 6th ed., 462; but see *Jacobs* v. *Revell*, [1900] 2 Ch. 858.

(*g*) These words do not apply to a reversion in fee expectant on the determination of a lease for years or lives. The words apply to future estates created by the owner of such a reversion, but not to the reversion itself (*Walter* v. *Yalden*, [1902] 2 K. B. 304).

(*h*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 2. Thus where a particular estate has been created with a reversion or remainder expectant on its determination, if a person without title obtains possession

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Successive remainders.

If there is a series of remainders limited to take effect in succession, each remainderman has six years to bring his action, after his own estate becomes an estate in possession, though another person may have been in possession, without title, for twelve years (*i*).

Possession by grantee of tenant for life.

Where a tenant for life conveys property and the grantee is in possession under the conveyance, the tenant for life is not "the person last entitled" within the meaning of the above provision, and the remainderman may bring his action within twelve years after the death of the tenant for life and is not limited to twelve years from the grantee's taking possession or to six years from the grantor's death (*k*).

Settlement by reversioner or remainderman.

217. If a reversioner or remainderman settles his estate, after the statute has begun to run against the person entitled to the particular estate in possession, the title of all persons claiming under this settlement will be barred, if and when the settlor of the reversion or remainder would be barred (*l*).

Merger of particular estate in reversion.

218. If a tenant for life, while time is running against him, surrenders his estate to the remainderman, the remainder is accelerated by the merger of the two estates and so falls into possession, and time will begin to run against the remainderman from the date of the surrender and not from the death of the tenant for life (*m*). If in similar circumstances the remainderman conveys his remainder to the tenant for life, the latter thus acquires a new right in respect of such estate which will be barred in twelve years from the time when the statute began to run against the life estate, or in six years from the date of the conveyance by which the tenant for life acquires the remainder, whichever period is the longer (*n*).

Conveyance by tenant for life and remainderman.

If, while time is running against the tenant for life, the tenant for life and remainderman concur in conveying the property, by way of settlement creating particular estates and remainders, and

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during the existence of this particular estate and remains in possession for twelve years, not only is the owner of the particular estate barred at the end of that time, but the reversioner or remainderman is also barred, unless he brings his action within six years of the time when his reversion or remainder becomes an estate in possession. So if an owner in possession creates an estate for life with remainders over, and the tenant for life is dispossessed and dies after being four years out of possession, the remainderman has eight years from the death of the tenant for life to bring his action. But if the tenant for life has been out of possession more than six years at the time of his death, the remainderman will not be barred until six years from the death.

(*i*) *Re Devon's (Earl) Settled Estates, White* v. *Devon (Earl), Re Steer, Steer* v. *Dobell*, [1896] 2 Ch. 562.

(*k*) *Pedder* v. *Hunt* (1887), 18 Q. B. D. 565. In such a case the grantee of the life estate is "the person last entitled" (*ibid.*, at p. 570).

(*l*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 2, second part of second clause. This provision does not apply if the settlor dies before his remainder falls into possession.

(*m*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 3, 4th branch; see p. 116, *ante*.

(*n*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 2.

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some of these estates are of such a nature that they are commensurate with and must take effect out of the estate of the tenant for life only, and all the rest must take effect out of the remainderman's estate, the owners of the former class of estates may be considered as claiming through the tenant for life only, and the owners of the latter class as claiming through the remainderman only, and time would run against their respective interests accordingly. If, however, the resettlement creates an estate in remainder which takes effect out of the estates of the tenant for life and remainderman jointly, the statute will, it seems, not begin to run until the new estate in remainder takes effect in possession, as until then the merger of the two estates through which the new estate takes effect does not take place (*o*).

Reversion on a lease.

219. If a lease is surrendered (*a*) and a new lease granted contemporaneously to the lessee, the reversion must be considered as falling into possession at the time of the renewal of the lease. If a person without title has during the currency of the old lease obtained possession of the demised premises or any part thereof, a right of action accrues to the reversioner at the time of the renewal and the statute runs against him from that time (*b*).

When reversion is barred.

If there is no surrender, and the lease determines by effluxion of time, and a trespasser is in possession of the demised premises, time begins to run against the reversioner from the expiration of the lease, and the grant by him of a fresh lease cannot avail him, as against the trespasser, if there is no possession against the trespasser under the fresh lease (*c*). If a trespasser has during the currency of the lease acquired a title under the statute against the lessee, the right of the lessor to bring ejectment against the trespasser accrues on the determination of the lease (*d*).

Conveyance by tenant in tail.

220. If a tenant in tail conveys to a stranger, by an assurance which is ineffectual to bar the issue, and possession is taken under

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(*o*) See *Doe* d. *Curzon* v. *Edmonds* (1840), 6 M. & W. 295. If a tenant for life and remainderman join in a conveyance or resettlement, when the tenant for life has been so long out of possession that the statute has run against him, then the grant of the tenant for life can have no effect, as his title is already extinguished, and time runs against estates taking effect out of the remainder as if the remainderman had aliened an estate in remainder expectant on the determination of the life estate.

(*a*) As to surrender of a lease, see title LANDLORD AND TENANT, Vol. XVIII., pp. 546 *et seq.*

(*b*) *Ecclesiastical Commissioners of England and Wales* v. *Rowe* (1880), 5 App. Cas. 736, distinguishing *Corpus Christi College, Oxford* v. *Rogers* (1879), 49 L. J. (Q. B.) 4, C. A.; see *Ecclesiastical Commissioners for England* v. *Treemer*, [1893] 1 Ch. 166; *East Stonehouse Urban Council* v. *Willoughby Brothers, Ltd.*, [1902] 2 K. B. 318; and see title LANDLORD AND TENANT, Vol. XVIII., pp. 549, 550, note (*a*). If the trespasser has acquired a title under the statute as against the lessee, the surrender of the lease will be ineffective as against the trespasser and the lessor will have no right of entry against the trespasser on the surrender, but time will not run against the lessor until the expiration of the term fixed by the original lease (*Walter* v. *Yalden*, [1902] 2 K. B. 304); and see the text, *infra*.

(*c*) See *Kennedy* v. *Woods* (1868), 2 I. R. C. L. 436, Ex. Ch. As to the effect of payment of rent to a person wrongfully claiming the reversion, see p. 128, *post*.

(*d*) *Walter* v. *Yalden*, *supra*.

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such assurance, the right of the issue or remainderman to enter on the death of the tenant in tail is a "future estate" within the meaning of the statute (*e*).

Future estates in care of husband and wife.

If land is limited to a husband and wife for their lives, with remainder to the husband in fee, the right of the husband and his heirs on the death of his wife is also such a "future estate" (*f*). So, also, in cases not governed by the Married Women's Property Act, 1882 (*g*), is the right of a wife or her heirs to enter on her property on the death of her husband, when he has conveyed it to another by an assurance not binding on her (*h*); but if a husband and wife simply discontinue the possession of her property, then, subject to the question of disabilities, time runs against the wife and her heirs from the time when the possession is discontinued, and no fresh right accrues on the death of the husband (*i*). In such a case no fresh right accrues to the husband, on the death of the wife, in respect of the curtesy, as a tenant by the curtesy is considered as claiming through the wife (*k*).

(ii.) *Ownership by One Party of Particular and Future Estates.*

When future estate is barred.

221. If a right to a particular estate in possession has been barred, the right of the owner of such estate, or of anyone claiming through him, to any future estate or interest, to which such owner was or became entitled at any time while the statute was running against the particular estate, is barred at the same time; but if in the meantime some person entitled to a particular estate subsequent to to the one barred has obtained possession, the bar is removed as regards the future estate (*l*). The right to the future estate is, however, not barred, unless the person entitled to the estate in possession becomes entitled to the future estate, before the estate in possession has been barred. Further, the right to the future estate is not barred, unless the particular estate in possession has been actually barred and such right is unaffected, if the particular estate determines before the prescribed period has run out (*m*).

Ouster of tenant for life by succeeding tenant for life.

222. If a tenant for life is ousted, not by a stranger, but by a succeeding tenant for life, who retains possession for more than

(*e*) *I.e.*, the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 3, 4th branch; see p. 116, *ante; Cannon* v. *Rimington* (1852), 12 C. B. 1. As to when assurances by a tenant in tail do not bar issue, see title REAL PROPERTY AND CHATTELS REAL.

(*f*) *Doe* d. *Johnson* v. *Liversedge* (1843), 11 M. & W. 517.

(*g*) 45 & 46 Vict. c. 75; see title HUSBAND AND WIFE, Vol. XVI., pp. 322 *et seq.*, 348 *et seq.*

(*h*) *Jumpsen* v. *Pitchers* (1843), 13 Sim. 327.

(*i*) *Doe* d. *Corbyn* v. *Bramston* (1835), 3 Ad. & El. 63.

(*k*) See Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 1; and see p. 109, *ante.*

(*l*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 20; *e.g.*, if there are two successive tenants for life with remainder to the first in fee and, on the bar of the estate of the first tenant for life, the second tenant for life recovers possession, the property would on the death of the second tenant for life pass to the persons claiming under the first tenant for life. It is immaterial how the possession of the person entitled to a particular estate is obtained (*Doe* d. *Johnson* v. *Liversedge, supra*).

(*m*) *Doe* d. *Johnson* v. *Liversedge, supra;* Sugden on the Statutes relating to Real Property, 2nd ed., 50.

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twelve years during the lifetime of the first tenant for life and then survives him and retains possession, the right of the persons claiming an estate in remainder to which the ousted tenant for life was entitled will be preserved by the possession of the second tenant for life after the death of the first, and such persons will have twelve years from the death of the second tenant for life to assert their right, just as if the first tenant for life had been ousted by a stranger and the right of the remainderman had been preserved by the entry of the second tenant for life (*n*).

Power of appointment.

223. If a tenant for life has a power of appointment in remainder, after the determination of remainders expectant on the determination of his life estate and, at his death, time has run against his life estate, the exercise of his power of appointment by will is not affected (*o*).

Particular estate and reversion vested without merger.

224. If an estate *pur autre vie* and the reversion expectant on the determination of such estate become vested in the same person, and he does not take possession, then, even though no merger may take place, he, or anyone claiming through him, is barred at the end of twelve years from the time when the two estates became vested in him (*p*).

Devise subject to conditions.

225. If land is devised to a person subject to a gift over on the happening of either of two events, and both events happen, time runs from the happening of the first event, and an action brought more than twelve years after the happening of the first event, but less than twelve years after the happening of the second event, is barred (*q*).

SUB-SECT. 4.—*Forfeiture and Breach of Condition.*

When time begins to run.

226. Where the person claiming land or rent (*r*), or the person through whom he claims, has become entitled by reason of any forfeiture or breach of condition, the right is deemed to have first accrued when the forfeiture was incurred or the condition broken (*s*). But where such right is in respect of any estate in reversion or remainder, and the land or rent has not been recovered by virtue of such right, the right is deemed to have first accrued in respect of such estate at the time when the estate became an estate in possession, as if no such forfeiture or breach of condition had happened (*t*).

Right of reversioner in case of lease.

227. Although no rent has been paid for upwards of twelve years

(*n*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 20; *Doe* d. *Johnson* v. *Liversedge* (1843), 11 M. & W. 517; and see note (*l*), p. 120, *ante*.

(*o*) *Re Devon's* (*Earl*) *Settled Estates*, *White* v. *Devon* (*Earl*), *Re Steer*, *Steer* v. *Dobell*, [1896] 2 Ch. 568. The appointees in such a case will not be barred under the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 20.

(*p*) *Doe* d. *Hall* v. *Moulsdale* (1847), 16 M. & W. 689; see *Poole* v. *Griffith* (1864), 15 I. C. L. R. 239, Ex. Ch., *per* PIGOT, C.B., at p. 292.

(*q*) *Clarke* v. *Clarke* (1868), 2 I. R. C. L. 395, following *Doe* d. *Hall* v. *Moulsdale*, *supra*; compare *Astley* v. *Essex* (*Earl*) (1874), L. R. 18 Eq. 290; and see p. 122, *post*.

(*r*) For the definitions of "land" and "rent," see pp. 106, 107, *ante*.

(*s*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 3, 5th branch.

(*t*) *Ibid.*, s. 4.

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before the expiration of a lease, the reversioner has, notwithstanding, twelve years from the determination of the lease in which to recover possession (*a*); and the rule is the same even if the lease contains a proviso for re-entry on non-payment of rent (*b*).

General application of provisions.

228. The preceding provisions apply to every forfeiture or breach of condition, and not merely to cases between landlord and tenant (*c*); so the right of the remainderman is preserved where, by the terms of a conditional limitation, on the breach of a condition, the previous estate is expressed to come to an end and the estate of the remainderman to fall into possession (*d*).

SUB-SECT. 5.—*Administration.*

When administrator's right accrues.

229. For the purposes of the Real Property Limitation Acts, 1833 and 1874 (*e*), an administrator claiming the estate or interest of his intestate is deemed to claim as if there had been no interval of time between the death and the grant of the letters of administration (*f*). Time therefore runs against the right of an administrator to an estate or interest in reversion or remainder from the time when the estate or interest becomes an estate or interest in possession, as it always does as against an executor (*g*).

(*a*) See p. 117, *ante*; *Doe* d. *Davy* v. *Oxenham* (1840), 7 M. & W. 131. As to recovery of possession by a landlord against his tenant, see title LANDLORD AND TENANT, Vol. XVIII., pp. 556 *et seq.*

(*b*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 4. In such a case the omission to enforce one forfeiture does not prejudice the right to enforce a subsequent one, and, as the lease remains in existence until a forfeiture is actually enforced, a fresh right to enter accrues, and therefore time begins to run afresh every time a fresh default in payment is made. There is, it is believed, no express authority on this point in England. The decision to the contrary effect in Ireland in *Doe* d. *Mannion* v. *Bingham* (1841), 3 I. L. R. 456, is inconsistent with *Grant* v. *Ellis* (1841), 9 M. & W. 113 (see p. 107, *ante*), and has been overruled in Ireland (see *Spratt* v. *Sherlock* (1853), 3 I. C. L. R. 69).

(*c*) *Doe* d. *Hall* v. *Moulsdale* (1847), 16 M. & W. 696; and see *Whitton* v. *Peacock* (1834), 3 My. & K. 325 (copyholds); *Doe* d. *Cook* v. *Danvers* (1806), 7 East, 299; *Doe* d. *Allen* v. *Blakeway* (1833), 5 C. & P. 563. As to forfeiture, in the case of landlord and tenant, see title LANDLORD AND TENANT, Vol. XVIII., pp. 530 *et seq.*; and as to forfeiture generally, see, further, titles COPYHOLDS, Vol. VIII., pp. 46 *et seq.*; REAL PROPERTY AND CHATTELS REAL.

(*d*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 4; *Astley* v. *Essex* (*Earl*) (1874), L. R. 18 Eq. 290; *Connolly* v. *Leahy*, [1899] 2 I. R. 344; compare *Clarke* v. *Clarke* (1868), 2 I. R. C. L. 395; and see p. 121, *ante*. As to the period of limitation in respect of a lord's right to seize copyhold *quousque*, see title COPYHOLDS, Vol. VIII., pp. 52, 58.

(*e*) 3 & 4 Will. 4, c. 27; 37 & 38 Vict. c. 57.

(*f*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 6. As to the law before this Act, see *Sanders* v. *Stanford* (1579), cited in *Saffyn* v. *Adams* (1605), Cro. Jac. 60, 61; *Fairclaim* v. *Little* (*circa* 1820), cited in *Murray* v. *East India Co.* (1821), 5 B. & Ald. 213, 214; *Murray* v. *East India Co.*, *supra*.

(*g*) *Re Scott and Alvarez's Contract*, *Scott* v. *Alvarez*, [1895] 1 Ch. 596, 605, C. A. The Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 6, applies for all the purposes of the Real Property Limitation Acts, 1833 (3 & 4 Will. 4, c. 27) and 1874 (37 & 38 Vict. c. 57), and is not merely a proviso to the provisions immediately preceding it. See cases cited in title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 230, note (*h*); compare *Holland* v. *Clark* (1842), 1 Y. & C. Ch. Cas. 151, 170.

SUB-SECT. 6.—*Tenancies at Will.*

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When Time begins to Run.

When lessor's right accrues.

230. Where any person is in possession or in receipt of the profits of any land or in receipt of any rent as tenant at will, the right of the person entitled subject to such tenancy, or of the person through whom he claims, is deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy (*h*).

Admission by occupier of nature of tenancy.

231. An admission by an occupier that his occupation is permissive is evidence to show that the occupation is permissive, but not to show when the tenancy began, nor does it operate in any way to set the statute running afresh; the effect is simply to postpone the bar of the statute for one year beyond the time at which it would have taken effect, if the occupation had been that of a trespasser (*i*).

Tenancy at will reserving rent.

232. The leaning of the courts is always to construe tenancies for an undefined period, reserving yearly rents, as tenancies from year to year, where the parties do not express an intention to the contrary, but they may agree to create a tenancy at will with a rent reserved (*k*), so that every time rent is paid the lessor at will, and not the lessee at will, is, as between themselves, in the receipt of the profits of the land for the purposes of the statute (*l*).

Acknowledgment by payment.

233. If a person without apparent title, who is in possession of land, gives an acknowledgment by payment to the owner, the payment may prevent time running, either as proof that the person is in occupation as tenant at will paying rent, or that a former tenancy at will has been determined and a new one created (*m*).

(*h*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 7. For a case where this provision was applied, see *Brighton Corporation* v. *Brighton Guardians* (1880), 5 C. P. D. 368. The Real Property Limitation Act, 1833 (3 & 4 Will. 4 c. 27), s. 7, is a necessary supplement to *ibid.*, s. 2 (now the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1). The Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 2, does not, apart from *ibid.*, s. 7, apply to tenancies at will, because the lessor at will could not bring ejectment until he had determined the possession of the tenant at will by demand of possession or otherwise (*Garrard* v. *Tuck* (1849), 8 C. B. 231, 251; *Right* d. *Lewis* v. *Beard* (1811), 13 East, 210); see title LANDLORD AND TENANT, Vol. XVIII., p. 436. As to how a tenancy at will may be determined, see *ibid.*

(*i*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 7; compare *Doe* d. *Groves* v. *Groves* (1847), 10 Q. B. 486. Acknowledgments in writing, or by way of payment (see p. 131, *post*), stand on a different footing. If a person has been in possession of land for more than twelve years, but within twelve years before action a letter is written by his agent to the original owner's agent, offering to accept a lease of the land in question, such a letter, if it does not amount to an acknowledgment in writing within the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 14 (see p. 131, *post*), is admissible in evidence against the occupier, and is evidence of a tenancy at will, but is no evidence as to the time when such tenancy began (*Ley* v. *Peter* (1858), 3 H. & N. 101).

(*k*) *Doe* d. *Bastow* v. *Cox* (1847), 11 Q. B. 122; see *Richardson* v. *Langridge* (1811), 4 Taunt. 128, and title LANDLORD AND TENANT, Vol. XVIII., pp. 435, 440, 443.

(*l*) *I.e.*, the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27) s. 7; see *Hodgson* v. *Hooper* (1860), 3 E. & E. 149. As to receipt of rent being receipt of profit, see p. 113, *ante*.

(*m*) See p. 132, *post*. *Quære*, whether such payment could have any effect if made after the expiration of thirteen years' possession without payment.

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Entry under void lease.

234. If a person enters on land under a lease which is invalid by the Statute of Frauds (*n*), a tenancy at will is created (*o*). If, however, a person enters on land under a lease which is void *ab initio*, and pays no rent, such person is not tenant at will, but is in possession without any title, and the statute runs in his favour from the date of his entry; but if any rent, however small, is reserved by the lease and paid by him, the statute will not run as long as such payment is made (*p*).

Or invalid conveyance.

A purchaser taking possession under a conveyance invalid for non-enrolment is a tenant at will within the statute (*q*).

Running of time when a tenancy at will is determined.

235. If a tenancy at will is determined within a year from its commencement, and no fresh tenancy is created, time runs from the determination. If a tenancy at will is actually determined before the expiration of thirteen years from its commencement, and a new tenancy at will is created, time begins to run afresh and the period of limitation must be reckoned with reference only to the last tenancy at will created before the question of title is raised (*r*). So, if a tenancy at will is thus determined within thirteen years, and the lessor actually takes possession, even if only for a moment, and the tenant resumes possession without any new tenancy being created, the statute runs from the day on which the person who was tenant resumes possession, for, from that day, he is a mere trespasser. But if in such a case the lessor does not actually take possession when he determines the tenancy at will, time does not run from his determination, but from one year after the commencement of the tenancy at will (*a*).

Effect of owner entering on land from time to time.

If the owner of a house allows someone else to occupy it for the statutory period, but from time to time during that period comes and lives in the house with the tenant at will, the inference may be drawn that every time the owner comes to live there he determines the existing tenancy and creates a fresh tenancy, and the statute will only begin to run from the time of his last departure (*b*).

(*n*) 29 Car. 2, c. 3, s. 1.

(*o*) *Goodtitle* d. *Gallaway* v. *Herbert* (1792), 4 Term Rep. 680; see title LANDLORD AND TENANT, Vol. XVIII., p. 435. As to the rule with regard to encroachments, see *ibid.*, p. 562.

(*p*) *Magdalen Hospital* (*President and Governors*) v. *Knotts* (1879), 4 App. Cas. 324, *per* Lord SELBORNE, at p. 335; *Bunting* v. *Sargent* (1879), 13 Ch. D. 330; and see title LANDLORD AND TENANT, Vol. XVIII., p. 440.

(*q*) *I.e.*, the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 7; see *Low Moor Co.* v. *Stanley Coal Co.* (1876), 34 L. T. 186, C. A.; see *Doe* d. *Stanway* v. *Rock* (1842), 4 Man. & G. 30.

(*r*) *Turner* v. *Doe* d. *Bennett* (1842), 9 M.& W. 643, Ex. Ch.; *Doe* d. *Goody* v. *Carter* (1847), 9 Q. B. 863; *Doe* d. *Stanway* v. *Rock*, *supra*; *Hodgson* v. *Hooper* (1860), 3 E. & E. 149; *Randall* v. *Stevens* (1853), 2 E. & B. 641; *Locke* v. *Matthews* (1863), 13 C. B. (N. S.) 753.

(*a*) *Doe* d. *Bennett* v. *Turner* (1840), 7 M. & W. 226; *Turner* v. *Doe* d. *Bennett*, *supra*; *Locke* v. *Matthews*, *supra*, *per* ERLE, C.J., at p. 761; *Doe* d. *Goody* v. *Carter*, *supra*; *Day* v. *Day* (1871), L. R. 3 P. C. 751; *Wimbledon and Putney Commons Conservators* v. *Nicol* (1894), 10 T. L. R. 247. The doubts expressed on this point by the Court of Queen's Bench in *Randall* v. *Stevens* (1853), 2 E. & B. 641, 652, and in *Locke* v. *Matthews*, *supra*, *per* WILLES, J., at p. 766, may now be disregarded. As to what is taking possession, see *Doe* d. *Baker* v. *Coombes* (1850), 9 C. B. 714; see *Worssam* v. *Vandenbrande* (1868), 17 W. R. 53.

(*b*) *Doe* d. *Groves* v. *Groves* (1847), 10 Q. B. 486. There may be cases of this

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If a person is allowed to occupy land by the permission of the owner, who comes from time to time on the land and tells the occupier what trees to lop and what repairs are required, then every time the owner sets foot on the land time will begin to run afresh (*c*). But the mere fact that the landlord enters the premises, without objection on the part of the tenant at will, for the purpose of doing repairs, does not amount to a determination of the tenancy so as to interrupt the acquisition of a title by the tenant (*d*). Acts of ownership which would be sufficient to show a determination of an existing tenancy at will (*e*), and the creation of a new one, if the occupation is permissive, do not necessarily amount to evidence against the occupier that his holding is permissive. In such a case, if there is no proof *aliunde* that a tenancy at will was in existence at the time of such acts, they would have no effect in preventing the operation of the statute, but would be ineffective as mere entries (*f*).

Evidence of permissive occupation.

236. There are cases in which, though the occupier is in possession by the will of the owner, his occupation is not an independent possession by him but the possession of the owner himself, so that the owner is in possession through the occupier; such cases may arise where the occupier is a servant of the owner and merely occupies in his capacity of and for the purpose of performing his duties as such servant (*g*), or where the occupier is a mere guest of the owner (*h*).

Owner in possession though not in occupation.

237. For the purposes of the Real Property Limitation Act, 1833 (*i*), s. 7, no mortgagor nor *cestui que trust* is to be deemed to be a tenant at will to his mortgagee or trustee (*j*).

Cestui que trust and mortgagor.

A *cestui que trust* in possession is still tenant at will to his trustee for all other purposes; but it is not necessary that any active steps should be taken by a trustee to prevent his estate from being destroyed, as in the case of an ordinary tenancy at will, by mere lapse of time (*k*). If, however, some *cestuis que trustent* are in possession to

Cestui que trust.

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kind, where the actual occupier has no independent possession, and the owner is by his occupation in possession throughout; see the text, *infra*.

(*c*) *Allen* v. *England* (1862), 3 F. & F. 49.

(*d*) *Lynes* v. *Snaith*, [1899] 1 Q. B. 486.

(*e*) See title LANDLORD AND TENANT, Vol. XVIII., pp. 436, 437.

(*f*) See Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 10; *Brassington* v. *Llewellyn* (1858), 27 L. J. (EX.) 297; and see p. 129, *post*.

(*g*) *Ellis's Lessee* v. *Crawford* (1842), 5 I. L. R. 402, *per* PENNEFATHER, B., at p. 404; *Moore's Lessee* v. *Doherty* (1843), 5 I. L. R. 449 (schoolmaster); *Jack* v. *Walsh* (1842), 4 I. L. R. 254; and see titles LANDLORD AND TENANT, Vol. XVIII., p. 340; MASTER AND SERVANT. As to occupation by the master, see *Brooks* v. *Baker* (1905), 1 Smith, Reg. Cas. 465. As to occupation by a mere licensee, see *Wimbledon and Putney Commons Conservators* v. *Nicol* (1884), 10 T. L. R. 247.

(*h*) *Peakin* v. *Peakin*, [1895] 2 I. R. 359, distinguishing *Doe* d. *Dayman* v. *Moore* (1846), 9 Q. B. 555. As to the doctrine of adverse possession, see p. 105, *ante*.

(*i*) 3 & 4 Will. 4, c. 27.

(*j*) *Ibid.*, s. 7. For circumstances in which such persons are deemed to be tenants at will, see titles LANDLORD AND TENANT, Vol. XVIII., p. 434, notes (*c*), (*d*); MORTGAGE. As to mortgages, see also p. 145, *post*.

(*k*) *Garrard* v. *Tuck* (1849), 8 C. B. 231, 253; *Knight* v. *Bowyer* (1858), 2 De G. & J. 421, C. A.; *Doe* d. *Jacobs* v. *Phillips* (1847), 10 Q. B. 130; see *East Stonehouse*

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the exclusion of the others and the trustees, the *cestuis que trustent* in possession will acquire a title (*l*). If a *cestui que trust* is not in actual occupation, but is only allowed to receive the rents or otherwise deal with the estate in the hands of occupying tenants, and if in such case the actual occupier is permitted to occupy for more than twelve years without paying rent, the trustees will lose their title (*a*).

Only express trusts included.

The statutory provision (*b*) with regard to *cestuis que trustent* relates only to express or actual direct trusts; it does not relate to implied trusts or such possible eventual trusts as may, if certain facts are established in evidence, be declared in a court of equity (*c*). If, however, a person is tenant at will in law, but has a right in equity to a lease, the right of the landlord will not be barred by the provision (*d*).

Tenant at will with right to lease.

SUB-SECT. 7.—*Tenancies from Year to Year or other Period without Lease in Writing.*

When lessor's right accrues.

238. Where any person is in possession or in receipt of the profits of any land or in receipt of rent (*e*), as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, is deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent (*f*) payable in respect of such tenancy has been received, whichever event last happens (*g*).

Urban Council v. *Willoughby Brothers, Ltd.*, [1902] 2 K. B. 318; compare *Re Cussons, Ltd.* (1904), 73 L. J. (CH.) 296; and see title TRUSTS AND TRUSTEES.

(*l*) *Burroughs* v. *M'Creight* (1844), 1 Jo. & Lat. 290; *Bolling* v. *Hobday* (1882), 31 W. R. 9; *Re Cussons, Ltd., supra.*

(*a*) *Melling* v. *Leak* (1855), 16 C. B. 652, 669; and see title LANDLORD AND TENANT, Vol. XVIII., p. 434, note (*d*).

(*b*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 7, proviso.

(*c*) *Drummond* v. *Sant* (1871), L. R. 6 Q. B. 763; *Sands to Thompson* (1883), 22 Ch. D. 614; *Locking* v. *Parker* (1872), 8 Ch. App. 30; *Re Cussons, Ltd., supra;* and see title TRUSTS AND TRUSTEES.

(*d*) See p. 139, *post*, and *Warren* v. *Murray*, [1894] 2 Q. B. 648, C. A.

(*e*) *I.e.*, rent as an inheritance; see p. 107, *ante.*

(*f*) *I.e.*, rent reserved; see p. 107, *ante;* *Baines* v. *Lumley* (1868), 16 W. R. 674; title LANDLORD AND TENANT, Vol. XVIII., pp. 464, 465.

(*g*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 8, which includes all cases of tenancies for a recurring period which are not under a lease in writing; and the words "without any lease in writing" apply to a person holding as tenant from year to year as well as to a person holding for any other period. A tenancy from year to year or any other tenancy for a recurring period created under a lease in writing is governed not by *ibid.*, s. 8, but by the clauses of the Act dealing with leases and reversions (see p. 127, *post*). A lease in writing to come within the exceptions in the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 8, must be an instrument in writing which operates as a lease and passes an interest and must be binding on the lessor; a writing which is evidence of the terms of the holding or which binds the tenant only is not sufficient (*Doe* d. *Lansdell* v. *Gower* (1851), 17 Q. B. 589; see Sugden on the Statutes relating to Real Property, 2nd ed., 61). As to the position of a tenant holding under an agreement for lease of which specific performance would be decreed, see title LANDLORD AND TENANT, Vol. XVIII., pp. 366, 367, 385, 440, note (*s*). As to the position of a person who enters into possession and pays rent under a lease void *ab initio*, thus becoming a tenant from year to year, see *Webster* v. *Southey* (1887), 36 Ch. D. 9; see also title

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239. Where a certain sum is due periodically from a tenant from year to year by way of rent (*h*), and it is proved that a similar sum has been paid from time to time, such payments will not prevent time running, unless they were made as rent (*i*).

Payment of rent.

If a sub-tenant who is in possession of land pays without compulsion to the superior landlord the rent due from the mesne tenant, such a payment of itself does not amount to a payment of rent to the mesne tenant, unless there are facts to show that the sub-tenant paid the rent by some arrangement with his immediate landlord (*k*). If an action of ejectment is brought to recover land from a person who is in possession, and the plaintiff proves that another person paid rent within twelve years, and that the defendant within twelve years had admitted that he held as tenant to the person who paid the rent, but there is no evidence of payment of rent by the defendant to anyone, the plaintiff is entitled to recover on the ground that an undertenant cannot be permitted to dispute a title which is valid against the person of whom he holds (*l*).

Payment of head-rent by sub-tenant.

Agent for owner receiving rent.

If a person originally receives rent as agent for the true owner and continues to receive it, but for more than twelve years pays nothing over to the true owner, payment of rent to such a person is payment to the true owner, until it is proved that the character in which such person received the rent was changed (*m*).

SUB-SECT. 8.—*Leases in Writing.*

Effect of non-payment of rent.

240. Where land has been demised for a term of years at a rent reserved, the title of the landlord to the reversion expectant on the lease is unaffected by the mere fact that the tenant omits to pay rent for any number of years during the existence of the lease (*n*), even if the tenant himself claims the reversion (*o*). In the case of a tenancy from year to year under a lease in writing, the non-payment for many years of rent reserved, coupled with

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LANDLORD AND TENANT, Vol. XVIII., pp. 440, 441. Where a tenant under a void lease occupied land for more than twelve years without paying rent and then paid some arrears of rent, it was held that the reversioner's title was not barred (*Bunting* v. *Sargent* (1879), 13 Ch. D. 330, *per* JESSEL, M.R., at p. 333).

(*h*) As to the nature of rent reserved, see title LANDLORD AND TENANT, Vol. XVIII., pp. 464 *et seq.*; compare the definition of "rent" given at p. 107, *ante*.

(*i*) *A.-G.* v. *Stephens* (1855), 6 De G. M. & G. 111, *per* Lord CRANWORTH, L.C., at p. 136. Payment of rent may be proved by parol admission of tenant (*Doe* d. *Spencer* (*Earl*) v. *Beckett* (1843), 4 Q. B. 601).

(*k*) *Grogan* v. *Regan*, [1902] 2 I. R. 196, C. A. As to underleases generally, see title LANDLORD AND TENANT, Vol. XVIII., pp. 406 *et seq.*

(*l*) *Doe* d. *Spencer* (*Earl*) v. *Beckett*, *supra*; and see titles ESTOPPEL, Vol. XIII., pp. 402, 403; LANDLORD AND TENANT, Vol. XVIII., pp. 406, 473.

(*m*) *Smith* v. *Bennett* (1874), 30 L. T. 100; *A.-G.* v. *London Corporation* (1850), 2 Mac. & G. 247; see *Lyell* v. *Kennedy*, *Kennedy* v. *Lyell* (1889), 14 App. Cas. 437; *Re Hobbs*, *Hobbs* v. *Wade* (1887), 36 Ch. D. 553; *M'Auliffe* v. *Fitzsimons* (1889), 26 L. R. Ir. 29; and title LANDLORD AND TENANT, Vol. XVIII., p. 472.

(*n*) See p. 121, *ante*.

(*o*) *Archbold* v. *Scully* (1861), 9 H. L. Cas. 360.

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absence of proof of any rent being demanded, is of itself evidence from which the determination of the tenancy may be inferred. In such a case, to establish a defence resting on the statute, the occupier must prove that such length of time had elapsed, without payment or demand of rent, as to warrant the inference that the tenancy had been determined twelve years or more before action (*p*).

Rent reserved paid to wrongful claimant.

241. Where, however, a tenant holding land or rent of inheritance under a lease in writing, which reserves a rent of 20*s.* or upwards, pays the rent so reserved, not to the person rightfully entitled to the reversion, but to a wrongful claimant, and no payment in respect of the rent reserved by such lease is afterwards made to the person rightfully entitled thereto, the right of the person entitled to such land or rent (*a*), subject to such lease, or of the person through whom he claims, is deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming, and not upon the determination of the lease (*b*).

Receipt for less than twelve years.

If a person wrongfully claiming the reversion receives rent (*c*) for a period less than twelve years and then ceases to receive the rent (*c*) and makes no claim to receive it, then, although the rightful owner does not receive rent (*c*) for twelve years, he will not, it seems, be barred (*d*).

Rent less than 20*s.*

Where there is a valid lease in writing and there is not an annual rent amounting to 20*s.* reserved, neither the receipt of rent by a person wrongfully claiming the reversion nor his obtaining actual possession of the land will prevent the reversioner's right of entry from accruing at the expiration of the lease (*e*).

Possession by wrongful claimant during term.

242. If no rent is paid to a wrongful claimant, but a person during the currency of the lease gets possession and claims to be entitled to the fee, time will run against the reversioner only from the determination of the lease (*f*). Where, however, within twelve years of the expiration of the lease, the rent has been received by a person wrongfully claiming the reversion, who also obtains possession of the land at the expiration of the lease, and retains it till the period of twelve years is completed from his first receipt of rent, the title of the rightful reversioner will be barred, his right to recover possession being deemed to have

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(*p*) *Stagg* v. *Wyatt* (1838), 2 Jur. 892; *Jackson* v. *M'Master* (1890), 28 L. R. Ir. 176, C. A.; and see title LANDLORD AND TENANT, Vol. XVIII., p. 455; compare *Molony* v. *Molony*, [1894] 2 I. R. 1; *Mulcaire* v. *Lane-Joynt* (1893), 32 L. R. Ir. 683, C. A.

(*a*) *I.e.*, rent as an inheritance; see p. 107, *ante*.

(*b*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 9. As to the law on this point before the Act, see *Doe* d. *Cook* v. *Danvers* (1806), 7 East, 299, 320; *Bushby* v. *Dixon* (1824), 3 B. & C. 298, 307; *Hovenden* v. *Annesley* (*Lord*) (1806), 2 Sch. & Lef. 607, 624, 625; *Taylor* d. *Atkyns* v. *Horde* (1757), 1 Burr. 60, H. L.; 2 Smith, L. C., 11th ed., 689.

(*c*) *I.e.*, rent reserved; see p. 107, *ante*.

(*d*) See *Agency Co.* v. *Short* (1888), 13 App. Cas. 793, P. C., and p. 111, *ante*.

(*e*) See Law of Real Property Commissioners' First Report, 1829, 47.

(*f*) *Chadwick* v. *Broadwood* (1840), 3 Beav. 308, 316.

accrued at the time of the first receipt of rent by the wrongful claimant (*g*).

SECT. 4.
When Time begins to Run.

243. The receipt of rent by a person other than the reversioner will not cause time to run unless the claim of such person is wrongful and adverse to the rightful reversioner (*h*). So if a small part of the land out of which the rent under the lease issued is conveyed to another person, and the rent is never apportioned, and the whole of the rent is paid as before to the original reversioner, time does not begin to run against the person to whom the small part was conveyed until the lease expires (*i*).

Claim must be wrongful and adverse.

The words "wrongfully claiming" (*k*) refer not only to an intentional and improper claim of the rent, but also to a claim made by mistake, and to the case of any person not entitled who makes a claim to the rent against a person who is entitled. Thus if a person receives the rents of property to which he is entitled, but by mistake accounts for them to another person who is not entitled, the receipt of the rents by such other person is a receipt by a person "wrongfully claiming" to be entitled (*l*).

Meaning of "wrongfully claiming."

244. If land is in the occupation of a sub-tenant, who pays the head rent to the superior landlord, but nothing is either received or paid by the mesne lessee, then, it seems, the receipt of rent by the superior landlord may be, though not necessarily, adverse to the title of the mesne lessee (*m*); and the claim of the mesne lessee will be barred unless it can be inferred that such payment was made under an arrangement between him and the sub-lessee (*n*). If the sub-lessee purchases the reversion in fee, but neither makes any payment of the rent due in respect of the underlease nor applies to the mesne lessee for the head rent, the statute will not run against the title of the mesne lessee (*o*).

Sub-lessee, paying head rent:

purchasing reversion.

SECT. 5.—*Entry and Continual Claim.*

245. If land is in the possession of a trespasser, the rightful owner is barred at the end of twelve years, although he may from time to time during the twelve years have made entry on the land in assertion of his title, unless such entry amounts to a resumption of possession by the owner (*p*).

Effect of entry.

(*g*) The law was the same in this respect before the statute (*Cholmondeley* (*Marquis*) v. *Clinton* (*Lord*) (1823), Turn. & R. 107).

(*h*) *Sloane* v. *Flood* (1855), 5 I. C. L. R. 75; see *Shaw* v. *Keighron* (1869), 3 I. R. Eq. 574 (receipt of rent by widow entitled to jointure).

(*i*) *Laybourn* v. *Gridley* (1892), 61 L. J. (CH.) 352; and, as to apportionment of rent reserved, see title LANDLORD AND TENANT, Vol. XVIII., pp. 482 *et seq.*

(*k*) See Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 9; and see p. 128, *ante*.

(*l*) *Williams* v. *Pott* (1871), L. R. 12 Eq. 149.

(*m*) *Drew* v. *Norbury* (*Earl*) (1846), 3 Jo. & Lat. 267; *Doe* d. *Newman* v. *Godsill* (1840), 4 Q. B. 603, n.

(*n*) See *Grogan* v. *Regan*, [1902] 2 I. R. 196, C. A., where the *dictum* of BLACKBURNE, L.C., to the contrary in *Hayes* v. *Woodley* (1852), 3 I. Ch. R. 142, which was followed by CHATTERTON, V.-C., in *Twiss* v. *Noblett* (1869), 4 I. R. Eq. 64, 80, was disapproved by the Irish Court of Appeal.

(*o*) *Hayes* v. *Woodley*, *supra*.

(*p*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 10; *Doe* d.

SECT. 5. Entry and Continual Claim.

Continual claim.

246. No continual or other claim upon or near any land will preserve any right of making an entry or distress, or of bringing an action (*q*).

SECT. 6.—*Possession by Co-owner or Relative of Owner.*

Possession of one co-owner.

247. Where any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common have been in possession of the entirety, or more than his or their undivided share or shares, of such land or rent (*r*), for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of such land or rent, such possession is not deemed to have been the possession of such last-mentioned person or persons or any of them (*s*). So, for the purposes of the Real Property Limitation Acts, 1833 and 1874 (*t*), the possession of joint tenants, tenants in common, and coparceners is separate and is not the possession of the other joint tenants, and, without an actual ouster, one co-owner can bring ejectment against the other, and the other can defend his possession (*u*).

Possession of part of land by co-owner.

If the person entitled to an undivided share in land is in exclusive possession of the whole land or of any part of it (*v*), whatever proportion such part may bear to the whole, the title of his companions to their undivided shares in such parts will be extinguished by such possession (*a*).

Receipt of rent.

So, also, if one co-owner receives the entirety of the rents (*b*) of

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Baker v. *Coombes* (1850), 9 C. B. 714; *Randall* v. *Stevens* (1853), 2 E. & B. 641; *Brassington* v. *Llewellyn* (1858), 27 L. J. (EX.) 297; *Allen* v. *England* (1862), 3 F. & F. 49; *Thorp* v. *Facey* (1866), 35 L. J. (C. P.) 349; *Worssam* v. *Vandenbrande* (1868), 17 W. R. 53; *Solling* v. *Broughton*, [1893] A. C. 556, P. C. As to trespass in general, see title TRESPASS.

(*q*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 11. As to the nature of a "continual claim," and as to the law before the Act, see 3 Bl. Com. 175; Burton, Compendium of the Law of Real Property, 8th ed., ss. 402, 403; Limitation Act, 1623 (21 Jac. 1, c. 16); stat. (1705) 4 & 5 Ann. c. 3, s. 16.

(*r*) *I.e.*, rent of inheritance; see p. 107, *ante*. For the definition of "land," see p. 106, *ante*.

(*s*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 12. As to the law before the Act, see Burton, Compendium of the Law of Real Property, 8th ed., ss. 395, 398; Co. Litt. 174 a; Cole, Law and Practice in Ejectment, Part I., c. 1; *Doe* d. *Fishar and Taylor* v. *Prosser* (1774), 1 Cowp. 217; *Doe* d. *Hellings* v. *Bird* (1809), 11 East, 49; *Culley* v. *Doe* d. *Taylerson* (1840), 11 Ad. & El. 1008; *O'Sullivan's Lessee* v. *M'Swiney* (1841), Long. & T. 111.

(*t*) 3 & 4 Will. 4, c. 27; 37 & 38 Vict. c. 57.

(*u*) This provision was retrospective (*Culley* v. *Doe* d. *Taylerson*, *supra*; see *Doe* d. *Holt* v. *Horrocks* (1834), 1 Car. & Kir. 566). As to ejectment, see title ACTION, Vol. I., pp. 34, 46; and see title LANDLORD AND TENANT, Vol. XVIII., p. 558, note (*s*). As to the right of one tenant in common to sue his co-tenant for an account, see *Henderson* v. *Eason* (1846), 15 Sim. 303; *Henderson* v. *Eason* (1850), 17 Q. B. 701, Ex. Ch.

(*v*) *Ex parte Hasell* (1839), 3 Y. & C. (EX.) 617; *Weeks* v. *Birch* (1893), 69 L. T. 759; *Stewart* v. *Conyngham* (*Marquis*) (1851), 1 I. Ch. R. 534, 551; *Re Dane's Estate* (1871), 5 I. R. Eq. 498; see *Paine* v. *Ryder* (1857), 24 Beav. 151.

(*a*) *Tidball* v. *James* (1859), 29 L. J. (EX.) 91; explained in *Murphy* v. *Murphy* (1864), 15 I. C. L. R. 205; *Thornton* v. *France*, [1897] 2 Q. B. 143, C. A.; *Glyn* v. *Howell*, [1909] 1 Ch. 666.

(*b*) For the definition of "rent," see p. 107, *ante*.

the property without accounting to his partner in title, the statute will run in favour of the person so receiving the rents (*c*).

SECT. 6. Possession by Co-owner or Relative of Owner.

248. After the statutory period, during which one co-owner has had exclusive possession or receipt of rents of the entirety, has run out, a subsequent payment of rent or acknowledgment of title by the co-owner in possession to the other co-owner cannot defeat the title which has been acquired (*d*).

Acknowledgment after time has run.

249. Where a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land or to the receipt of any rent enters into the possession or receipt thereof, such possession or receipt is not deemed to be that of the person entitled as heir (*e*).

Possession by relation.

SECT. 7.—*Acknowledgment of Title.*

SUB-SECT. 1.—*In General.*

250. When any acknowledgment of the title of the person entitled to any land or rent has been given to him or his agent (*f*) in writing, signed by the person in possession or in receipt of the profits of such land or in receipt of such rent, the right of the person to whom the acknowledgment was given or anyone claiming through him is deemed to have first accrued at and not before the time at which the acknowledgment or the last of such acknowledgments, if more than one, was given (*g*); but an acknowledgment is of no effect after the prescribed period has run out (*h*).

Acknowledgment in writing.

(*c*) *Sanders* v. *Sanders* (1881), 19 Ch. D. 373, C. A.; *Burroughs* v. *M'Creight* (1844), 1 Jo. & Lat. 290; *Re Hobbs, Hobbs* v. *Wade* (1887), 36 Ch. D. 553; *Bolling* v. *Hobday* (1882), 31 W. R. 9.

(*d*) *Re Hobbs, Hobbs* v. *Wade, supra;* compare *Sanders* v. *Sanders, supra* (where payment in later years was held to raise a presumption of payment in earlier years).

(*e*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 13. As to the law before the Act, see Gilbert's Tenures, 2nd ed., 24; Co. Litt. 242 a; *Page* v. *Selfby* (1680), Buller, Law of Nisi Prius, 100. The effect of the entry of a father or mother upon the land of an infant child is governed by entirely different principles and is not within this provision; see *Jones* v. *Jones* (1847), 16 M. & W. 699, 712, and p. 165, *post.*

(*f*) Admission to third parties is not sufficient; see Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 14. But an acknowledgment contained in an answer in Chancery in a suit in which the person entitled was plaintiff was held to be a good acknowledgment (*Goode* v. *Job* (1858), 28 L. J. (Q. B.) 1). As to acknowledgments in bankruptcy, see *Hobson* v. *Burns* (1849), 13 I. L. R. 286, and pp. 63, 80, 93, *ante.* In an action by an executor for use and occupation, a letter written by the defendant to the testator's attorney after the testator's death was admitted as an acknowledgment of the testator's title (*Fursdon* v. *Clogg* (1842), 10 M. & W. 572; see *Johnston* v. *Smith,* [1896] 2 I. R. 82).

(*g*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 14, in which the word "rent" means rent as an inheritance; see p. 107, *ante.* As to the effect of payment of rent as an inheritance, see p. 113, *ante;* of rent reserved, see p. 113, *ante;* of interest on a mortgage, see p. 146, *post.*

(*h*) *Sanders* v. *Sanders, supra; Re M'Clure and Garrett's Contract,* [1899] 1 I. R. 225; Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 34. The opinion that the effect of giving an acknowledgment under *ibid.,* s. 14, was immediately to set time running against the person to whom it

SECT. 7.
Acknowledgment of Title.

Essentials of acknowledgment.

251. The acknowledgment must be signed by the person in possession, and therefore signature by an agent is insufficient (*i*); but if a person signs the name of the principal by his direction and in his presence, such signature is sufficient, for in such case the person signing must, it seems, be regarded not as the agent, but, as it were, the hand or instrument of the principal himself (*k*).

Effect of acknowledgment.

Acknowledgment enures for the benefit of persons claiming under those to whom it is made (*l*); and an acknowledgment given by a person in possession is binding on those claiming through him (*m*).

SUB-SECT. 2.—*What is Sufficient Acknowledgment.*

Acknowledgment in writing.

Proof.

252. An acknowledgment has no operation, unless it is in writing, but parol evidence of a lost written acknowledgment, or to explain such an acknowledgment, may be admissible (*n*). It is a question for the judge to decide whether a writing is such that it can be an admission of title, and therefore evidence to go to the jury at all (*o*).

What is a sufficient acknowledgment.

253. Any acknowledgment in writing is sufficient, if from it there may fairly be implied an admission that the person to whom it is given is the owner of the land in question. Thus a correspondence from which it appears that the person in possession claims to hold the property till certain accounts as to charges thereon to which he claims to be entitled are settled will be sufficient (*p*). So if in answer to a claim for rent the person in possession does not deny the title of the person entitled, but begs for forbearance, this may be sufficient (*q*). An admission by the person in possession that he holds the property as tenant of the person entitled is sufficient (*r*); and so is an offer to take a lease, although the offer was not accepted (*s*). A covenant to pay a mortgage debt in a deed executed subsequently to and referring to the mortgage is an acknowledgment of the existence of the relation of mortgagor and mortgagee, and

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was given, even although it had not begun to run before (see *Scott* v. *Nixon* (1843), 3 Dr. & War. 388, *per* SUGDEN, L.C., at p. 404; *Burroughs* v. *M'Creight* (1844), 1 Jo. & Lat. 290, 304), is not warranted by the words of the statute.

(*i*) *Ley* v. *Peter* (1858), 3 H. & N. 101; compare *Lewis* v. *Thomas* (1843), 3 Hare, 26.

(*k*) *Dublin Corporation's Lessee* v. *Judge* (1847), 11 I. L. R. 8. For forms of acknowledgment, see Encyclopædia of Forms and Precedents, Vol. I., pp. 193, 195.

(*l*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 14.

(*m*) *Goode* v. *Job* (1858), 28 L. J. (Q. B.) 1.

(*n*) See cases cited in note (*c*), p. 60, *ante;* and see title EVIDENCE, Vol. XIII., p. 518.

(*o*) See p. 63, *ante; Doe* d. *Curzon* v. *Edmonds* (1840), 6 M. & W. 295; Sugden on the Statutes relating to Real Property, 2nd ed., 67; compare *Incorporated Society in Dublin for Promoting English Protestant Schools in Ireland* v. *Richards* (1841), 1 Dr. & War. 258, 290.

(*p*) *Incorporated Society in Dublin for Promoting English Protestant Schools in Ireland* v. *Richards, supra.*

(*q*) *Fursdon* v. *Clogg* (1842), 10 M. & W. 572.

(*r*) *Goode* v. *Job, supra.*

(*s*) *Dublin Corporation's Lessee* v. *Judge, supra;* compare *Doe* d. *Curzon* v. *Edmonds, supra.*

SECT. 7. Acknowledgment of Title.

therefore of the mortgagee's title (*t*). An acknowledgment made within twelve years of action admitting that the person claiming the property had a title more than twelve years before action is not sufficient, as it is quite consistent with the non-existence of the title at the time when the acknowledgment was made (*a*). But an acknowledgment within the twelve years admitting that the person claiming had a title at a time within the twelve years, although not expressly admitting title at the time when the acknowledgment is made, is, it seems, sufficient. An admission that a person has recovered judgment in an action of ejectment is not an admission of title, for it is quite consistent with an assertion that the judgment in ejectment was wrong and that the person had no title at all (*b*).

SECT. 8.—*Disabilities.*

Infants and lunatics.

254. If at the time at which the right of any person to make an entry or distress or to bring an action to recover any land or rent (*c*) has first accrued as defined in the Real Property Limitation Acts, 1833 and 1874 (*d*), such person is either an infant or of unsound mind (*e*), then he or the persons claiming through him may, although the statutory period applicable in other cases has expired, take such proceedings at any time within six years next after the time at which he ceases to be under any such disability or dies, whichever of these two events first happens (*f*).

Married women.

255. Coverture is not a disability so far as regards the real estate of women married since the 31st December, 1882, and so far as regards the real estate of women married on or before that date, whose title accrues after that date (*g*). But as regards the interests of a husband and wife in the wife's property, when the marriage took place and the wife's title to the property accrued before the 1st January, 1883, coverture is a disability within the above provisions (*h*).

(*t*) *Jayne* v. *Hughes* (1854), 10 Exch. 430.

(*a*) *Hobson* v. *Burns* (1849), 13 I. L. R. 286.

(*b*) See *Hobson* v. *Burns*, *supra*.

(*c*) For the definitions of "land" and "rent," see pp. 106, 107, *ante*.

(*d*) 3 & 4 Will. 4, c. 27, ss. 3, 4, 7, 8, 9, 14; 37 & 38 Vict. c. 57, ss. 1, 2; see pp. 110—129, *ante*.

(*e*) As to coverture, see the text, *infra*. Absence beyond the seas ceased to be a disability on 1st January, 1879, when the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), came into operation (*ibid.*, ss. 4, 12).

(*f*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 3; see *Devine* v. *Holloway* (1861), 14 Moo. P. C. C. 290, decided under the corresponding provision of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 16. The provisions of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 5), as to disabilities have no application to an action for the redemption of a mortgage (*Kinsman* v. *Rouse* (1881), 17 Ch. D. 104, 107; and see title MORTGAGE).

(*g*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 1, 5, 12; see *Lowe* v. *Fox* (1885), 15 Q. B. D. 667, C. A.; p. 56, *ante*; and title HUSBAND AND WIFE, Vol. XVI., pp. 321 *et seq.*, 453 *et seq.*

(*h*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 3; see *Kennedy* v. *Lyell* (1885), 15 Q. B. D. 491, 498; *Hounsell* v. *Dunning*, [1902] 1 Ch. 512.

SECT. 8. Disabilities.

Successive disabilities in one person;

256. If, before one disability ceases, another supervenes, time will not run against the person entitled to land until the last of such disabilities is removed (*i*). But no proceeding can be taken by any such person or by any person claiming under him except within thirty years after the accrual of the right of such person, although he may have remained under one or more of such disabilities for the whole of such thirty years, or although the term of six years from the time at which he ceased to be under any such disability or has died may not have expired (*k*).

in different persons.

If a person is under any of these disabilities when his right accrues, and dies without having ceased to be under such disability, no time to take proceedings, beyond the expiration of the statutory period after the accrual of the right to such person, is allowed by reason of the disability of any other person (*l*).

Disability after time has begun to run.

When time has once begun to run, it will not be stopped by the occurring of a subsequent disability (*m*). Thus a remainderman, even if he is under disability when his remainder falls into possession (*n*), is barred at the same time as the tenant in tail would have been barred (*o*), had he lived.

Quit-rents.

257. The right to bring an action to recover quit-rents is deemed to accrue not when default is made in payment, but when the last payment is made (*p*). The effect of this is in some cases to make the provisions as to disabilities practically nugatory, for a person may not be under disability when the last payment is made, but may be under disability when the next day of payment arrives; in such case time will begin to run against the person's right from the last payment, and the supervening disability affords him no protection, although no right of action accrued until he came under disability (*q*).

Coparceners.

258. If land descends to two coparceners, one of whom is under disability but the other is not, the disability of one does not preserve the title of the other after the expiration of the statutory period, and if the one not under disability does not enter within that period, he or she is barred (*r*).

(*i*) *Borrows* v. *Ellison* (1871), L. R. 6 Exch. 128. See 1 Hayes, Introduction to Conveyancing, 5th ed., 240; *Re Dane's Estate* (1871), 5 I. R. Eq. 498; and p. 57, *ante*.

(*k*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 5; see *Hounsell* v. *Dunning*, [1902] 1 Ch. 512; and p. 105, *ante*.

(*l*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 18, as altered by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 9.

(*m*) *Murray* v. *Watkins* (1890) 62 L. T. 796.

(*n*) *Murray* v. *Watkins*, *supra*; *Garner* v. *Wingrove*, [1905] 2 Ch. 233; and see p. 137, *post*.

(*o*) See p. 135, *post*.

(*p*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 3; see p. 113, *ante*; *Owen* v. *De Beauvoir* (1847), 16 M. & W. 547; *sub nom. De Beauvoir* v. *Owen* (1850), 5 Exch. 166, Ex. Ch.,

(*q*) *Owen* v. *De Beauvoir*, *supra*, *per* PARKE, B., at p. 567; *De Beauvoir* v. *Owen*, *supra*, *per* PATTESON, J., at p. 182; compare Sugden on the Statutes relating to Real Property, 2nd ed., 71.

(*r*) See *Roe* d. *Langdon* v. *Rowlston* (1810), 2 Taunt. 441, decided under the Limitation Act, 1623 (21 Jac. 1, c. 16), s. 2 (now repealed). As to estates in coparcenary, see title REAL PROPERTY AND CHATTELS REAL.

SECT. 8.
Disabilities.

Acknowledgment to persons under disability.

259. If the person to whom a signed acknowledgment of title is given is then under disability, he has, it seems, the same extension of time for taking proceedings after the cessation of the disability as if his right had accrued when the acknowledgment was given (*s*)

Possession on behalf of infant.

260. If a father or mother is in possession of land belonging to an infant child, the parent will, in ordinary circumstances, be presumed to have entered on it as the guardian or bailiff of the infant, and such possession during the infancy is one on which the statute will not operate (*a*). The entry on and possession of an infant's land by some person other than the father or mother may make the same rule applicable to such entry and possession (*b*). Where the person so held to be guardian or bailiff continues in possession after the infancy has ceased, he is supposed to continue in possession in the same capacity as before, unless something is done to change the character of the possession, and the statute will not run even after the infancy has ceased, until such character is changed (*c*).

SECT. 9.—*Estates Tail.*

When rights of persons claiming under tenant in tail are barred.

261. Where the prescribed period has run out against a tenant in tail during his life, the right of all persons whom he might have barred by any act of his own is barred by the effluxion of time against himself (*d*). Where the prescribed period has begun to run against a tenant in tail in his lifetime, but he has died before the completion of the prescribed period, the effect as against all whom he might have barred by an act of his own is the same as if they, whether issue in tail or remaindermen, had claimed through him as heir (*e*). These provisions affect both issue (*f*) and remaindermen.

(*s*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 3.

(*a*) *Thomas* v. *Thomas* (1855), 2 K. & J. 79; *Re Hobbs, Hobbs* v. *Wade* (1887), 36 Ch. D. 553; *Mulhern* v. *Dorian* (1883), 17 I. L. T. 74; compare *M'Cormack* v. *Courtney*, [1895] 2 I. R. 97; *Re Maguire's and M'Clelland's Contract*, [1907] 1 I. R. 393, C. A.

(*b*) *Pelly* v. *Bascombe* (1863), 4 Giff. 390; *Nanney* v. *Williams* (1856), 22 Beav. 452; *Howard* v. *Shrewsbury* (*Earl*) (1874), L. R. 17 Eq. 378, 397; *Lambert* v. *Browne* (1870), 5 I. R. C. L. 218; *Quinton* v. *Frith* (1868), 2 I. R. Eq. 396 As to the guardianship of infants, see title INFANTS AND CHILDREN, Vol. XVII., pp. 121 *et seq.*, 131 *et seq*

(*c*) *Re Hobbs, Hobbs* v. *Wade, supra; Wall* v. *Stanwick* (1887), 34 Ch. D. 763; *Tinker* v. *Rodwell* (1893), 69 L. T. 591; *Mulhern* v. *Dorian, supra.*

(*d*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 21; *Austin* v. *Llewellyn* (1853), 9 Exch. 276; see *Tolson* v. *Kaye* (1822), 3 Brod. & Bing. 217; *Doe* d. *Smith* v. *Pike* (1832), 3 B. & Ad. 738 (decided under the Limitation Act, 1623 (21 Jac. 1, c. 16), s. 1 (now repealed)); *Murray* v. *Watkins* (1890), 62 L. T. 796. In the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 21, the word "barred" is used in two senses: at the beginning of the section it is used of the operation of the statute in barring a right of entry etc.; at the close of the section it is used of the barring of an estate tail by a conveyance. As to the barring of an estate tail by a deed, see title REAL PROPERTY AND CHATTELS REAL.

(*e*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 22; *Goodall* v. *Skerratt* (1855), 3 Drew. 216.

(*f*) By issue is meant all the issue of the first tenant in tail claiming *per*

SECT. 9. Estates Tail.

Base fee.

262. A conveyance in fee by a tenant in tail, otherwise than by deed duly enrolled (*g*), has the effect of giving to the grantee a base fee subject to be defeated by the entry of the issue in tail (*h*). In such case the right of the issue in tail accrues upon the death of the tenant in tail who executed the conveyance, and time begins to run against them and all remaindermen from such death (*i*). So if possession is enjoyed under such deed for more than twelve years, the right of the issue is not barred during the life of the grantor; the case is the same as if the tenant in tail had merely granted away his life estate (*k*).

Assurance by tenant in tail in remainder.

263. Where a tenant in tail in remainder has executed an assurance which would have barred all remaindermen, if he had at the time of its execution been tenant in tail in possession, all the remaindermen are barred at the end of twelve years from the first time at which such tenant in tail or some person claiming under the entail would have been entitled in possession to the same estate tail (*l*). This provision only applies to assurances which though ineffectual to bar the remaindermen are effectual to bar the issue in tail (*m*). If a tenant for life having an estate tail in remainder after other life estates makes a conveyance in fee simple, time does not begin to run until the estate tail falls into possession (*n*).

Possession under assurance.

Possession also must be taken by virtue of the assurance; and possession under the assurance will not begin to have any effect until the time arrives at which the tenant in tail who executed the assurance, or some person claiming under the entail, would have been entitled in possession to the same estate tail (*o*).

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formam doni and capable of inheriting under the entail, whether issue of the tenant in tail against whom time has begun to run or not, and, as regards issue in tail, see also the interpretation clause of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 1, where "person through whom another person is said to claim" means, *inter alios*, "issue in tail"; see also *Cannon* v. *Rimington* (1852), 12 C. B. 1, 16; *Murray* v. *Watkins* (1890), 62 L. T. 796.

(*g*) Under the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74); see title REAL PROPERTY AND CHATTELS REAL.

(*h*) See *Doe* d. *Daniel* v. *Woodroffe* (1849), 2 H. L. Cas. 811, 829; *Cannon* v. *Rimington*, *supra*, at pp. 12, 17; *Morgan* v. *Morgan* (1870), L. R. 10 Eq. 99.

(*i*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), ss. 21, 22; see *Cannon* v. *Rimington*, *supra*; *Rimington* v. *Cannon* (1852), 12 C. B. 18, 34, Ex. Ch.; *Murray* v. *Watkins*, *supra*.

(*k*) *Morgan* v. *Morgan*, *supra*.

(*l*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 6, which has taken the place of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 23. Both provisions seem to have especial reference to assurances to be executed under the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), which was passed in the same session as but after the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27); see 1 Hayes, Introduction to Conveyancing, 5th ed., 264; Sugden on the Statutes relating to Real Property, 2nd ed., 98; *Anderson* v. *Anderson* (1861), 30 Beav. 209; *Penny* v. *Allen* (1857), 7 De G. M. & G. 409, 426.

(*m*) See *Penny* v. *Allen*, *supra*; *Morgan* v. *Morgan*, *supra*.

(*n*) *Mills* v. *Capel* (1875), L. R. 20 Eq. 692.

(*o*) *Ibid.*

SECT. 9. Estates Tail.

264. If an estate tail is made inalienable by Act of Parliament, the Real Property Limitation Acts, 1833 (*p*) and 1874 (*q*), have no application (*r*).

Inalienable estate tail.

265. The provisions with respect to acknowledgments of title (*s*) and disabilities (*t*) apply to all cases which come under the Real Property Limitation Act, 1833 (*p*), ss. 21, 22. But the Real Property Limitation Act, 1874 (*a*), s. 6, extinguishes the title of remaindermen at the end of twelve years from the moment when time has begun to run under that provision, and makes no provision for acknowledgments or disabilities; therefore no disability existing in the person of a remainderman, and no acknowledgment made to him, even if, at the time of such disability or acknowledgment his right to recover the property has accrued, prevents or delays the operation of that provision in extinguishing his title (*b*).

Application of provisions as to acknowledgment and disabilities.

SECT. 10.—*Equitable Rights to Real Property.*

Limitations for proceedings in equity.

266. Subject to exceptions in the case of trusts (*c*), concealed fraud (*d*), and acquiescence (*e*), every remedy in equity for the recovery of land or rent is in the same position as if it were a remedy at law, not only as to the period of limitation, but also as to the time at which the right to sue is deemed to have accrued, and as to all exceptions on the grounds of disability or otherwise (*f*). Thus a proceeding to recover title-deeds (*g*), or an

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(*p*) 3 & 4 Will. 4, c. 27.

(*q*) 37 & 38 Vict. c. 57.

(*r*) *Abergavenny* (*Earl*) v. *Brace* (1872), L. R. 7 Exch. 145; see *Brighton Corporation* v. *Brighton Guardians* (1880), 5 C. P. D. 368. A reversion to the Crown expectant on the determination of an estate tail granted by the Crown to a subject for services cannot be barred (Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 18; stat. (1542-3) 34 & 35 Hen. 8, c. 20, s. 2; *Robinson* v. *Giffard*, [1903] 1 Ch. 865). To such a reversion the Real Property Limitation Acts, 1833 (3 & 4 Will. 4, c. 27) and 1874 (37 & 38 Vict. c. 57), would have no application.

(*s*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 14; see p. 131, *ante*.

(*t*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 18; Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), ss. 3, 5; see p. 133, *ante*.

(*a*) 37 & 38 Vict. c. 57; see p. 136, *ante*. This provision contains no reference to the other sections of the Real Property Limitation Acts, 1833 (3 & 4 Will. 4, c. 27) and 1874 (37 & 38 Vict. c. 57), such as is found in the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), ss. 21, 22.

(*b*) As to the effect of a tenant in tail, who is under no disability when he becomes entitled in possession, afterwards coming under disability, see *Murray* v. *Watkins* (1890), 62 L. T. 796; Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 22; and compare p. 134, *ante*.

(*c*) See p. 139, *post*.

(*d*) See p. 143, *post*.

(*e*) See p. 144, *ante*.

(*f*) See *Hicks* v. *Sallitt* (1854), 3 De G. M. & G. 782, C. A.; *Thompson* v. *Simpson* (1841), 1 Dr. & War. 459, 489; *St. Mary Magdalen College, Oxford* v. *A.-G.* (1857), 6 H. L. Cas. 189, 215. The Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 24, applies the limitations set out in *ibid.*, ss. 1—23, to suits in equity. The Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), expressly applies to proceedings in equity; and see title EQUITY, Vol. XIII., p. 175. As to an action of foreclosure of a mortgage of an advowson in gross, see p. 173, *post*, and to an action for an assignment of dower, see p. 107, *ante*.

(*g*) *Wells* (*Dean and Chapter*) v. *Doddington* (1845), 2 Coll. 73.

SECT. 10. Equitable Rights to Real Property.

action on an equitable title for partition (*h*) or a foreclosure action (*i*) will be barred after twelve years.

Waste.

If a tenant for life commits equitable waste, the waste is in effect an abstraction of part of the inheritance, and an action by a remainderman in tail against the personal representatives of the tenant for life is barred at the end of twelve years, and time begins to run from the death of the tenant for life (*k*). If legal waste, for instance felling timber by a person impeachable for waste, is committed, the remainderman's remedy, both at law and in equity, is barred at the end of six years from the felling of the timber (*l*). But if the tenant for life is also entitled to the next estate of inheritance in remainder, time runs only from his death, and at the end of six years from such death every remainderman is barred of his remedy, although his estate may not have fallen into possession within that period (*m*).

Acquiescence.

Even in cases of waste where time does not begin to run against the remainderman till the death of the tenant for life, if the remainderman acquiesces before that event in the commission of the waste, he may prejudice his remedy in equity (*n*). But to produce such result there must be something more than mere non-interference by the remainderman (*o*).

Charities.

267. Charities are within the general provisions as to limitation (*p*), subject to the exception in the case of express trusts (*q*).

Whether beneficiary is barred when trustee is barred.

268. If the claim of a trustee is barred by lapse of time, the right of any *cestui que trust* who is entitled in possession is also barred (*r*). If the whole fee simple estate in land is vested in trustees upon trusts under which the persons interested take

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(*h*) *Thornton* v. *France*, [1897] 2 Q. B. 143, 158, C. A.

(*i*) *Pugh* v. *Heath* (1882), 7 App. Cas. 235; *Harlock* v. *Ashberry* (1882), 19 Ch. D. 539, C. A.; and see p. 145, *post;* but the provisions as to disabilities (see p. 133, *ante*) are not applicable to a redemption action (*Kinsman* v. *Rouse* (1881), 17 Ch. D. 104, 107).

(*k*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 24; *Leeds* (*Duke*) v. *Amherst* (*Earl*) (1846), 2 Ph. 117; see *Dashwood* v. *Magniac*, [1891] 3 Ch. 306, 386, C. A. As to equitable waste, see title SETTLEMENTS. As to waste by tenants for years, see title LANDLORD AND TENANT, Vol. XVIII., pp. 430, 496 *et seq.*

(*l*) Limitation Act, 1623 (21 Jac. 1, c. 16), s. 3; see p. 51, *ante;* and see *Higginbotham* v. *Hawkins* (1872), 7 Ch. App. 676; *Denys* v. *Shuckburgh* (1840), 4 Y. & C. (EX.) 42; *Seagram* v. *Knight* (1867), 2 Ch. App. 628; *Simpson* v. *Simpson* (1879), 3 L. R. Ir. 308.

(*m*) *Birch-Wolfe* v. *Birch* (1870), L. R. 9 Eq. 683; see *Bagot* v. *Bagot*, *Legge* v. *Legge* (1863), 32 Beav. 509; *Gent* v. *Harrison* (1859), John. 517; *Lowndes* v. *Norton* (1877), 6 Ch. D. 139; Craig, Rights and Liabilities as to Trees and Woods, 132, 146, 167.

(*n*) *Harcourt* v. *White* (1860), 28 Beav. 303; *Browne* v. *Cross* (1851), 14 Beav. 105; *Life Association of Scotland* v. *Siddal*, *Cooper* v. *Greene* (1861), 3 De G. F. & J. 58, C. A.

(*o*) *Life Association of Scotland* v. *Siddal*, *Cooper* v. *Greene*, *supra;* *Leeds* (*Duke*) v. *Amherst* (*Earl*), *supra.*

(*p*) See title CHARITIES, Vol. IV., p. 204.

(*q*) See p. 142, *post.*

(*r*) *Llewellin* v. *Mackworth* (1740), 2 Eq. Cas. Abr. 579; *Hovenden* v. *Annesley* (*Lord*) (1806), 2 Sch. & Lef. 607, 629; see *Williams* v. *Papworth*, [1900] A. C. 563, P. C.

in succession by way of remainder, and a mere trespasser, not claiming through any conveyance and not having notice of the equities affecting the land, gains possession, it seems that when the trustees are barred by dispossession for twelve years, all the *cestuis que trustent* out of possession are barred also, their title being dependent on that of the trustees (*s*). In such a case, in the absence of any special circumstance, the *cestuis que trustent* have no direct equity against the trespasser, their only remedy against him being ejectment in the name of their trustees, or ejectment in their own name in an action in which the trustees are made defendants as well as the trespasser. The *cestuis que trustent* in such a case would also have a remedy against the trustee in an action for breach of trust, but such an action would be barred at the expiration of six years from the time when the *cestuis que trustent* became entitled in possession or ceased to be under disability (*a*).

Trespasser without notice of trust.

If a trespasser who has notice of the equities to which the land is subject acquires, as against a trustee, a title to land by the operation of the statute, he holds subject to the equities, and the *cestuis que trustent* in such a case have an independent remedy against the trespasser, and time will not run against them until their estate becomes an estate in possession or they are free from disabilities (*b*).

Trespasser with notice of the equities.

269. Where the court during the pendency of an action is in possession of property by a receiver, that possession enures for the benefit of the party to the action ultimately declared to be entitled, so that during such possession time will run against, but not in favour of, a person who is a stranger to the suit (*c*).

Land in possession of receiver.

270. If a trustee who has received rents of property comes into court and asks for an account, mere lapse of time does not deprive him of his right to have his rights and liabilities as an accounting party ascertained (*d*).

Right of a trustee to an account.

SECT. 11.—*Express Trusts affecting Real Property.*

271. In the case of persons claiming under express trusts, lapse of time is unimportant in all cases between the *cestui que trust* and the trustee, or any person claiming through him otherwise than for value, so long as the trustee or the person so claiming through him

Time does not run in favour of trustees or volunteers claiming under them.

(*s*) *Barcroft* v. *Murphy*, [1896] 1 I. R. 590; *Cooper* v. *Warre* (1865), 18 Ir. Jur. 24; *Quinton* v. *Frith* (1868), 2 I. R. Eq. 396, 416; Lewin, Law of Trusts, 11th ed., 1087; but see *Williams* v. *Papworth*, [1900] A. C. 563, P. C.

(*a*) Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8; see p. 161, *post*.

(*b*) *Scott* v. *Scott* (1854), 4 H. L. Cas. 1065. As to a purchaser who buys under a title less than forty years being affected with notice, see titles EQUITY, Vol. XIII., pp. 100 *et seq.*; LANDLORD AND TENANT, Vol. XVIII., p. 590; SALE OF LAND.

(*c*) *Wrixon* v. *Vize* (1842), 3 Dr. & War. 104, 123; *Harrisson* v. *Duignan* (1842), 2 Dr. & War. 295; *Hunt* v. *Bateman* (1848), 10 I. Eq. R. 360, 378; *Groome* v. *Blake* (1858), 8 I. C. L. R. 428, Ex. Ch.; *Re Butler's Estate* (1863), 13 I. Ch. R. 453; *Re Slacke's Estate*, [1896] 1 I. R. 191, C. A. But as to an acknowledgment by the receiver, see *Penney* v. *Todd* (1878), 26 W. R. 502.

(*d*) *Smith* v. *O'Grady* (1870), L. R. 3 P. C. 311.

SECT. 11. Express Trusts affecting Real Property.

retains the property (*e*). The possession of the trustee is in effect deemed to be the possession of the *cestui que trust* (*f*). So long as a trustee receives the rents of an estate, time does not run against the *cestui que trust*, even though the trustee accounts for the rents to a person not entitled (*g*).

If property passes by the death of the trustee to his legal representative (*h*), or passes to a volunteer on conveyance (*i*), the right of the *cestui que trust* is preserved, and time does not run against that right, so that, however long such a representative or volunteer holds the property with or without knowledge of the trust, he will be liable, at any time, to an action to recover the inheritance and for an account of arrears of profits, provided there be no acquiescence or laches on the part of the *cestui que trust* (*k*).

Purchaser for value from trustee without notice.

Purchaser with notice.

272. If a trustee, having the legal estate in fee simple, conveys trust property to a purchaser for value without notice of the trust, the *cestui que trust* has, on general principles, no right in equity against such purchaser, and the right of the *cestui que trust* to the land is lost immediately on such conveyance (*l*). If, however, trust property has been conveyed to a purchaser for value with notice of the trust (*m*), the right of a *cestui que trust*, if a right to an estate in possession, to recover the property against such purchaser, or anyone claiming under him as a volunteer or with notice, will be barred in twelve years' time from the conveyance (*n*), time running, it seems, not from the contract for the purchase by which the estate is transferred in equity, but from the actual legal conveyance (*o*). The *cestui que trust*, on the conveyance for value being made, is in the position of any equitable owner who has a remedy in equity, but has no express trust in his favour; the time from which the statute begins to run depends on the nature of the equitable limitations, and so will not run

(*e*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 25; *Law* v. *Bagwell*, *Evans* v. *Bagwell* (1843), 4 Dr. & War. 398, 408. As to claims against a trustee for breach of trust when he has parted with the property, see p. 161, *post*. As to what are express trusts, see titles EQUITY, Vol. XIII., p. 154; TRUSTS AND TRUSTEES.

(*f*) *Hunt* v. *Bateman* (1848), 10 I. Eq. R. 360, *per* PENNEFATHER, B., at p. 380.

(*g*) *Lister* v. *Pickford* (1865), 34 L. J. (CH.) 582; see *Knight* v. *Bowyer* (1858), 2 De G. & J. 421, C. A.; *Christ's Hospital* v. *Grainger* (1848), 1 Mac. & G. 460; *East Stonehouse Urban Council* v. *Willoughby Brothers, Ltd.*, [1902] 2 K. B. 318. As to the effect of possession by the *cestui que trust*, see p. 138, *ante*.

(*h*) *Salter* v. *Cavanagh* (1838), 1 Dr. & Wal. 668; *Smith* v. *Smith* (1876), 1 L. R. Ir. 206, C. A.; *Patrick* v. *Simpson* (1889), 24 Q. B. D. 128.

(*i*) See *Sturgis* v. *Morse* (1858), 3 De G. & J. 1, C. A.

(*k*) As to acquiescence and laches, see title EQUITY, Vol. XIII., pp. 166 *et seq.*, 168 *et seq.*

(*l*) See titles SALE OF LAND; TRUSTS AND TRUSTEES; and p. 138, *ante*.

(*m*) As to purchasers for value being affected by notice, see titles EQUITY, Vol. XIII., pp. 76, 86; SALE OF LAND.

(*n*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 25.

(*o*) *A.-G.* v. *Flint* (1844), 4 Hare, 147. As to a settlement by a trustee of the trust property in a marriage settlement, see *Petre* v. *Petre* (1853), 1 Drew. 371, 397. As to the meaning of purchaser in the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 25, see *Smith* v. *Smith* (1876), 1 L. R. Ir. 206, C. A.; *A.-G.* v. *Davis* (1870), 18 W. R. 1132.

as against parties entitled in remainder or under disability until the remainder becomes an estate in possession or, in case of disability, until the parties under disability cease to be so or the period of thirty years has expired from the accrual of the right (*p*).

Annuity charged on land secured by trust.

273. If an annuity is charged on land on an express trust, and the land remains in the hands of the trustee, the annuity is "a rent" within the interpretation clause of the Real Property Limitation Act, 1833 (*q*), and is not "a sum of money or legacy charged upon or payable out of land" within the meaning of the Real Property Limitation Act, 1874 (*r*), s. 10. If no payment in respect of such annuity is made for more than twelve years the annuity is not extinguished (*s*); but the Real Property Limitation Act, 1874 (*r*), s. 10, applies to the arrears, and no distress or action can, it seems, be brought to recover any arrears, or at least not more than six years' arrears (*t*).

Devise or conveyance subject to annuity.

A devise to a person beneficially, subject to an annuity or other series of periodical payments, does not create an express trust, so as to except the case from the operation of the statute (*a*); nor does a conveyance of land to a person beneficially, subject to such a charge, when the grantee covenants with the grantor to pay the annuity (*b*). But such a trust is created when land is devised to trustees, subject to a charge of annuities, in trust to convey in strict settlement (*c*).

Express trusts.

274. Lapse of time as between a trustee and a *cestui que trust* is only unimportant in cases of express trusts of land or rent (*d*), that is, cases where such land or rent is vested in trustees on trust, either declared in express terms by a deed, will, or other written instrument, or else stated in such language that, by the rules of construction put on that language by courts of equity, the legal estate

(*p*) *Thompson* v. *Simpson* (1841), 1 Dr. & War. 459, 489; *St. Mary Magdalen College, Oxford* v. *A.-G.* (1857), 6 H. L. Cas. 189, 215; see Lewin, Law of Trusts, 11th ed., 1100; and as to the period of thirty years, see p. 134, *ante*.

(*q*) 3 & 4 Will. 4, c. 27; see p. 107, *ante*.

(*r*) 37 & 38 Vict. c. 57; see p. 82, *ante*.

(*s*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 25; see the text, *supra*.

(*t*) See p. 97, *ante;* and see *Hughes* v. *Coles* (1884), 27 Ch. D. 231; *Dower* v. *Dower* (1885), 15 L. R. Ir. 264; *Re Nugent's Trusts* (1885), 19 L. R. Ir. 140; *Re Belton's Estate*, [1894] 1 I. R. 537; compare *Re Drake's Estate*, [1909] 1 I. R. 136, C. A. As to the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 10, which deals with money charged on land, see p. 82, *ante*.

(*a*) See *Francis* v. *Grover* (1845), 5 Hare, 39; *Hunt* v. *Bateman* (1848), 10 I. Eq. R. 360; *Jacquet* v. *Jacquet* (1859), 27 Beav. 332; *Dickenson* v. *Teasdale* (1862), 1 De G. J. & Sm. 52.

(*b*) *Harrisson* v. *Duignan* (1842), 2 Dr. & War. 295; *Hughes* v. *Kelly* (1843), 3 Dr. & War. 482; *Massy* v. *O'Dell* (1859), 10 I. Ch. R. 22; *Thomson* v. *Eastwood* (1877), 2 App. Cas. 215; *Cunningham* v. *Foot* (1878), 3 App. Cas. 974.

(*c*) *Charitable Donations Commissioners* v. *Wybrants* (1845), 7 I. Eq. R. 580; *Hughes* v. *Coles, supra; Re Nugent's Trusts, supra*. But as to the effect of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 10, see p. 82, *ante*.

(*d*) For the definition of "rent," see p. 107, *ante*.

SECT. 11. Express Trusts affecting Real Property.

is vested in the trustees and the beneficial estate in another (*e*). The existence of a constructive trust does not prevent time from running; thus a person who has been in possession of land as a constructive trustee for more than twelve years may set up the statute against the person who, but for the lapse of time, would be the rightful owner (*f*).

Charities.

275. Although a mere gift direct to a charity creates no express trust (*g*), land or rent may be granted or devised in such a way as to create an express trust in favour of a charity. In such a case, so long as the property is in the power of those on whom the duty is cast of dealing with it for the purposes of the charity, the rights of the parties entitled to the benefit of the charity are preserved from the effect of lapse of time (*h*).

Trespasser in possession of charity land.

If a trespasser, or a person who claims independently of the right of the charity, gets into possession, time will run against the title of the charity just as it would against any *cestui que trust* entitled under an express trust, if the trustees were out of possession and the property held by a stranger (*i*).

Lease by charity trustees.

276. If the trustees of the charity property demise it by a lease reserving rent and the rent has been regularly paid, the right of the persons entitled to the benefit of the charity to upset the lease is barred at the end of twelve years from the time when it was granted (*k*). If a charity makes a lease of land which is void

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(*e*) *Hunt* v. *Bateman* (1848), 10 I. Eq. R. 360; *Drummond* v. *Sant* (1871), L. R. 6 Q. B. 763; *Dawkins* v. *Penrhyn* (*Lord*) (1878), 4 App. Cas. 51; *Cunningham* v. *Foot* (1878), 3 App. Cas. 974; *Re Nugent's Trusts* (1885), 19 L. R. Ir. 140; *Price* v. *Phillips* (1894), 13 R. 191; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, C. A.; *Re Montalt's* (*Earl*) *Estate*, [1909] 1 I. R. 390; *Re Drake's Estate*, [1909] 1 I. R. 136, C. A.; *Life Association of Scotland* v. *Siddal*, *Cooper* v. *Greene* (1861), 3 De G. F. & J. 58, C. A.; *Soar* v. *Ashwell*, [1893] 2 Q. B. 390, C. A.; *Smith* v. *Smith* (1876), 1 L. R. Ir. 206, C. A.; *Salter* v. *Cavanagh* (1838), 1 Dr. & Wal. 668; *Patrick* v. *Simpson* (1889), 24 Q. B. D. 128; *Nugent* v. *Nugent* (1884), 15 L. R. Ir. 321; *Mathew* v. *Brise* (1851), 14 Beav. 341. As to constructive trusts, see titles EQUITY, Vol. XIII., pp. 154 *et seq.*; TRUSTS AND TRUSTEES. As to the admission of extrinsic evidence in construing them, see title EVIDENCE, Vol. XIII., p. 567.

(*f*) *Petre* v. *Petre* (1853), 1 Drew. 371, 393; see *Henderson* v. *Atkins* (1859), 28 L. J. (CH.) 913; *Sands to Thompson* (1883), 22 Ch. D. 614; *Re Dane's Estate* (1871), 5 I. R. Eq. 498; *Churcher* v. *Martin* (1889), 42 Ch. D. 312; *Re Lacy*, *Royal General Theatrical Fund Association* v. *Kydd*, [1899] 2 Ch. 149; *Yardley* v. *Holland* (1875), L. R. 20 Eq. 428; *Mason* v. *Broadbent* (1863), 33 Beav. 296; *Locking* v. *Parker* (1872), 8 Ch. App. 30; *Re Alison*, *Johnson* v. *Mounsey* (1879), 11 Ch. D. 284, C. A.; *Chapman* v. *Corpe* (1879), 41 L. T. 22.

(*g*) *Charitable Donations Commissioners* v. *Wybrants* (1845), 7 I. Eq. R. 580; *St. Mary Magdalen College*, *Oxford* v. *A.-G.* (1857), 6 H. L. Cas. 189; compare *Re Drake's Estate*, [1909] 1 I. R. 136, C. A. See, generally, title CHARITIES, Vol. IV., pp. 204 *et seq.*

(*h*) *Charitable Donations Commissioners* v. *Wybrants*, *supra*; *A.-G.* v. *Persse* (1842), 2 Dr. & War. 67; *A.-G.* v. *Davis* (1870), 18 W. R. 1132.

(*i*) *Magdalen Hospital* (*President and Governors*) v. *Knotts* (1879), 4 App. Cas. 324; and see title CHARITIES, Vol. IV., p. 201. As to the running of time in favour of a charity in respect of land acquired under a void conveyance or lease, see *ibid.*, pp. 204, 205.

(*k*) *A.-G.* v. *Davey* (1859), 4 De G. & J. 136, C. A.; *A.-G.* v. *Payne* (1859), 27 Beav. 168; and see title CHARITIES, Vol. IV., p. 228. As to right of the

ab initio and the lessee enters and pays no rent, the title of the charity is barred at the expiration of twelve years from the entry (*l*).

SECT. 11. Express Trusts affecting Real Property.

SECT. 12.—*Fraud.*

Concealed fraud.

277. In every case of a concealed fraud the right of any person to sue to recover any land or rent of which he, or the person through whom he claims, may have been deprived by such fraud is deemed to have first accrued at and not before the time at which such fraud was, or with reasonable diligence might have been, discovered, except as against any *bonâ fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who at the time he made the purchase did not know, and had no reason to believe, that any such fraud had been committed (*m*).

Application of provision.

This provision applies to a case of designed fraud by which a person knowing to whom the right belongs conceals the circumstances giving the right, and by means of such concealment enables himself or some other person to enter and hold (*n*). For instance, where an insolvent deliberately omits to give information as to his property (*o*), or a person is designedly brought up as the second legitimate son, whereas he is, in fact, the eldest (*p*).

Conveyance by a lunatic.

278. A conveyance by a lunatic may be void or voidable, but the mere fact of possession having been obtained from a lunatic or person of infirm mind is not of itself sufficient to establish a case of fraud (*q*). But such a fact is an element in the proof of fraud, and if the execution of a conveyance or devise be obtained from such a person in circumstances which show *mala fides* on the part of the grantee or devisee, this is a case of fraud (*a*). A lunatic may be within the exception of the statute provided especially for

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beneficiaries as against a purchaser for value under a conveyance, see title CHARITIES, Vol. IV., p. 204.

(*l*) *Magdalen Hospital* (*President and Governors*) v. *Knotts* (1879), 4 App. Cas. 324. As to the liability of trustees holding on express trusts for a charity to account when there has been a fraudulent misappropriation by the trustees, see title CHARITIES, Vol. IV., pp. 276 *et seq.*

(*m*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 26, which specifically referred only to suits in equity, but by the effect of the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (3), it will, it seems, affect proceedings in all branches of the Supreme Court where equitable relief is sought. As to equitable relief against fraud, see title EQUITY, Vol. XIII., pp. 13 *et seq.*; as to fraud generally, see title MISREPRESENTATION AND FRAUD.

(*n*) *Petre* v. *Petre* (1853), 1 Drew. 371, 397; *Willis* v. *Howe* (*Earl*), [1893] 2 Ch. 545, 551, 552, C. A.; *Rains* v. *Buxton* (1880), 14 Ch. D. 537 (where mere occupation of a cellar was held not within the provision); but see *Re McCallum, McCallum* v. *McCallum*, [1901] 1 Ch. 143, C. A.; and compare p. 49, *ante*.

(*o*) *Sturgis* v. *Morse* (1858), 3 De G. & J. 1, C. A.

(*p*) *Vane* v. *Vane* (1873), 8 Ch. App. 383.

(*q*) *Price* v. *Berrington* (1850), 3 Mac. & G. 486; *Manby* v. *Bewicke* (1857), 3 K. & J. 342; compare title EQUITY, Vol. XIII., p. 16; and see, generally, title LUNATICS AND PERSONS OF UNSOUND MIND, pp. 389 *et seq.*, *post*. See also, as to conveyances impeachable by the position of the parties, title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., p. 103.

(*a*) *Lewis* v. *Thomas* (1843), 3 Hare, 26.

SECT. 12. **Fraud.**

disabilities (*b*), but in deciding at what time a person who has been defrauded might with reasonable diligence have discovered the fraud the court will not regard the capacity of such a person's mind to discover the fraud (*c*).

Diligence in discovery of fraud.

279. To prove that a person might have discovered a fraud within a reasonable time, it is not, it seems, sufficient to show that he might have discovered the fraud by pursuing an inquiry in some collateral matter; it must be shown that there has been something to put him upon inquiry respecting the matter itself, which inquiry, if made, would have led to the discovery of the real facts (*d*). But the fact that a very considerable interval of time has elapsed between the alleged fraud and its discovery may of itself be a reason for inferring that the fraud might with reasonable diligence have been discovered long before (*e*).

Party sued must be privy to fraud.

280. The fact that a concealed fraud has been committed does not prevent the running of time if neither the person sued nor his predecessor in title nor the agent of either was party or privy to the fraud at the time of its performance (*f*).

Bonâ fide purchaser for value.

281. Fraud does not prevent the running of time in the case of a *bonâ fide* purchaser who had no reason to believe that a fraud had been committed. It seems that the same circumstances as would be held sufficient to enable the person defrauded to discover the fraud with reasonable diligence should be considered sufficient to give a purchaser reason to believe that a fraud had been committed (*g*).

Purchase through agent.

A purchaser for value who, though himself ignorant of the fraud, contracts through an agent who knows of the fraud is not protected (*h*).

SECT. 13.—*Acquiescence.*

Acquiescence.

282. A court of equity may refuse relief before the lapse of the statutory period in all cases in which, on account of the plaintiff's acquiescence or on any other ground, courts of equity would before the Act have refused relief (*i*).

(*b*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 3; see p. 133, *ante*.

(*c*) *Manby* v. *Bewicke* (1857), 3 K. & J. 342.

(*d*) *Sturgis* v. *Morse* (1858), 3 De G. & J. 1, C. A.

(*e*) *Chetham* v. *Hoare* (1870), L. R. 9 Eq. 571; see *Laurance* v. *Norreys* (1890), 15 App. Cas. 210; *Re Jennens, Willis* v. *Howe* (*Earl*) (1880), 50 L. J. (CH.) 4; *Willis* v. *Howe* (*Earl*), [1893] 2 Ch. 545, C. A. In *Chetham* v. *Hoare, supra*, MALINS, V.-C., expressed an opinion that the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 26, should receive the strictest interpretation.

(*f*) *Re McCallum, McCallum* v. *McCallum*, [1901] 1 Ch. 143.

(*g*) *Sturgis* v. *Morse, supra*.

(*h*) *Vane* v. *Vane* (1873), 8 Ch. App. 383.

(*i*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 27, which gives no new effect to acquiescence, but leaves the rules of equity on this subject as they were before, and makes it clear that the statutory limitations applicable to suits in equity were not intended to interfere with such rules. As to the rules of equity with regard to acquiescence, see title EQUITY, Vol. XIII., p. 166.

SECT. 14.—*Mortgagor and Mortgagee.*

SUB-SECT. 1.—*Right of Mortgagee to Recover Mortgaged Land.*

(i.) *When the Mortgagor is in Possession.*

Mortgagee's right.

283. The right of a mortgagee (*j*) to enter upon the mortgaged land and to bring an action for its recovery, if no principal or interest is paid in respect of the mortgage, is barred twelve years after the right has accrued to him or someone through whom he claims (*k*).

Date from which time runs.

284. The date from which time runs against the mortgagee, when there has been no acknowledgment and no payment of principal or interest, depends partly on the nature of the property mortgaged, partly on the nature of the remedy which the mortgagee seeks to enforce, and partly on the form of the mortgage deed. If, in the case of an interest in land in possession, the mortgagee seeks to enter or recover possession of the land by action of ejectment, time, in the case of a mortgage in the ordinary form, will run from the date of the mortgage, from which time the mortgagee has the right of possession (*l*), and this is so even when the mortgage contains a covenant that it shall be lawful for the mortgagee to enter after default has been made in payment (*m*). If, however, there is a provision in the mortgage for quiet possession by the mortgagor until default upon a certain day, and the mortgage deed is executed by the mortgagee, the deed operates as a redemise by the mortgagee until the day named; till then, accordingly, ejectment will not lie, nor will time run against such an action (*n*). If, on the other hand, the remedy adopted is foreclosure, time will run from the date fixed for the payment of the principal (*o*); and, when the principal is made payable on demand,

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(*j*) As to the rights of mortgagor and mortgagee generally, see title MORTGAGE.

(*k*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1; Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 3. The time when the right accrues is governed generally by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1, and the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 3, 3rd branch. As to the effect of payment of principal or interest, see p. 146, *post*. The personal remedies of the mortgagee to recover the mortgage debt are generally governed by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8, the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 3, and the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 42; see pp. 76, 82, 97, *ante*.

(*l*) *Doe* d. *Roylance* v. *Lightfoot* (1841), 8 M. & W. 553; see *Rogers* v. *Grazebrook* (1846), 8 Q. B. 895; *Green* v. *Burns* (1879), 6 L. R. Ir. 173. In this event the action, which is one to recover possession of the land, falls within the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 3, 3rd branch; see p. 110, *ante*.

(*m*) *Doe* d. *Roylance* v. *Lightfoot*, *supra*.

(*n*) *Wilkinson* v. *Hall* (1837), 3 Bing. (N. C.) 508.

(*o*) *Kibble* v. *Fairthorne*, [1895] 1 Ch. 219, 225. Here the action, which is one to recover the equity of redemption in the land (*Wrixon* v. *Vize* (1842), 3 Dr. & War. 104, 120), falls within the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 3, 3rd branch; see p. 115, *ante* (*Wrixon* v. *Vize*, *supra*, at p. 117); see *Johnson* (*Samuel*) *& Sons, Ltd.* v. *Brock*, [1907] 2 Ch. 533, 536. As to the effect of a foreclosure order, see p. 147, *post*.

SECT. 14. Mortgagor and Mortgagee.

time will run from the date of the mortgage deed (*p*). If the interest mortgaged is reversionary, time will not run against a foreclosure action till the interest falls into possession, although the personal remedy to recover the mortgage debt may then be barred (*q*).

Effect of payment of principal or interest.

285. If any payment has been made in respect of the principal or interest due on a mortgage, time runs against any person claiming under the mortgage from the last of such payments (*r*), whether in the case of foreclosure or ejectment (*s*).

By whom interest must be paid.

The payment of principal or interest must be by a person liable as mortgagor or by some person on his behalf (*t*). Part payment or payment of interest by the owner of part of the property will preserve the mortgagee's right against all the property originally mortgaged (*a*).

Payment by a tenant for life is good as against remaindermen (*b*). If the mortgagee, or the person entitled to the interest on the mortgage debt, is tenant for life of the mortgaged land, time will not run during his life (*c*).

Payments by a mortgagor (*d*), or by a person bound as between himself and the mortgagor to pay (*e*), prevent time running in favour of an assignee of the equity of redemption (*f*).

To whom interest must be paid.

286. The payment of principal or interest must be made to a person entitled to receive it as mortgagee (*g*).

Payment after twelve years' non-payment.

287. If there was no possession adverse to the mortgagor at the date of the mortgage and interest is paid within twelve years of

(*p*) *Re Brown's* (*J.*) *Estate, Brown* v. *Brown*, [1893] 2 Ch. 300, 305; compare *Re Turner, Turner* v. *Spencer* (1894), 43 W. R. 153 (where the covenant was to pay on the death of a tenant for life); *Hamill* v. *Mathews* (1909), 44 I. L. T. 25, C. A. (where there was a covenant that the principal should not be called in for twenty years).

(*q*) *Hugill* v. *Wilkinson* (1888), 38 Ch. D. 480; *Re Lake's Trusts* (1890), 63 L. T. 416; *Re Conlan's Estate* (1892), 29 L. R. Ir. 199.

(*r*) Real Property Limitation Act, 1837 (7 Will. 4 & 1 Vict. c. 28) (sometimes called Littledale's Act); Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1; see *Doe* d. *Jones* v. *Williams* (1836), 5 Ad. & El. 291.

(*s*) *Harlock* v. *Ashberry* (1882), 19 Ch. D. 539, C. A.

(*t*) *Newbould* v. *Smith* (1886), 33 Ch. D. 127, C. A.; *Ellis* v. *Ellis*, [1905] 1 Ch. 613, 619; *Alston* v. *Mineard* (1906), 51 Sol. Jo. 132. As to the effect of payment of rent by a tenant of the mortgaged property, see p. 72, *ante;* or by a receiver, see pp. 72, 94, *ante.* As to payment of interest by a person, other than the mortgagor, entitled to pay, see p. 94, *ante;* or by a person liable only to the mortgagor to pay, see p. 94, *ante.* Such cases are applicable to the provisions now being dealt with.

(*a*) *Chinnery* v. *Evans* (1864), 11 H. L. Cas. 115, 133; *Re Muskerry* (1858), 9 I. Ch. R. 94, C. A.; and see p. 96, *ante.* As to the effect of payment of interest, by the specific devisee of mortgaged property, on the right of the mortgagee to an order for the administration of the whole of the testator's real estate, see *Re Lacey, Howard* v. *Lightfoot*, [1907] 1 Ch. 330, C. A.

(*b*) *Barclay* v. *Owen* (1889), 60 L. T. 220; see *Gregson* v. *Hindley* (1846), 10 Jur. 383 (where an admission by deed by a tenant for life of payment of interest was held not sufficient).

(*c*) *Wynne* v. *Styan* (1847), 2 Ph. 303; *Corbett* v. *Barker* (1796), 3 Anst. 755; *Topham* v. *Booth* (1887), 35 Ch. D. 607; *Re Finnegan's Estate*, [1906] 1 I. R. 370; *Re Hawes, Re Burchell, Burchell* v. *Hawes* (1892), 62 L. J. (CH.) 463.

(*d*) *Chinnery* v. *Evans, supra.*

(*e*) *Bradshaw* v. *Widdrington*, [1902] 2 Ch. 430, C. A.; *Cann* v. *Taylor* (1859), 1 F. & F. 651.

(*f*) See *contra, Newbould* v. *Smith* (1886), 33 Ch. D. 127, C. A.

(*g*) *Barclay* v. *Owen, supra;* and see p. 94, *ante.*

action brought, the mortgagee can recover the mortgaged land even although twelve years may previously have elapsed within which no interest was paid (*h*).

Property vested in trustees.

288. Where the property is vested in trustees, who receive and accumulate the rents, but nothing is paid by the mortgagor to the mortgagee, the latter will be barred after twelve years (*i*).

Payment in case of rentcharge.

289. Receipt of interest on a debt secured by a mortgage of a rentcharge will not, it seems, have the effect of keeping alive the mortgagee's right to distrain for the rentcharge on the land out of which it issues (*k*).

Mortgagor in possession after debt paid.

290. A mortgagor in possession is not deemed a tenant at will to his mortgagee (*l*), unless he has paid the mortgage debt and is in possession of the property without a reconveyance having been made to him; in which case the mortgagee's title to the legal estate is extinguished in thirteen years from the payment (*m*).

Effect of foreclosure order.

291. An order of foreclosure absolute obtained by a legal mortgagee vests the ownership and the beneficial title to the land in him for the first time, and a fresh right accrues to him at the date of the order, and an action to recover the land within twelve years of the order is not barred, although more than twelve years may have elapsed since the legal estate was conveyed to the mortgagee and since the last payment of principal or interest secured by the mortgage (*n*).

(*h*) Real Property Limitation Act, 1837 (7 Will. 4 & 1 Vict. c. 28). The Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 34, has, it seems, no application as against a mortgagee where interest has been paid; see the words at the end of the Real Property Limitation Act, 1837 (7 Will. 4 & 1 Vict. c. 28)—"anything in the said Act" (*i.e.*, the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27) "notwithstanding." In *Hemming* v. *Blanton* (1873), 42 L. J. (C. P.) 158, there had been possession adverse to the mortgagor at the date of the mortgage, and the mortgagee's right would have been extinguished even if interest had been regularly paid; compare *Gregson* v. *Hindley* (1846), 10 Jur. 383.

(*i*) *Re Hazeldine's Trusts*, [1908] 1 Ch. 34, C. A.

(*k*) The Real Property Limitation Act, 1837 (7 Will. 4 & 1 Vict. c. 28), is confined to mortgages of "land" as defined by the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 1, that is, to mortgages of corporeal hereditaments and of tithes in the hands of any person except spiritual and eleemosynary corporations sole (see *Brooks* v. *Muckleston*, [1909] 2 Ch. 519, 522, and p. 106, *ante*); the Real Property Limitation Act, 1837 (7 Will. 4 & 1 Vict. c. 28), does not apply to mortgages of rentcharges. It seems that if a mortgagee of a rentcharge does not receive any instalment of the rentcharge or any acknowledgment under the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 14, from the person in possession of the land out of which the rentcharge issues, and does not take any proceedings against such person to recover the rentcharge, the mortgagee's right as against the land will be barred at the expiration of twelve years from the mortgage debt becoming due (Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 3, 3rd branch; see p. 115, *ante*), although he may have received interest due on the mortgage. As to rentcharges generally, see title RENTCHARGES AND ANNUITIES.

(*l*) Within the meaning of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 7; see p. 125, *ante*.

(*m*) *Sands to Thompson* (1883), 22 Ch. D. 614.

(*n*) *Pugh* v. *Heath* (1882), 7 App. Cas. 235; and, as to foreclosure generally, see title MORTGAGE.

SECT. 14.

Mortgagor and Mortgagee.

(ii). *Where a Third Party is in Possession.*

Mortgagor out of possession at time of mortgage.

292. If the mortgagor is himself out of possession at the date of the mortgage, whether the property is in the occupation of a tenant or of someone holding without a title, the period of limitation in favour of the person in possession and as against the mortgagee, in cases where no payment of principal or interest has been made, must be calculated from the time at which, if no mortgage had been executed, the statute would begin to run against the title of the mortgagor, or those through whom he claims (*o*).

Effect of payment of interest.

When possession is not adverse.

But when some payment has been made in respect of the mortgage debt or interest, the payment sets time running afresh in favour of the right of all persons claiming under the mortgage, as against all persons in possession, provided that such possession was not adverse to the mortgagor at the time of the mortgage (*p*), or that the persons in possession had not at the time of the mortgage gained a good title under the statute as against the mortgagor (*a*). So if at the date of the mortgage a person is in possession by permission of the mortgagor and not adversely to him, then, although the statute may have begun to run against the mortgagor, if he pays interest or a part of the mortgage debt to the mortgagee, such payment confers a new right of entry on the mortgagee, and, so long as such a payment is made, time will not run against his right, although time will continue to run against the right of the mortgagor (*b*). In such case, at the expiration of the statutory period, the mortgagor's equity of redemption will be barred, but, it seems, the person so in possession will have a right to redeem the mortgage (*c*).

When possession is adverse.

If, however, at the date of the mortgage a person is in possession adversely to the mortgagor, the payment of interest or of part of the mortgage debt will not preserve the mortgagee's right as against the person so in possession (*d*).

Persons claiming under a mortgage.

293. A mortgagor who pays off a mortgage is not a person claiming under a mortgage within the meaning of the Real Property Limitation Act, 1837 (*e*), and time will not commence to run again, from the date of such payment, as against a third party

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(*o*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), ss. 3 *et seq.*

(*p*) *Doe* d. *Palmer* v. *Eyre* (1851), 17 Q. B. 366; *Ford* v. *Ager* (1863), 2 H. & C. 279; *Doe* d. *Baddeley* v. *Massey* (1851), 17 Q. B. 373; *Eyre* v. *Walsh* (1860), 10 I. C. L. R. 346; *Ludbrook* v. *Ludbrook*, [1901] 2 K. B. 96, C. A.; *Thornton* v. *France*, [1897] 2 Q. B. 143, C. A.

(*a*) *Doe* d. *Palmer* v. *Eyre*, *supra*, *per* Lord CAMPBELL, C.J., at p. 372; *Hemming* v. *Blanton* (1873), 42 L. J. (C. P.) 158.

(*b*) See *Doe* d. *Palmer* v. *Eyre*, *supra;* and cases cited in note (*p*), *supra*. The effect of the Real Property Limitation Act, 1837 (7 Will. 4 & 1 Vict. c. 28), in such a case is, as regards the mortgagee's right, to restore the old doctrine of adverse possession as it existed before the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27). As to the abolition of the doctrine otherwise, see p. 105, *ante*.

(*c*) *Fletcher* v. *Bird* (1896), Fisher, Law of Mortgage, 5th ed., Appendix, 972

(*d*) *Thornton* v. *France*, [1897] 2 Q. B. 143, C. A.

(*e*) 7 Will 4 & 1 Vict. c. 28; see p. 146, *ante*.

SECT. 14
Mortgagor and Mortgagee.

in possession (*f*). A person who pays off a mortgage debt and takes at once a conveyance of the legal estate in the mortgaged land from the mortgagee and of the equity of redemption from the mortgagor is a person claiming under a mortgage to the extent of the interest which he purchases from the mortgagee, but not with regard to the interest which he affects to purchase from the mortgagor (*g*). If a person buys from a mortgagee who exercises a power of sale, where his title is unbarred, the purchaser takes the whole interest, legal and equitable, in the mortgaged land, and the effect of such sale, it seems, is that a person who has by possession acquired a title under the statute to the equity of redemption loses his title.

Time as against second mortgagee.

294. The fact that a first mortgagee has taken possession after time has begun to run against a second mortgagee does not suspend the running of time against the latter (*h*).

SUB-SECT. 2.—*Redemption Actions.*

(i.)—*When the Mortgagor is Barred.*

Possession of mortgagee bars mortgagor.

295. If a mortgagee has obtained possession or receipt of the profits of any land or receipt of any rent (*i*) comprised in the mortgage, the mortgagor or any person claiming through him can only bring an action to redeem the mortgage within twelve years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor has been given (*k*).

Settlement of equity of redemption.

296. When the mortgagee goes into possession (*l*) the statute runs against the mortgagor and all persons claiming through him; therefore, if an equity of redemption is settled, and, after the settlement takes effect, the mortgagee goes into possession, all persons claiming under the settlement will be barred of their right to redeem in twelve years from the mortgagee's going into possession, and it is immaterial at what times their several estates take effect in possession (*m*).

Extension of time for redemption.

297. If the mortgage contract provides in terms that the mortgagor may redeem at any time during a period extending beyond

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(*f*) *Thornton* v. *France*, [1897] 2 Q. B. 143, C. A.; *Pugh* v. *Heath* (1882), 7 App. Cas. 235. A mortgagor who redeems would, it seems, be in the same position.

(*g*) *Doe* d. *Baddeley* v. *Massey* (1851), 17 Q. B. 373; see *Ford* v. *Ager* (1863), 2 H. & C. 279.

(*h*) *Johnson* (*Samuel*) *& Sons, Ltd.* v. *Brock*, [1907] 2 Ch. 533; compare *Kibble* v. *Fairthorne*, [1895] 1 Ch. 219; *Re Bermingham's Estate* (1870), 5 I. R. Eq. 147, C. A.

(*i*) "Rent" means rent as an inheritance; see p. 107, *ante*.

(*k*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 7. As to acknowledgments, see p. 151, *post*. As to a "Welsh mortgage," see *Balfe* v. *Lord* (1842), 2 Dr. & War. 480; and title MORTGAGE.

(*l*) The words "possession or receipt of profits" (see the text, *supra*) seem to include the case of a mortgagee receiving rent from a tenant in possession; receipt of such rent by a mortgagee for twelve years will, it seems, bar the mortgagor's right to redeem (*Ward* v. *Carttar* (1865), L. R. 1 Eq. 29; *Markwick* v. *Hardingham* (1880), 15 Ch. D. 339, C. A.).

(*m*) *Browne* v. *Cork* (*Bishop*) (1839), 1 Dr. & Wal. 700.

SECT. 14.
Mortgagor and Mortgagee.

twelve years, the mortgagor's title, it seems, will not be barred in twelve years after the mortgagee's possession commenced (*n*).

Mortgagee purchasing life estate.

298. If the tenant for life of an estate pays off a charge on the estate, he is, in the absence of evidence of an intention to put an end to the charge, entitled to it for his own benefit; and although twelve years elapse before his death without anything being paid on account of the charge or any acknowledgment being given, his representatives are entitled to the charge after his death as against the remaindermen (*o*).

Tenant for life paying off charge.

So, if a mortgagee in possession purchases a life estate in the equity of redemption, time will not run during the continuance of the life estate against those entitled in remainder to the equity of redemption (*p*).

Mortgage in form of trust for sale.

299. A mortgage made by conveyance to a trustee, in trust to sell and to pay to the mortgagee the principal of the mortgage debt and interest and to hand over the surplus to the mortgagor, is within the above limitation (*q*). In such a case, when the mortgagor's right of redemption is barred, the trust for the surplus money is also extinguished (*r*).

Receipt of rents by solicitor of mortgagor.

300. When a solicitor, to facilitate a transaction in which he is employed, himself pays off the mortgage debt of a client, and then receives the rents of the property, he is treated as having acted as agent for his client, and therefore time does not run in his favour as mortgagee in possession (*s*).

Mortgaged property descending as personalty of mortgagee.

301. If a mortgagee of land enters into possession and, after his death, the right of the mortgagor is barred by the statute, the land, as between his representatives, is treated as part of the personal estate (*t*).

Disabilities.

302. There is no provision in the Real Property Limitation Act, 1874 (*a*), s. 7, for disability of the mortgagor or his heirs, and the provisions already referred to (*b*) relating to disabilities have no application to such a case (*c*).

(ii.) *Effect of Acknowledgment by Mortgagee.*

Acknowledgment.

303. If an acknowledgment in writing of the title of the

(*n*) *Alderson* v. *White* (1858), 2 De G. & J. 97, 109.

(*o*) *Burrell* v. *Egremont* (*Earl*) (1844), 7 Beav. 205; *Carbery* (*Lord*) v. *Preston* (1850), 13 I. Eq. R. 455; *Baldwin* v. *Baldwin* (1855), 4 I. Ch. R. 501; compare *Kensington* (*Lord*) v. *Bouverie* (1855), 7 De G. M. & G. 134, C. A.; *Clarke* v. *Bodkin* (1851), 13 I. Eq. R. 492.

(*p*) *Hyde* v. *Dallaway* (1843), 2 Hare, 528; Sugden on the Statutes relating to Real Property, 2nd ed., 115; *Raffety* v. *King* (1836), 1 Keen, 601.

(*q*) *Locking* v. *Parker* (1872), 8 Ch. App. 30; *Re Alison, Johnson* v. *Mounsey* (1879), 11 Ch. D. 284, C. A.

(*r*) *Chapman* v. *Corpe* (1879), 41 L. T. 22; *Re Loveridge, Pearce* v. *Marsh*, [1904] 1 Ch. 518.

(*s*) *Ward* v. *Carttar* (1865), L. R. 1 Eq. 29.

(*t*) *A.-G.* v. *Vigor* (1803), 8 Ves. 256, 277; see *Re Loveridge, Drayton* v. *Loveridge*, [1902] 2 Ch. 859; *Re Loveridge, Pearce* v. *Marsh*, [1904] 1 Ch. 518. As to the extinction of the mortgagor's right to redeem a mortgage which includes both realty and personalty, see p. 173, *post*.

(*a*) 37 & 38 Vict. c. 57.

(*b*) See p. 133, *ante*.

(*c*) *Kinsman* v. *Rouse* (1881), 17 Ch. D. 104; *Forster* v. *Patterson* (1881), 17 Ch. D. 132.

mortgagor or of his right to redeem has been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or a person claiming through him, the action to redeem may be brought within twelve years after the giving of such acknowledgment or the last of such acknowledgments, if there has been more than one (*d*).

Acknowledgment after lapse of twelve years.

If twelve years elapse after the mortgagee goes into possession and no acknowledgment of the mortgagor's title is made, the title of the mortgagor to the land or rent is extinguished, and a subsequent acknowledgment will not revive his title (*e*).

What is sufficient acknowledgment.

304. An acknowledgment in order to keep alive a mortgagor's right to redeem must be signed by the mortgagee or other person claiming through him; an acknowledgment signed by his agent is not sufficient (*f*). It must be given to the mortgagor or his agent; if given to a third person it is of no avail (*g*), and an acknowledgment by a mortgagee in a deed assigning the mortgage and the mortgaged property to a third person, the mortgagor not being a party (*h*), or an acknowledgment by the mortgagee to the mortgagor, after the mortgagor has become bankrupt, is insufficient (*i*). In order that the person to whom an acknowledgment is made should be the agent of the mortgagor, it is sufficient if he has acted or has been treated as such by the person making the acknowledgment (*k*).

Account of rents.

If a mortgagee has entered into possession, accounts of his receipt of rents are not a sufficient acknowledgment, unless they are signed by him and kept for or communicated to the mortgagor or his agent (*l*).

Form.

305. No particular form of acknowledgment is required, but any expression in writing would seem sufficient, if from it there may fairly be inferred an admission of the right to redeem in the persons to whom the expression is communicated (*m*). In judging whether a document is a sufficient acknowledgment the court will look at the circumstances in which it was written and will construe it in the way in which the writer intended it to be construed by the person to whom it is addressed (*n*).

(*d*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 7, substituted for the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 28, as to which see *Batchelor* v. *Middleton* (1848), 6 Hare, 75. For a form of acknowledgment, see Encyclopædia of Forms and Precedents, Vol. I., p. 195.

(*e*) *Sanders* v. *Sanders* (1881), 19 Ch. D. 373, C. A.; see *Kibble* v. *Fairthorne*, [1895] 1 Ch. 219; *Beamish* v. *Whitney*, [1908] 1 I. R. 38; [1909] 1 I. R. 360; compare *Stansfield* v. *Hobson* (1853), 3 De G. M. & G. 620, C. A. As to the old law, see *Pendleton* v. *Rooth* (1859), 1 De G. F. & J. 81, C. A.

(*f*) See *Richardson* v. *Younge* (1871), 6 Ch. App. 478, *per* MELLISH, L.J., at p. 480.

(*g*) *Batchelor* v. *Middleton*, *supra*, at p. 83; see *Wilson* v. *Walton and Kirkdale Permanent Building Society* (1903), 19 T. L. R. 408; *Re Metropolis and Counties Permanent Investment Building Society, Gatfield's Case*, [1911] 1 Ch. 689.

(*h*) *Lucas* v. *Dennison* (1843), 13 Sim. 584.

(*i*) *Markwick* v. *Hardingham* (1880), 15 Ch. D. 339, C. A.

(*k*) *Trulock* v. *Robey* (1841), 12 Sim. 402.

(*l*) In *Baker* v. *Wetton* (1845), 14 Sim. 426, this question was raised but not decided; see Sugden on the Statutes relating to Real Property, 2nd ed. 117; *Re Alison, Johnson* v. *Mounsey* (1879), 11 Ch. D. 284, C. A.

(*m*) *Stansfield* v. *Hobson*, *supra*; *Thompson* v. *Bowyer* (1863), 9 Jur. (N. S.) 863. For some suitable forms, see Encyclopædia of Forms and Precedents, Vol. I., pp. 189 *et seq.*

(*n*) *Trulock* v. *Robey*, *supra*, *per* SHADWELL, V.-C., at p. 406.

SECT. 14. Mortgagor and Mortgagee.

To one of several mortgagors.

By one of several mortgagees.

306. If there are more mortgagors than one, or more persons than one claiming through the mortgagor or mortgagors, such an acknowledgment, if given to any of such mortgagors or persons, is as effectual as if it had been given to all such mortgagors (*o*).

If there are more mortgagees than one, or more persons than one claiming the estate of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, if entitled to separate interests, is effectual, but only as against the party or parties signing and any person claiming under him or them or entitled to any estate to take effect after or in defeasance of his or their estate (*p*).

An acknowledgment by a person entitled jointly has no effect (*q*). When any such person who has given such acknowledgment is entitled to a divided part of the land or rent (*r*), and not to an ascertained part of the mortgage money, the mortgagor or mortgagors are entitled to redeem the divided part, on payment with interest of such part of the mortgage money which bears the same proportion to the whole of the mortgage money as the value of the divided part bears to the value of the whole of the land or rent comprised in the mortgage (*s*).

SECT. 15.—*Property of Spiritual and Eleemosynary Corporations Sole.*

Period of limitation.

307. No archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole may take proceedings to recover any land or rent (*a*) belonging to such corporation except within the following period next after the time at which the right of such corporation sole has accrued, *i.e.*, the period during which two persons in succession have held the office or benefice in respect whereof the land or rent is claimed and six years after a third person has been appointed thereto, if such period, with the addition of the six years, amounts to sixty years; if such period, with such addition, does not amount to sixty years, the period is to be extended to sixty years (*b*).

When time begins to run.

308. The period within which an action may be brought to recover land or rent belonging to a spiritual or eleemosynary corporation sole does not begin until the right has accrued (*c*). The time when

(*o*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 7.

(*p*) *Ibid.*

(*q*) *Richardson* v. *Younge* (1871), 6 Ch. App. 478.

(*r*) For the definition of "rent," see p. 107, *ante.*

(*s*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 7.

(*a*) For the definitions of "land" and "rent," see pp. 106, 107, *ante.* As to tithe and tithe rentcharge, see title ECCLESIASTICAL LAW, Vol. XI., p. 748, note (*e*), and see *ibid.*, p. 742, note (*c*); see also pp. 106, 109, *ante.*

(*b*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 29, which excepts spiritual and eleemosynary corporations sole from *ibid.*, s. 2 (now the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1); the period of limitation under the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 29, is never less than sixty years. Claims by spiritual and eleemosynary corporations aggregate (see title CORPORATIONS, Vol. VIII., p. 304) are regulated by the general provisions of the Real Property Limitation Acts, 1833 (3 & 4 Will. 4, c. 27) and 1874 (37 & 38 Vict. c. 57).

(*c*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 29.

SECT. 15. Property of Spiritual and Eleemosynary Corporations Sole.

the right is deemed to accrue in each particular case must be determined by the general statutory rules relating to the accrual of a right (*d*) and by the statutory provisions as to acknowledgments (*e*). When the remedy is once taken away, the whole right to the inheritance in the land or rent is extinguished (*f*).

Ecclesiastical Commissioners.

Special power not generally applicable.

309. If at the time when any estate becomes vested in the Ecclesiastical Commissioners (*g*) the corporation sole to which the estate belonged had a right o action against a trespasser on property belonging to the corporation and this right is not then barred, the Commissioners, by virtue of statutory powers (*h*) vested in them, are not barred until the expiration of sixty years from the accrual of the right (*i*); but if property belonging to an ecclesiastical corporation sole is vested in a lay body by an Act which contains no such powers as those above referred to, the period of limitation applicable to the lay body for the recovery of land or rent is twelve years from the accrual of the right of action (*k*).

SECT. 16.—*Presentations and Advowsons.*

Rights of patron on usurpation.

310. If a stranger usurps a presentation to a benefice, the rightful patron can recover the benefice by an action of *quare impedit*, provided he pursues his remedy within six months from the institution of the usurper's presentee. But, even if the rightful patron does not do so, the usurper gains no right to the advowson, nor anything more than the benefit of a single presentation (*l*). This provision applies if a mortgagor of an advowson, who is equitably entitled to present to a benefice, brings an action to compel a presentee to resign (*m*).

When time begins to run

The time from which the statute begins to run on the occasion of an adverse presentation is the time when the clerk obtains possession of the benefice, and this, it seems, is the time of induction, which is the act by which the clerk is made complete incumbent (*n*).

Enforcement of right to present.

311. The limitation on the right of a person to bring an action to enforce a right to present to an ecclesiastical benefice is three incumbencies or sixty years (*o*).

(*d*) See p. 110, *ante*.
(*e*) See p. 131, *ante*.
(*f*) See p. 155, *post*.
(*g*) See title ECCLESIASTICAL LAW, Vol. XI., pp. 794 *et seq.*
(*h*) *Ibid.*, p. 800.
(*i*) *Ecclesiastical Commissioners of England and Wales* v. *Rowe* (1880), 5 App. Cas. 736, where Lord SELBORNE, L.C., expressed an opinion that when once the Commissioners had gained possession of any land vested in them, the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 29, no longer applied.
(*k*) *Irish Land Commission* v. *Grant* (1884), 10 App. Cas. 14.
(*l*) See title ECCLESIASTICAL LAW, Vol. XI., pp. 586—589; Stat. Westminister II. (1285), 13 Edw. 1, c. 5; Advowsons Act, 1708 (7 Ann. c. 18); R. S. C., Appendix A, Part III., s. 4.
(*m*) *Gardiner* v. *Griffith* (1727), 2 P. Wms. 404; *Boteler* v. *Allington* (1747), 3 Atk. 453. As to mortgages of an advowson, see p. 173, *post*.
(*n*) Watson, Clergyman's Law, c. 15, p. 155.
(*o*) See title ECCLESIASTICAL LAW, Vol. XI., pp. 589, 590; and see *ibid.*,

SECT. 16. Presentations and Advowsons.

There are no provisions either for disabilities or acknowledgments in actions with respect to rights of presentation.

Adverse possession.

312. The old doctrine of adverse possession applies in cases of advowsons (*p*), and time does not run against a patron's right to present from the mere fact of a benefice being in the hands of a clerk who did not obtain possession from such patron or his predecessor, but only if such possession was obtained adversely to the patron's title.

Joint ownership.

If an advowson is vested in two or more coparceners, joint tenants, or tenants in common, and a partition is made between them, each of them is separately seised of her or his right to present in turn independently of the rest (*q*), and such presentation is in no way inconsistent with the right of the other or others to present in turn subsequently. But, although a presentation by one coparcener, joint tenant, or tenant in common, in turn, is never considered adverse to the right of the partner in title, and although a presentation, adverse to one entitled to present on any vacancy, is not adverse to the right of another person entitled to present, yet for the purpose of the statutory period of limitation of one hundred years (*r*) a presentation adverse to one of such parties has the same effect as if it had been adverse to all.

Remainder after estates tail.

313. A person claiming an estate in an advowson, which the owner of an estate tail might have barred, is to be deemed to claim through the person entitled to such estate tail, and is barred by presentations adverse to the tenant in tail (*s*). But it seems that if such tenant in tail aliens the estate and creates a base fee, the persons presenting in right of such base fee do not present adversely to the right in remainder, and, if this is so, that right can never in such circumstances be barred, as long as the base fee lasts, the law concerning advowsons being in this respect different from that relating to other hereditaments (*t*).

Presentation by Crown or universities of Oxford or Cambridge.

314. Where the right of presentation passes to the Crown in such cases as by forfeiture for simony (*a*), or by reason of the outlawry of the patron (*b*), a clerk presented by the Crown would, it seems, obtain possession adversely to the patron's right (*c*). When the

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p. 590, note (*a*); Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), ss. 30, 33. Before the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), there was no limitation for such rights.

(*p*) *Ibid.*, s. 30. As to adverse possession generally, see cases cited in note (*r*), p. 106, *ante*.

(*q*) Advowsons Act, 1708 (7 Ann. c. 18); see title ECCLESIASTICAL LAW, Vol. XI., pp. 571, 572.

(*r*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 33; see title ECCLESIASTICAL LAW, Vol. XI., p. 589.

(*s*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 32; compare pp. 135 *et seq.*, *ante*.

(*t*) See p. 105, *ante*.

(*a*) Stat. (1588—9) 31 Eliz. c. 6, s. 4. The right to present is given "for one turn only."

(*b*) Com. Dig. Esglise (H. 6); Watson, Clergyman's Law, c. 11, p. 104. But outlawry is now almost unknown; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 431.

(*c*) As to the effect of a presentation by the Crown on a lapse, see title

right to present goes to either of the universities of Oxford or Cambridge for the reason that the patron is a Papist (*d*), the presentation is, it seems, not adverse to the patron's right.

SECT. 16. Presentations and Advowsons.

SECT. 17.—*Title Extinguished by Dispossession.*

SUB-SECT. 1.—*Extinguishment of Title.*

Extinguishment of title.

315. At the determination of the statutory period (*e*) limited to any person for making an entry or bringing an action, the right and title of such person to the land, rent, or advowson, for the recovery of which such entry or action might have been made or brought within such period, is extinguished (*f*), and such title cannot afterwards be revested either by re-entry (*g*) or by a subsequent acknowledgment (*h*). A rentcharge is extinguished when the remedy to recover it is barred (*i*), and it seems that, even when there is a covenant to pay a rentcharge, the right of the covenantee to sue upon the covenant is then also destroyed (*k*).

SUB-SECT. 2.—*Nature of Title Acquired.*

Nature of title acquired.

316. The operation of the statute is merely negative; it extinguishes the right and title of the dispossessed owner and leaves the occupant with a title gained by the fact of possession and resting on the infirmity of the right of others to eject him (*l*).

ECCLESIASTICAL LAW, Vol. XI., pp. 590, note (*a*), 591. As to effect of a presentation by the Crown on the removal of an incumbent to a bishopric, see *ibid.*, p. 590, note (*a*).

(*d*) See title ECCLESIASTICAL LAW, Vol. XI., p. 806.

(*e*) For the respective statutory periods, see pp. 109, 123, 126, 128, 135, 143, 145, 153, *ante*.

(*f*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 34; *Dawkins* v. *Penrhyn* (*Lord*) (1878), 4 App. Cas. 51, 59. The earlier Limitation Act, 1623 (21 Jac. 1, c. 16), s. 1, only took away the remedy, leaving the title in the owner who was out of possession; but see *Doe* d. *Harding* v. *Cooke* (1831), 7 Bing. 346.

(*g*) *Brassington* v. *Llewellyn* (1858), 27 L. J. (EX.) 297; *Bryan* v. *Cowdal* (1873), 21 W. R. 693; *Re Jolly, Gathercole* v. *Norfolk*, [1900] 2 Ch. 616, C. A.

(*h*) *Sanders* v. *Sanders* (1881), 19 Ch. D. 373, C. A.; *Re Hobbs, Hobbs* v. *Wade* (1887), 36 Ch. D. 553; see *Re M'Clure and Garrett's Contract*, [1899] 1 I. R. 225; *Beamish* v. *Whitney*, [1908] 1 I. R. 38; [1909] 1 I. R. 360. Note, however, the effect of payment of rent under a tenancy from year to year (note (*g*), p. 126, *ante*) or payment of interest on a mortgage (p. 146, *ante*), after non-payment for twelve years.

(*i*) *Shaw* v. *Crompton*, [1910] 2 K. B. 370; see pp. 113, 114, *ante*.

(*k*) See *Sutton* v. *Sutton* (1882), 22 Ch. D. 511, C. A.; see p. 83, *ante*.

(*l*) See *Dixon* v. *Gayfere* (No. 1), *Fluker* v. *Gordon* (1853), 17 Beav. 421; *Tichborne* v. *Weir* (1892), 67 L. T. 735, C. A. It has been said that the effect of the statute is to execute a conveyance to the person in possession, and not only to extinguish the right of the former owner, but to transfer the legal fee simple (*Scott* v. *Nixon* (1843), 3 Dr. & War. 388, 407; see *Doe* d. *Jukes* v. *Sumner* (1845), 14 M. & W. 39, 42; *Incorporated Society in Dublin for Promoting English Protestant Schools in Ireland* v. *Richards* (1841), 1 Dr. & War. 258, 289). But it is submitted that the true view is that stated in the text. The statute which gives a wrongful holder a title to land does not give him a way of necessity (*Wilkes* v. *Greenway* (1890), 6 T. L. R. 449, C. A.); see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 289.

SECT. 17.
Title Extinguished by Dispossession.

Title forced on a purchaser.

Necessity to show state of title at commencement of possession.

317. A title gained by the operation of the statute is a good title, both at law and in equity, and will be forced by the court on a reluctant purchaser (*m*). But proof that a vendor and those through whom he claims have had independent possession of an estate for twelve years will not be sufficient to establish a saleable title, without evidence to show the state of the title at the time such possession commenced. If the contract for purchase is an open one, possession for twelve years is not sufficient; in such case a forty years' title by possession is required (*n*). Although possession of land is *primâ facie* evidence of seisin in fee, it does not follow that a person who has gained a title to land from the fact of certain persons interested in it being barred of their rights has got the fee simple vested in himself; for although he may have gained an indefeasible title as against those who had an estate in possession, there may be persons entitled in reversion or remainder whose rights are quite unaffected by the statute (*o*).

Quantity of estate acquired.

318. The title gained by possession is limited by easements and other rights which still remain unextinguished (*p*), and is no larger than the interest which the rightful owner has lost by the operation of the statute, and must therefore, it seems, have the same legal character and be freehold, leasehold, or copyhold accordingly (*q*).

Leaseholds.

But the person who gains by the statute the leasehold interest to property held on lease does not thereby become liable to be sued on the covenants of the lease; the term is in no sense vested in him (*r*), though, if such covenants are enforceable by a proviso for re-entry on breach of any of them, the person who so gains a title may indirectly be forced to perform such covenants to preserve his interest from being destroyed by ejectment. A title acquired by adverse possession does not destroy the right of persons entitled to the benefit of covenants to enforce them against the land (*a*).

(*m*) *Scott* v. *Nixon* (1843), 3 Dr. & War. 388; *Lethbridge* v. *Kirkman* (1855), 25 L. J. (Q. B.) 89; see *Tuthill* v. *Rogers* (1844), 1 Jo. & Lat. 36, 72; *Games* v. *Bonnor* (1884), 54 L. J. (CH.) 517, C. A.; *Sands to Thompson* (1883), 22 Ch. D. 614. When property is purchased compulsorily under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and the purchase-money is paid into court, a person who has been in possession for the statutory period is entitled to an order for payment out under *ibid.*, s. 79 (*Re Harris, Ex parte London County Council* (1909), 53 Sol. Jo. 716; *Re Metropolitan Street Improvement Act*, 1877, *Ex parte Chamberlain* (1880), 14 Ch. D. 323); see *Ex parte Winder* (1877), 6 Ch. D. 696; *Gedye* v. *H.M. Commissioners of Works and Public Buildings*, [1891] 2 Ch. 630, C. A.; and title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 116.

(*n*) *Jacobs* v. *Revell*, [1900] 2 Ch. 858; see *Re Nisbet and Potts' Contract*, [1906] 1 Ch. 386, C. A.; *Moulton* v. *Edmonds* (1859), 1 De G. F. & J. 246, 250; and title SALE OF LAND.

(*o*) See p. 116, *ante*.

(*p*) See *Re Nisbet and Potts' Contract, supra*.

(*q*) See *Rankin* v. *M'Murtry* (1889), 24 L. R. Ir. 290, 297; *Walter* v. *Yalden*, [1902] 2 K. B. 304.

(*r*) *Tichborne* v. *Weir* (1892), 67 L. T. 735, C. A.; *O'Connor* v. *Foley*, [1905] 1 I. R. 1; *Williams* v. *Allen* (1889), 5 T. L. R. 200; compare *Re Hayden*, [1904] 1 I. R. 1. As to the effect of a person entering, as against a tenant from year to year, and paying rent, see *Jackson* v. *M'Master* (1890), 28 L. R. Ir. 176, C. A.; *Mulcaire* v. *Lane-Joynt* (1893), 32 L. R. Ir. 683, C. A.

(*a*) See *Re Nisbet and Potts' Contract, supra*. This applies to restrictive covenants as well as to positive covenants, whether the restrictive covenants

SECT. 17. Title Extinguished by Dispossession.

Copyholds.

When a person has possession of copyhold land for the statutory period without paying any rent or making any acknowledgment to the lord, the interest which is acquired by such person is a freehold interest (*b*). The extinction of one service is no ground for presuming the extinction of other services to which the same land is subject, or the extinction of the tenure to which the services are incident (*c*). However, if for a very long period no rights of tenure whatever are exercised in respect of land held of a manor, and it is treated and dealt with adversely to the rights of the lord, an enfranchisement or release of tenure may be presumed (*d*).

Joint possession.

319. When two or more persons acquire a title under the statute by joint possession, they become joint tenants of the property so acquired (*e*), unless they have a beneficial interest as tenants in common as in the case of next of kin (*f*).

SUB-SECT. 3.—*Possession by Successive Trespassers.*

Statutory title is transmissible.

320. A person who is in possession of land without title has, while he continues in possession, and before the statutory period has elapsed, a transmissible and inheritable interest in the property, but an interest which is liable at any moment to be defeated by the entry of the rightful owner; and if such person is succeeded in possession by one claiming through him who holds till the expiration of the statutory period, such a successor has then as good a right to the possession as if he himself had occupied for the whole period (*g*).

Abandonment of trespasser's possession.

321. If an intruder without title holds possession for less than the statutory period and then abandons possession and no other person immediately takes possession of the land, as there is then no person against whom the rightful owner can bring an action the rightful owner is in the same position as if no intrusion had taken

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are contained in a lease or in the conveyance of freehold. The Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 34, does not extinguish such covenants, and, it seems, they are enforceable against the land in the case of a person who acquires a title by the statute. They are also similarly enforceable against a purchaser for valuable consideration from such a person without actual notice, if such purchaser accepts a title for less than the full statutory period (forty years), and if by insisting on a title for the full statutory period he would have had notice of the covenants (*Re Nisbet and Potts' Contract*, [1906] 1 Ch. 386, C. A.); and see titles LANDLORD AND TENANT, Vol. XVIII., pp. 382, 383, 590; SALE OF LAND.

(*b*) *A.-G.* v. *Tomline* (1880), 15 Ch. D. 150, C. A.

(*c*) *Chichester* (*Earl*) v. *Hall* (1851), 17 L. T. (o. s.) 121; and see title COPYHOLDS, Vol. VIII., p. 45.

(*d*) *Roe* d. *Johnson* v. *Ireland* (1809), 11 East, 280; *Re Lidiard and Jackson's and Broadley's Contract* (1889), 42 Ch. D. 254. In *Turner* v. *West Bromwich Union Guardians* (1860), 9 W. R. 155, WOOD, V.-C., held that no Statute of Limitation applies to such a case; and see title COPYHOLDS, Vol. VIII., p. 114.

(*e*) *Ward* v. *Ward* (1871), 6 Ch. App. 789; *Bolling* v. *Hobday* (1882), 31 W. R. 9; *Coyle* v. *M'Fadden*, [1901] 1 I. R. 298; *Smith* v. *Savage*, [1906] 1 I. R. 469.

(*f*) *Smith* v. *Savage*, *supra*; *Marten* v. *Kearney* (1902), 36 I. L. T. 117; see *MacCormack* v. *Courtney*, [1895] 2 I. R. 97.

(*g*) *Asher* v. *Whitlock* (1865), L. R. 1 Q. B. 1; *Keeffe* v. *Kirby* (1857), 6 I. C. L. R. 591; *Clarke* v. *Clarke* (1868), 2 I. R. C. L. 395; *Perry* v. *Clissold*, [1907] A. C. 73, 79, P. C.; *Calder* v. *Alexander* (1900), 16 T. L. R. 294.

SECT. 17. Title Extinguished by Dispossession.

place, and, although he is out of possession for the statutory period and another intruder subsequently takes possession but does not hold for the statutory period, the title of the rightful owner is unaffected by the statute (*h*).

Possession by series of trespassers.

322. If a series of trespassers, adverse to one another and to the rightful owner, take and keep possession of land in succession for various periods, each less than, but exceeding on the whole, twelve years, the rightful owner is barred (*i*). In such a case the person in possession at the expiration of the period of twelve years, although he does not necessarily acquire a title by the statute, may succeed in holding the property, not by reason of the validity of his own title, but by reason of the infirmity of the title of anyone else to eject him (*k*). It has been suggested that the earliest possessor within the twelve years has the best title (*l*). If in such a case the court is in possession of the property by a receiver, and no one has acquired a statutory title, it may determine the rights of competing claimants without regard to the statute, and award the property to the person who would be entitled apart from the statute (*m*).

SUB-SECT. 4.—*Possession under Will, Settlement, or by Lessee.*

Estoppel.

323. If a person takes wrongful possession of land and keeps it for the prescribed period of limitation, not claiming to be himself entitled in fee, but claiming a limited interest under some instrument, it does not follow that he can, by possession until the rightful owner is barred, claim the whole estate in perpetuity (*n*). Whether possession was taken under the instrument or independently of it is, it seems, a question of fact in each particular case (*o*).

Trespasser and lessee.

324. A trespasser who has occupied without title, and for less than the statutory period, a plot of land belonging to another, and who afterwards takes as tenant from the owner of the plot a strip of adjacent land, is not thereby prevented from acquiring as against his landlord, by virtue of the statute, a title to that plot (*p*).

(*h*) *Agency Co.* v. *Short* (1888), 13 App. Cas. 793, P. C.; see *Willis* v. *Howe* (*Earl*), [1893] 2 Ch. 545, C. A.; *Johnson* (*Samuel*) *& Sons, Ltd.* v. *Brock*, [1907] 2 Ch. 533.

(*i*) *Doe* d. *Goody* v. *Carter* (1847), 9 Q. B. 863.

(*k*) See *Dixon* v. *Gayfere* (No. 1), *Fluker* v. *Gordon* (1853), 17 Beav. 421; *Asher* v. *Whitlock* (1865), L. R. 1 Q. B. 1, 4, where some observations of ROMILLY, M.R., in *Dixon* v. *Gayfere* (No. 1), *Fluker* v. *Gordon*, *supra*, were criticised; *Doe* d. *Goody* v. *Carter*, *supra*; *Doe* d. *Carter* v. *Barnard* (1849), 13 Q. B. 945.

(*l*) See Pollock and Wright, Possession in the Common Law, 95, quoted by LINDLEY, L.J., in *Dalton* v. *Fitzgerald*, [1897] 2 Ch. 86, C. A., at p. 90.

(*m*) *Dixon* v. *Gayfere* (No. 1), *Fluker* v. *Gordon*, *supra*.

(*n*) As to the reasons for this see title ESTOPPEL, Vol. XIII., p. 374. If the interest claimed is a life estate under a will, the devisee in remainder will be entitled to enter, when that estate determines; see *Hawksbee* v. *Hawksbee* (1853), 11 Hare, 230; *Anstee* v. *Nelms* (1856), 1 H. & N. 225; *Board* v. *Board* (1873), L. R. 9 Q. B. 48; *Molony* v. *Molony*, [1894] 2 I. R. 1. The doctrine of *Board* v. *Board*, *supra*, applies to instruments other than wills (*Dalton* v. *Fitzgerald*, *supra*, *per* RIGBY, L.J., at p. 95).

(*o*) *Anstee* v. *Nelms*, *supra*.

(*p*) See title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 533—535, and as to the effect of encroachments on adjoining land by a lessee, see title LANDLORD AND TENANT, Vol. XVIII., p. 562.

SUB-SECT. 5.—*Registered Land.*

SECT. 17.

Title Extinguished by Dispossession.

Registered land.

325. A title to land adverse to or in derogation of the title of the proprietor registered under the Land Transfer Act, 1897 (*q*), cannot be acquired by any length of possession, and the registered proprietor may at any time make an entry or bring an action to recover possession of the land (*r*). But where a person would, but for this provision, have obtained a title to registered land, he may apply for an order for the rectification of the register, and, on such application, the court may, subject to any estate or rights acquired by registration for valuable consideration, order the register to be rectified accordingly (*a*).

SECT. 18.—*Rights of the Crown and the Duchy of Cornwall.*

Limitation to claim to manor or real property by the Crown.

326. The Crown (*b*) cannot sue or lay claim to any manor or other real property, other than liberties or franchises, except where the right or title has first accrued within sixty years before the commencement of proceedings, unless the Crown has been answered by any such right or has taken the rents or profits within such period of sixty years (*c*).

(*q*) 60 & 61 Vict. c. 65; see title REAL PROPERTY AND CHATTELS REAL.

(*r*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 12, which re-enacts the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 21, but contains some additional provisions.

(*a*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 12. There is another proviso that this section is not to prejudice, as against any person registered as first proprietor of land with a possessory title only, any adverse claim in respect of length of possession of any other person who was in possession of such land at the time when the registration of such first proprietor took place. There does not appear to be any judicial interpretation of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 12, or of the corresponding provision, Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 21. In *Belize Estate and Produce Co.* v. *Quilter*, [1897] A. C. 367, P. C., it was held that twenty years' adverse possession of land, commencing after the registration of the title of a registered owner under the Honduras Lands Titles Registry Act, established a title adverse to the registered owner, but that Act did not contain any provision like the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 12. As to what is possession adverse to a registered title, see *McVity* v. *Tranouth*, [1908] A. C. 60, P. C.

(*b*) The Real Property Limitation Acts, 1833 (3 & 4 Will. 4, c. 57) and 1874 (37 & 38 Vict. c. 57), do not mention the Crown, and therefore do not bind the Crown. Rights against the Crown in respect of real property are governed by the Crown Suits Act, 1769 (9 Geo. 3, c. 16), commonly called the Nullum Tempus Act, and the amending Acts (Duchy of Cornwall Act, 1844 (7 & 8 Vict. c. 105; Duchy of Cornwall Act, 1860 (23 & 24 Vict. c. 53); Crown Suits Act, 1861 (24 & 25 Vict. c. 62); and see title CONSTITUTIONAL LAW, Vol. VI., p. 410.

(*c*) Crown Suits Act, 1769 (9 Geo. 3, c. 16), s. 1; and see title CONSTITUTIONAL LAW, Vol. VI., p. 410. Formerly the right of the Crown was preserved, if the rents had been in charge to the Crown or had stood *insuper* of record within the period; but this is no longer so (Crown Suits Act, 1861 (24 & 25 Vict. c. 62), s. 1), except in the case of rentcharges to which the latter Act does not apply (*Re Maxwell's Estate* (1891), 28 L. R. Ir. 356, decided under the Nullum Tempus (Ireland) Act, 1876 (39 & 40 Vict. c. 37)). This exception no longer exists in Ireland (Crown Lands Act, 1906 (6 Edw. 7, c. 28), s. 9); see also *A.-G.* v. *Eardley (Lord)* (1820), 8 Price, 39; questioned in *Tuthill* v. *Rogers* (1844), 1 Jo. & Lat. 36, 82; *A.-G. for New South Wales* v. *Love*, [1898] A. C. 679, 686, P. C. As to when rents are to be deemed in charge, see *A.-G.* v. *Eardley (Lord)*, *supra*; *A.-G.* v. *Maxwell* (1814), 8 Price, 76, n.; but see *Tuthill* v. *Rogers*, *supra*; Crown Suits Act, 1769 (9 Geo. 3, c. 16), s. 10. The abolition of the doctrine of adverse possession by the Real Property Limitation Act, 1833 (3 & 4 Will. 4,

SECT. 18.
Rights of the Crown and the Duchy of Cornwall.

Remainders.

When any remainder or reversion is vested in the Crown, or when it has granted any limited estate, it is allowed a like period of sixty years to enforce its rights from the time when the estate comes or ought to come into possession (*d*).

Rents.

All fee farm rents or other rents which have been paid out of such manors, or other property within sixty years of any action brought to recover such rents, are secured to the Crown (*e*).

Nature of title acquired against Crown.

After the lapse of sixty years the subject is secured in the quiet enjoyment of the property, both against the Crown and against all persons claiming by colour of letters patent, or of grants upon suggestions of concealment or wrongful detaining (*f*).

The manor and property to which the subject's title is established by the Act are to be held of the Crown on the same tenures as they would have been if the title confirmed had originally been valid at law (*g*).

Rents part of manor.

327. The Crown is not deemed to have been answered the rents or profits of any lands by reason only of the same having been part of any honour or manor or other hereditaments of which the rents or profits have been answered to the Crown (*h*).

Accrual of title of Crown to property demised.

328. The right or title of the Crown to any manors or hereditaments comprised in a lease granted by the Crown is not deemed to have first accrued until the expiration of such lease, as against any person, whose enjoyment of such hereditaments or whose receipt of the rents or profits thereof commenced during the term of the lease, or who claims through any person whose enjoyment or receipt so commenced (*i*).

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c. 27) (see p. 105, *ante*), has no relation to property belonging to the Crown, and to gain a title against the Crown there must still be adverse possession. *Quære* whether the Crown Suits Act, 1769 (9 Geo. 3, c. 16), applies to advowsons (*Gibson* v. *Clark* (1819), 1 Jac. & W. 159). The Crown Suits Act, 1769 (9 Geo. 3, c. 16), contains many provisions similar to those of stat. (1623) 21 Jac. 1, c. 2, and a commentary by Sir E. Coke (3 Co. Inst. 188—191) on the stat. (1623) 21 Jac. 1, c. 2, explains most of the technical expressions used in the Crown Suits Act, 1769 (9 Geo. 3, c. 16).

(*d*) *Ibid.*, ss. 3, 4. These provisions seem unnecessary, as by the Act the statute only runs against the Crown from the time when the right accrues, but they were borrowed from the stat. (1622) 21 Jac. 1, c. 2, where they were needed, as by it the rights of the Crown were barred when the subject had been sixty years in possession before the passing of the Act; see *Tuthill* v. *Rogers* (1844), 1 Jo. & Lat. 36, 83. A reversion to the Crown, expectant on the determination of an estate tail, granted by the Crown to a subject for services, cannot be barred (see note (*r*), p. 137, *ante*). In such a case time cannot, it seems, run against the Crown until the time when the reversion falls in, and an attempt to bar the reversion could have no effect.

(*e*) Crown Suits Act, 1769 (9 Geo. 3, c. 16), s. 7; see *Doe* d. *William IV.* v. *Roberts* (1844), 13 M. & W. 520; *A.-G. for British Honduras* v. *Bristowe* (1880), 6 App. Cas. 143, P. C.; 3 Co. Inst. 191. A person may gain a title as against the Crown to the fee simple of land, but if such person and his predecessor in title have paid a quit-rent which they were not bound to pay, the Crown gains an indefeasible title to the quit-rent (*Tuthill* v. *Rogers*, *supra*, decided on the construction of the corresponding Crown Claims Limitation (Ireland) Act, 1808 (48 Geo. 3, c. 47), by SUGDEN, L.C., and BLACKBURNE, M.R.).

(*f*) Crown Suits Act, 1769 (9 Geo. 3, c. 16), s. 1.

(*g*) *Ibid.*, s. 5.

(*h*) Crown Suits Act, 1861 (24 & 25 Vict. c. 62), s. 3.

(*i*) *Ibid.*, s. 4.

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329. If the Crown has been out of possession of real property for twenty years, the person in possession can retain possession until the Crown has established its title by an information of intrusion, but this does not prevent the Crown or its grantee from making peaceable entry and then holding by virtue of title (*k*).

Right against Crown after twenty years' possession.

330. Limitations similar to those prescribed with regard to the Crown have been enacted with respect to claims by the Duke of Cornwall to lands and other hereditaments within the county of Cornwall other than liberties or franchises, mines, minerals, stones, and substrata (*l*).

Claims by the Duke of Cornwall.

Part VI.—Actions against Trustees.

SECT. 1.—*In General.*

When time does not run.

331. The fact that the defendant is an express trustee (*m*) for the plaintiff will prevent the action from being barred by lapse of time, whether the claim is to recover land (*n*), or personal estate (*o*), or is in respect of a breach of trust (*a*), if the defendant still retains the property or has converted it to his use or if the claim is founded on fraud (*b*). In other cases the existence of an express trust does not prevent the action being barred by lapse of time (*c*), and in the case of money (including a legacy) charged on land, or arrears of interest on money so charged, or arrears of rent, the mere existence of an express trust does not prevent time running (*d*).

SECT. 2.—*The Trustee Act*, 1888.

Effect of the Act.

332. Except in two cases hereafter referred to (*e*), a trustee (*f*),

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(*k*) *Emmerson* v. *Maddison*, [1906] A. C. 569, P. C.; stat. (1623) 21 Jac. 1, c. 14; see *Doe* d. *Watt* v. *Morris* (1835), 2 Bing. (N. C.) 189.

(*l*) Duchy of Cornwall Act, 1844 (7 & 8 Vict. c. 105), ss. 71, 88; see title CONSTITUTIONAL LAW, Vol. VII., p. 267. There seems to be no limitation with regard to liberties or franchises.

(*m*) As to what trusts are express for this purpose, see pp. 141, *ante*, 164, *post*; and titles EQUITY, Vol. XIII., p. 154; TRUSTS AND TRUSTEES.

(*n*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 25.

(*o*) See *Banner* v. *Berridge* (1881), 18 Ch. D. 254, 262.

(*a*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (2); see *Re Cross, Harston* v. *Tenison* (1882), 20 Ch. D. 109, 121, C. A.

(*b*) Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8 (1); see p. 163, *post*.

(*c*) Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8 (1).

(*d*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 10; see p. 83, *ante*. As to an annuity charged on land and secured by an express trust, see p. 141, *ante*.

(*e*) See p. 163, *post*.

(*f*) For the purposes of the Trustee Act, 1888 (51 & 52 Vict. c. 59), the expression "trustee" is to be deemed to include an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee, but not the official trustee of charitable funds (*ibid.*, s. 1). As to the application of this provision to a trustee in bankruptcy, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 105, note (*r*); to a director of a limited company, see title COMPANIES, Vol. V., p. 235; to an executor, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 318. As to the position of partners, see p. 171, *post*, and title PARTNERSHIP.

SECT. 2. The Trustee Act, 1888.

or any person claiming through him (*g*), has the benefit of all rights and privileges conferred by any Statute of Limitation in the like manner and to the like extent as if the trustee or such person had not been a trustee or person claiming through a trustee (*h*). If the action or other proceeding is brought to recover money or other property and is one to which no existing Statute of Limitation applies (*i*), the trustee, or anyone claiming through him, is entitled to the benefit of the lapse of time as a bar to such action or other proceeding as if the claim had been for money had and received (*k*). The statute runs against a married woman entitled in possession for her separate use, even if restrained from anticipation (*l*).

What actions are within the Act.

333. The following actions are within the above provision, and are not maintainable after the expiration of six years from the alleged breach of trust:—an action against a trustee for a declaration that he is liable to make good a loss from not realising residuary personal estate (*m*); an action against a trustee to make good losses arising from investments negligently made (*n*); an action against executors who are also trustees for an account and payment of a share of personal estate (*o*); an action against trustees for improperly paying annuities in full without deducting income tax out of the dividends of securities on which income tax was deducted (*p*); an action against a first mortgagee who sells the mortgaged property under a power of sale, and, without fraud on his part, allows his solicitor to retain the surplus after payment of the first mortgage, on the representation of the solicitor that he had the authority of the second mortgagee to receive it (*q*); an action brought against a director of a company for an act which is *ultra vires* but not fraudulent (*r*).

(*g*) The expression "any person claiming through him" does not apply to *cestuis que trustent*, but to persons deriving property from and subject to the liabilities of the trustee, *i.e.*, his executors, administrators, and assigns (*Leahy* v. *De Moleyns*, [1896] 1 I. R. 206, C. A.).

(*h*) Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8 (1) (a). The effect is the same as if an action for non-fraudulent breach of trust were enumerated in the appropriate Statute of Limitation (*How* v. *Winterton* (*Earl*), [1896] 2 Ch. 626, C. A.; *Re Croyden, Hincks* v. *Roberts* (1911), 55 Sol. Jo. 632); as to form of account against trustees, see *How* v. *Winterton* (*Earl*), *supra*; *Re Davies, Ellis* v. *Roberts*, [1898] 2 Ch. 142; see also *Sovereign Life Assurance Co.* v. *Wilmot* (1893), 9 T. L. R. 525. The provision applies to actions or other proceedings commenced after the 1st January, 1890 (Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8 (3)); and it does not deprive any executor or administrator of any right or defence to which he is entitled under any existing Statute of Limitation (*ibid.*).

(*i*) See *Re Timmis, Nixon* v. *Smith*, [1902] 1 Ch. 176.

(*k*) Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8 (1) (b). The period applicable to such a claim is the six years provided by the Limitation Act, 1623 (21 Jac. 1, c. 16), s. 3; see p. 37, *ante*; see also title CONTRACT, Vol. VII., pp. 473 *et seq.*

(*l*) Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8 (1) (b).

(*m*) *Re Swain, Swain* v. *Bringeman*, [1891] 3 Ch. 233; see *Re Page, Jones* v. *Morgan*, [1893] 1 Ch. 304; *Collings* v. *Wade*, [1896] 1 I. R. 340, C. A.

(*n*) *Re Somerset, Somerset* v. *Poulett* (*Earl*), [1894] 1 Ch. 231, C. A. As to losses caused by the fraud of an agent of the trustee who has no knowledge of the fraud, see *Re Fountaine, Re Dowler, Fountaine* v. *Amherst* (*Lord*), [1909] 2 Ch. 382, C. A.

(*o*) *Re Timmis, Nixon* v. *Smith, supra*; compare *Re Croyden, Hincks* v. *Roberts, supra*; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 265.

(*p*) *Re Sharp, Rickett* v. *Rickett*, [1906] 1 Ch. 793.

(*q*) *Thorne* v. *Heard and Marsh*, [1895] A. C. 495.

(*r*) *Re Lands Allotment Co.*, [1894] 1 Ch. 616, C. A.; *Whitwam* v. *Watkin* (1898), 78 L. T. 188; see title COMPANIES, Vol. V., p. 235.

When time begins to run.

334. In cases within the above provision time runs from the date of the breach of trust, not from the time when the loss occurred to the *cestui que trust* (*s*), but does not begin to run against a beneficiary unless the interest of such beneficiary is an interest in possession (*t*).

Person whose right is barred cannot benefit by another's action.

No beneficiary, as against whom there would be a good defence by virtue of the above provision, can derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and a defence grounded on the statute had been pleaded (*u*).

Cases excepted from protection.

335. If a claim against a trustee, or a person claiming through him (*v*), is founded upon any fraud or fraudulent breach of trust, to which the trustee was party or privy, the above provision does not apply (*w*). So if trust funds are paid to a firm for purposes of investment and are fraudulently dealt with by one of the partners who makes a misrepresentation which prevents the discovery of the fraud, the other partners are liable, although they had no share in the fraud; and time will not run till the fraud is discovered or might with reasonable diligence have been discovered (*x*). If an agent of a trustee acting in the scope of his employment commits a fraud, the trustee is liable for it although he himself was not aware of it, and the statute (*a*) has no application (*b*). But the trustee is not liable for a fraud committed by his agent if, in committing it, the latter was not acting as the agent of the trustee (*c*).

Fraud.

Trust property retained by trustee or received and converted.

336. The above provision (*d*) has no application when trust property or the proceeds thereof are retained by the trustee or

(*s*) *Re Somerset, Somerset* v. *Poulett* (*Earl*), [1894] 1 Ch. 231, C. A.; *Want* v. *Campain* (1893), 9 T. L. R. 254; *Thorne* v. *Heard and Marsh*, [1895] A. C. 495; *Collings* v. *Wade*, [1896] 1 I. R. 340, C. A.

(*t*) Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8 (b); *Collings* v. *Wade, supra; Re Somerset, Somerset* v. *Poulett* (*Earl*), *supra; Want* v. *Campain, supra;* see *Mara* v. *Browne*, [1895] 2 Ch. 69 (reversed on another point, [1896] 1 Ch. 199, C. A.). He may, however, be barred by laches (*Re Taylor, Atkinson* v. *Lord* (1900), 81 L. T. 812).

(*u*) Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8 (2). As to the meaning of this proviso, see *Collings* v. *Wade, supra;* and see *Re Somerset, Somerset* v. *Poulett* (*Earl*), *supra; Want* v. *Campain, supra; Re Dive, Dive* v. *Roebuck*, [1909] 1 Ch. 328, 336; *Re Fountaine, Re Dowler, Fountaine* v. *Amherst* (*Lord*), [1909] 2 Ch. 382, 393, C. A. Where the tenant for life is barred but not the remainderman, the interest on funds replaced by the trustee will be paid to him during the life interest (*ibid.*). As to the form of order, see 2 Seton, Judgments and Orders, 6th ed., 1144.

(*v*) See note (*g*), p. 162, *ante*.

(*w*) Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8 (1); as to what is fraud within the Act, see *Collings* v. *Wade, supra; Re Sale Hotel, Ltd.* (1897), 46 W. R. 314.

(*x*) *Moore* v. *Knight*, [1891] 1 Ch. 547; see *Blair* v. *Bromley* (1847), 2 Ph. 354, the principle laid down in which case has not been affected by the Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8 (*Moore* v. *Knight, supra; Walshan* v. *Stainton* (1863), 12 W. R. 63, C. A.). As to the position of partners generally, see title PARTNERSHIP.

(*a*) Trustee Act, 1888 (51 & 52 Vict. c. 59).

(*b*) *Moore* v. *Knight, supra*.

(*c*) *Thorne* v. *Heard and Marsh, supra; Sims* v. *Brutton* (1850), 5 Exch. 802; and see title AGENCY, Vol. I., p. 212.

(*d*) Trustee Act, 1888 (51 & 52 Vict. c. 59, s. 8 (1); see p. 161, *ante*.

SECT. 2. The Trustee Act, 1888.

have been previously received by him and converted to his use (*e*). But this exception does not apply where trust funds advanced on mortgage are, with the concurrence of the mortgagor, applied in payment of a debt previously charged on the mortgaged property in favour of a firm of which the trustee is a partner (*f*).

Payment of interest by trustees.

337. In the case of an improper investment by a trustee or any negligent act amounting to a breach of trust, the payment of interest by the trustee to the *cestui que trust* is not such an admission of liability as to deprive the trustee of the benefit of the statute (*g*).

SECT. 3.—*Trusts Sufficient to Prevent Time Running.*

Trust must be express.

338. In cases to which the Trustee Act, 1888 (*h*), has no application, the Statutes of Limitation are ousted, as between trustee and *cestui que trust*, when there is an express trust constituted by the act of the parties (*i*); a constructive trust arising by implication of law will not oust the operation of the statutes, except where a constructive trustee enters into possession of property with knowledge of a trust affecting it (*j*).

(*e*) Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8 (1). *Thorne* v. *Heard and Marsh*, [1895] A. C. 495; *How* v. *Winterton* (*Earl*), [1896] 2 Ch. 626, C. A.; *Re Page, Jones* v. *Morgan*, [1893] 1 Ch. 304; *Re Tufnell* (1902), 18 T. L. R. 705; *Wassell* v. *Leggatt*, [1896] 1 Ch. 554 (where a husband took and retained his wife's separate property). It seems that the Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8, has no application if the action is brought against a person claiming through the trustee, and such person at the time of the action still retains the trust property. So if a person who, with the consent of the trustees, having lawfully been in possession of trust property during the lifetime of his wife, the tenant for life, remains in possession after his wife's death with knowledge of the trust, he is bound to account for the whole of the arrears of the profits from the time of the death of his wife and not merely for six years (*M'Ardle* v. *Gaughran*, [1903] 1 I. R. 106). Trustees who, being also annuitants, receive the whole of their annuities without deducting income tax, although the income tax was deducted out of the dividends from which the annuities were payable, are not protected in respect of a claim for the refunding of the income tax (*Re Sharp, Rickett* v. *Rickett*, [1906] 1 Ch. 793; and see p. 162, *ante*.

(*f*) *Re Gurney, Mason* v. *Mercer*, [1893] 1 Ch. 590.

(*g*) *Re Somerset, Somerset* v. *Poulett* (*Earl*), [1894] 1 Ch. 231, C. A.; *Re Fountaine, Re Dowler, Fountaine* v. *Amherst* (*Lord*), [1909] 2 Ch. 382, C. A.; *Want* v. *Campain* (1893), 9 T. L. R. 254; see *Thorne* v. *Heard and Marsh, supra*; see Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8 (1) (a).

(*h*) 51 & 52 Vict. c. 59; see p. 163, *ante*.

(*i*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (2); see p. 161, *ante*. See *Townshend* v. *Townshend* (1783), 1 Bro. C. C. 550; *Beckford* v. *Wade* (1805), 17 Ves. 87, P. C.; *Petre* v. *Petre* (1853), 1 Drew. 371; *Salter* v. *Cavanagh* (1838), 1 Dr. & Wal. 668; *Yardley* v. *Holland* (1875), L. R. 20 Eq. 428; *Sands to Thompson* (1883), 22 Ch. D. 614; *Churcher* v. *Martin* (1889), 42 Ch. D. 312; *Patrick* v. *Simpson* (1889), 24 Q. B. D. 128; *Nugent* v. *Nugent* (1884), 15 L. R. Ir. 321; *Re Rowe, Jacobs* v. *Hind* (1889), 61 L. T. 581, C. A.; *Lockey* v. *Lockey* (1719), Prec. Ch. 518; *Hovenden* v. *Annesley* (*Lord*) (1806), 2 Sch. & Lef. 607, 632; *Thomas* v. *Thomas* (1855), 2 K. & J. 79. As to express trusts, see p. 141, *ante*; titles EQUITY, Vol. XIII., p. 154; TRUSTS AND TRUSTEES.

(*j*) *M'Ardle* v. *Gaughran, supra*; see *Bridgman* v. *Gill* (1857), 24 Beav. 302; *Wassell* v. *Leggatt*, [1896] 1 Ch. 554, and as to constructive trusts, see title EQUITY, Vol. XIII., pp. 154, 155. As to the running of time where the tenant for life is presumed to have paid himself, the trustee being consequently affected, see pp. 72, 73, *ante*, and the cases cited in notes (*a*), (*b*) and (*c*) thereon; see also *Jenner* v. *Akerman* (1864) 10 Jur. (N. S.) 465.

SECT. 3.
Trusts Sufficient to Prevent Time Running.

Mortgage.

Trust of surplus.

339. A mortgagee is not a trustee of his power of sale for the mortgagor (*k*). Where in a mortgage deed there is an express trust that the surplus shall be paid to the mortgagor and the mortgaged property is sold, the mortgagee is a trustee of any surplus for the mortgagor, and if the mortgagee retains the surplus or converts it to his use, no Statute of Limitation can be set up as a bar to a claim against him (*l*). But where in the case of such a mortgage the mortgagor's right to redeem is extinguished by the possession of the mortgagee for twelve years, the power of sale and the trusts of the surplus are also extinguished, and no claims can be made by the mortgagor in respect of a sale made after such extinction (*m*).

Statutes of Limitation and equitable remedies of *cestui que trust.*

340. Where a *cestui que trust* has a direct remedy in equity, independently of that of the trustee, against a person who is liable to pay trust moneys (*n*), and the relation between the *cestui que trust* and the debtor is such as merely to give the *cestui que trust* a remedy analogous to some legal remedy, the Statutes of Limitation apply to the equitable claims of the *cestui que trust*, subject to the same rules relating to disabilities and accrual of the right of action as govern a legal right (*o*). But the relation between the *cestui que trust* and the debtor may be of such a fiduciary nature as, except in cases falling under the Trustee Act, 1888 (*p*), to exclude the operation of the Statutes of Limitation altogether (*q*).

Persons in fiduciary capacity.

341. Where any person as agent (*r*), guardian (*s*), or in any other fiduciary capacity, is in receipt of money for which it is his duty to account, no lapse of time, so long as the relation of confidence exists between the parties, can bar the right to an account from the beginning of the transactions (*t*); nor will the statute begin to run when

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(*k*) *Warner* v. *Jacob* (1882), 20 Ch. D. 220; *Martinson* v. *Clowes* (1882), 21 Ch. D. 857, 860; *Nash* v. *Eads* (1880), 25 Sol. Jo. 95, C. A.; *Colson* v. *Williams* (1889), 58 L. J. (CH.) 539, dissenting from the *dictum* of STUART, V.-C., to the contrary in *Robertson* v. *Norris* (1858), 1 Giff. 421. As to a mortgagee of a ship, see *Banner* v. *Berridge* (1881), 18 Ch. D. 254; and title SHIPPING AND NAVIGATION.

(*l*) *Re Bell, Lake* v. *Bell* (1886), 34 Ch. D. 462; *Banner* v. *Berridge, supra; Charles* v. *Jones* (1887), 35 Ch. D. 544; *Thorne* v. *Heard*, [1894] 1 Ch. 599, 607, C. A. A mortgagee, when there is a surplus and there are other mortgages, is trustee of the surplus for the other mortgagees; see *Thorne* v. *Heard and Marsh*, [1895] A. C. 495; and, as to mortgages generally, see title MORTGAGE.

(*m*) *Chapman* v. *Corpe* (1879), 41 L. T. 22.

(*n*) As to which, see title TRUSTS AND TRUSTEES.

(*o*) *Burrowes* v. *Gore* (1858), 6 H. L. Cas. 907, *per* Lord CHELMSFORD, L. C., at p. 940, and *per* Lord CRANWORTH, at p. 945; *Stone* v. *Stone* (1869), 5 Ch App. 74; see *Williams* v. *Papworth*, [1900] A. C. 563; and see title EQUITY, Vol. XIII., p. 175.

(*p*) 51 & 52 Vict. c. 59; see p. 162, *ante*.

(*q*) See *Bridgman* v. *Gill* (1857), 24 Beav. 302; and p. 166, *post*. As to a covenant to pay money on trust, see *Spickernell* v. *Hotham* (1854), Kay, 669, 675; *Stone* v. *Stone, supra*; see p. 73, *ante*; and *Burrowes* v. *Gore, supra*.

(*r*) See title AGENCY, Vol. I., pp. 186 *et seq.*

(*s*) See title INFANTS AND CHILDREN, Vol. XVII., pp. 117, 131, 132.

(*t*) *Mathew* v. *Brise* (1851), 14 Beav. 341; *Pelly* v. *Bascombe* (1863), 4 Giff.

SECT. 3.
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the relation is put an end to. If a guardian is in receipt of rents of land during the minority of the infant and he retains those rents or converts them to his own use and never accounts for the rents received, an action for an account may be maintained more than six years after the ward's coming of age, though such an action would, in general, be barred in equity, by the lapse of six years, in analogy to the action at common law (*u*). A person who receives rents as bailiff for infant children and continues to receive them after the infancy has determined remains liable to account so long as he receives the rents in the capacity of bailiff (*v*).

Banker and customer.

In cases where money has been received by a person in the position of a confidential receiver or agent, and has been wilfully misapplied for his own benefit, no lapse of time will protect such persons or their personal representatives from the liability to account (*a*); but the relation of banker and customer is simply that of debtor and creditor (*b*), and, in the absence of special circumstances, the relation of solicitor and client is not that of trustee and *cestui que trust*. If, however, money is delivered by a person to a solicitor or other agent with a general authority and discretion to invest it for the benefit of the former, the money is received on an express trust and no Statute of Limitation is available as an answer to a claim for an account (*c*).

Solicitor and client.

Persons receiving trust property with notice.

342. If money or other property is subject to an express trust, and a person enters into possession or receives the rent of such property with full notice of the trust, he is a trustee, and unless

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390; see *Pare* v. *Clegg* (1861), 29 Beav. 589. As to actions for an account, see p. 170, *post*.

(*u*) *Mathew* v. *Brise* (1851), 14 Beav. 341; see p. 133, *ante*. If the claim does not come within the exceptions of the Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8 (see p. 161, *ante*), such an action would be barred at the expiration of six years from the ward's coming of age (*Re Page, Jones* v. *Morgan*, [1893] 1 Ch. 304; see *Lockey* v. *Lockey* (1719), Prec. Ch. 518; *Hovenden* v. *Annesley* (*Lord*) (1806) 2 Sch. & Lef. 607, 632; *Thomas* v. *Thomas* (1855), 2 K. & J. 79); and see title AGENCY, Vol. I., p. 188.

(*v*) *Wall* v. *Stanwick* (1887), 34 Ch. D. 763; see *Tinker* v. *Rodwell* (1893), 9 T. L. R. 657; *Re Maguire and M'Clelland's Contract*, [1907] 1 I. R. 393, C. A.

(*a*) *Hardwicke* (*Earl*) v. *Vernon* (1808), 14 Ves. 504; *Teed* v. *Beere* (1859), 28 L. J. (CH.) 782; and see *Heath* v. *Henly* (1663), 1 Cas. in Ch. 20. As to the limitation on a principal's claim for mere breach of duty, see title AGENCY, Vol. I., p. 184.

(*b*) See title BANKERS AND BANKING, Vol. I., p. 584; compare *Bridgman* v. *Gill* (1857), 24 Beav. 302; *Re Seaber, Ex parte Gowers* (1837), 3 Mont. & A. 172; *In re Tidd, Tidd* v. *Overell*, [1893] 3 Ch. 154; *Atkinson* v. *Bradford Third Equitable Benefit Building Society* (1890), 25 Q. B. D. 377, C. A.

(*c*) As to the liability of solicitors and other agents to account for money received, see *Re Hindmarsh* (1860), 1 Drew. & Sm. 129; *Watson* v. *Woodman* (1875), L. R. 20 Eq. 721, 731; *Mara* v. *Browne*, [1896] 1 Ch. 199, C. A.; *Dooby* v. *Watson* (1888), 39 Ch. D. 178; *Power* v. *Power* (1884), 13 L. R. Ir. 281; *Soar* v. *Ashwell*, [1893] 2 Q. B. 390, C. A.; *North American Land and Timber Co., Ltd.* v. *Watkins*, [1904] 2 Ch. 233, C. A.; *Burdick* v. *Garrick* (1870), 5 Ch. App. 233; *Sheldon* v. *Weldman* (1663), 1 Cas. in Ch. 26; *James* v. *Holmes* (1862), 31 L. J. (CH.) 567; *Gray* v. *Bateman* (1872), 21 W. R. 137; *Lyell* v. *Kennedy, Kennedy* v. *Lyell* (1889), 14 App. Cas. 437; *Edwards* v. *Warden* (1876), 1 App. Cas. 281; *Lister & Co.* v. *Stubbs* (1890), 45 Ch. D. 1, C. A.; *Cheese* v. *Keen*, [1908] 1 Ch. 45; and see titles AGENCY, Vol. I., p. 188; SOLICITORS.

he comes within the statutory protection (*d*) cannot, when he is called upon to account for such property, avail himself of the lapse of time as a defence (*e*).

SECT. 3. Trusts Sufficient to Prevent Time Running.

Receivers appointed under an order of the court are trustees (*f*); so are the directors of a company (*g*).

Receivers. Directors.

An executor is not a trustee of a legacy or share of residue so as to exclude the operation of the statute, unless he is so appointed by the will or makes himself a trustee by an act of his own (*h*), nor is he such a trustee of undisposed-of residue (*i*).

Executors.

SECT. 4.—*Trusts for Payment of Debts.*

343. A transfer of property to trustees for payment of debts, if made by a debtor in his lifetime and without the concurrence of the creditors, gives the creditors no right to enforce the execution of the trusts, but operates merely as a direction to the trustees, pointing out the way in which they are to apply the property vested in them for the benefit of the debtor, who alone stands towards them in the relation of *cestui que trust* (*k*). But when the trusts declared by the deed are to take effect only after the death of the settlor, the persons in whose favour the trusts are declared are *cestuis que trustent* (*l*); and, when the creditors

Trust for payment of debts.

(*d*) See p. 161, *ante*.

(*e*) *Re Dixon, Heynes* v. *Dixon*, [1899] 2 Ch. 561; *Soar* v. *Ashwell*, [1893] 2 Q. B. 390, C. A.; *Wassell* v. *Leggatt*, [1896] 1 Ch. 554; *M'Ardle* v. *Gaughran*, [1903] 1 I. R. 106; *Bridgman* v. *Gill* (1857), 24 Beav. 302; *Hartford* v. *Power* (1868), 2 I. R. Eq. 204; but see *Mara* v. *Browne*, [1896] 1 Ch. 199, C. A.

(*f*) *Seagram* v. *Tuck* (1881), 18 Ch. D. 296.

(*g*) See title COMPANIES, Vol. V., p. 226. If a company declares a dividend on its shares, the declaration does not make the company a trustee of the dividend for the shareholders; see title COMPANIES, Vol. V., p. 276. The secretary of a company is not a trustee (*Municipal Freehold Land Co., Ltd.* v. *Pollington* (1890), 63 L. T. 238); nor is an auditor of accounts (*Leeds Estate, Building and Investment Co.* v. *Shepherd* (1887), 36 Ch. D. 787); and see title COMPANIES, Vol. V., pp. 244, 269.

(*h*) *Phillipo* v. *Munnings* (1837), 2 My. & Cr. 309; *Tyson* v. *Jackson* (1861), 30 Beav. 384; *Re Rowe, Jacobs* v. *Hind* (1889), 60 L. T. 596; affirmed, 61 L. T. 581, C. A.; *Re Mackay, Mackay* v. *Gould*, [1906] 1 Ch. 25, 31; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 265, and cases there cited. As to the position of a personal representative who has committed a *devastavit*, see *ibid.*, p. 316, and p. 40, *ante*. As to an executor *de son tort*, see *Doyle* v. *Foley*, [1903] 2 I. R. 95.

(*i*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 284. As to the position of a deceased trustee's estate with regard to a breach of trust committed by him, see *ibid.*, p. 312; and see *Coxwell* v. *Franklinski* (1864), 11 L. T. 153; *Woodhouse* v. *Woodhouse* (1869), L. R. 8 Eq. 514; *Re Burge, Gillard* v. *Lawrenson* (1887), 57 L. T. 364; *Re Blake, Blake* v. *Power* (1889), 60 L. T. 663; *Carroll* v. *Hargrave* (1871), 5 I. R. Eq. 548, C. A.; *Smith* v. *Cork and Bandon Rail. Co.* (1870), 5 I. R. Eq. 65, 76, C. A.; *Butler* v. *Carter* (1868), L. R 5 Eq. 276; the cases to the contrary effect (*Dunne* v. *Doran* (1844), 13 I. Eq. R. 545; *Brereton* v. *Hutchinson* (1854), 3 I. Ch. R. 361; *Newport* v. *Bryan* (1856), 5 I. Ch. R. 119) have been overruled; see *Carroll* v. *Hargrave, supra*; and see title TRUSTS AND TRUSTEES.

(*k*) *Garrard* v. *Lauderdale* (*Lord*) (1830), 3 Sim. 1; *Henriques* v. *Bensusan* (1872), 20 W. R. 350; *Re Sanders' Trusts* (1878), 47 L. J. (CH.) 667; *Johns* v. *James* (1878), 8 Ch. D. 744, C. A.; see 2 White & Tud. L. C., 7th ed., 887; title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 328.

(*l*) *Re Fitzgerald's Settlement, Fitzgerald* v. *White* (1887), 37 Ch. D. 18, C. A.; see *Synnot* v. *Simpson* (1854), 5 H. L. Cas. 121; *Priestley* v. *Ellis*, [1897] 1 Ch. 489.

SECT. 4.
Trusts for Payment of Debts.

are parties to the assignment, or it is communicated to them, the relation of trustee and *cestui que trust* is constituted between the assignee in trust and every one of the creditors (*m*). If the trust is for the payment of debts out of personal estate, and the Trustee Act, 1888 (*n*), does not apply, no Statute of Limitation will run against the right of any creditor to an account and to payment. But if any sum of money is charged upon or payable out of real estate and secured by an express trust, time will run as if there were no such trust (*o*).

Debts barred at the date of the creation of the trust.

344. When an assignment of property is made so as to raise a trust in favour of creditors in general, a debt barred at the date of the assignment will not be included, unless there was something in the assignment sufficient to operate as an acknowledgment of the debt to the creditor or a direction to the trustees to include the debt among those to be paid (*p*).

Trust of personalty for payment of debts.

Trust of realty.

345. A trust of personal estate declared by will does not prevent the statute from being set up as a defence even as to debts upon which the statute had not taken effect in the testator's lifetime, though he believed the personal estate of which the trust is declared to be realty and devised it as such (*q*); but a provision by a testator for payment of his debts out of his realty includes all debts recoverable at his death, and as to debts not then barred the statute will run from the death (*r*). It is immaterial whether the provision is by a charge or by a trust, as a trust does not, in respect of money charged upon or payable out of land, keep a debt alive longer than a charge (*a*).

Direction to pay statute-barred debt.

346. A direction by a testator to pay a particular debt which is statute-barred will take the debt out of the statute (*b*); and if a testator expresses a wish that a trust should include statute-barred debts, such debts will be payable out of the residue left after payment of all demands to which the estate is legally liable (*c*).

(*m*) *Acton* v. *Woodgate* (1833), 2 My. & K. 492; 2 White & Tud. L. C., 7th ed., 889; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 328, 329.

(*n*) 51 & 52 Vict. c. 59; see p. 161, *ante*.

(*o*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 10; see p. 83, *ante*; as to express trusts, see p. 141, *ante*.

(*p*) See *Scott* v. *Jones* (1838), 4 Cl. & Fin. 382, 391, H. L. As to what is a sufficient acknowledgment, see pp. 63, 80, 92, 103, *ante*. As to a trust in a will for payment of debts in general, see *Burke* v. *Jones* (1813), 2 Ves. & B. 275; *O'Connor* v. *Haslam* (1855), 5 H. L. Cas. 170, 178; title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 254.

(*q*) *Scott* v. *Jones*, *supra*; *Re Hepburn*, *Ex parte Smith* (1884), 14 Q. B. D. 394; see *Evans* v. *Tweedy* (1838), 1 Beav. 55.

(*r*) *Re Balls*, *Trewby* v. *Balls*, [1909] 1 Ch. 791; *Fergus' Executors* v. *Gore* (1803), 1 Sch. & Lef. 107; *Hargreaves* v. *Michell* (1822), Madd. & G. 326; *Hughes* v. *Wynne* (1823), Turn. & R. 307; see *O'Connor* v. *Haslam* (1855), 5 H. L. Cas. 170.

(*a*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 10; see p. 83, *ante*; *Re Stephens*, *Warburton* v. *Stephens* (1889), 43 Ch. D. 39; *Re Balls*, *Trewby* v. *Balls*, *supra*; title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 254.

(*b*) See *Millington* v. *Thompson* (1852), 3 I. Ch. R. 236.

(*c*) See *Scott* v. *Jones*, *supra*; compare *Williamson* v. *Naylor* (1838), 3 Y. & C. (EX.) 208.

SECT. 4.
Trusts for Payment of Debts.

Debts of another person.

If a testator makes provision for the payment of the debts of another person who is dead, the provision will include all debts which are unbarred at the death of the original debtor (*d*).

Part VII.—Equity and the Statutes of Limitation.

SECT. 1.—*In General.*

Application of statutes to equitable claims.

347. The Real Property Limitation Acts, 1833 (*e*) and 1874 (*f*), apply expressly to equitable as well as legal claims (*g*). The Trustee Act, 1888 (*h*), also applies to proceedings in equity.

The Limitation Act, 1623 (*i*), and the Civil Procedure Act, 1833 (*k*), dealing, *inter alia*, with certain actions which applied originally only to proceedings in courts of law (*l*), apply now to any action in the High Court which comes within their terms, whether such action is brought in the King's Bench or in the Chancery

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(*d*) *O'Connor* v. *Haslam* (1855), 5 H. L. Cas. 170.
(*e*) 3 & 4 Will. 4, c. 27; see pp. 97, 105, *ante*.
(*f*) 37 & 38 Vict. c. 57; see p. 82, *ante*.
(*g*) See p. 137, *ante*, and title EQUITY, Vol. XIII., p. 175.
(*h*) 51 & 52 Vict. c. 59; see p. 161, *ante*.
(*i*) 21 Jac. 1, c. 16; see p. 38, *ante*.
(*k*) 3 & 4 Will. 4, c. 42; see p. 76, *ante*.
(*l*) No Statute of Limitation before the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27) (see p. 105, *ante*), provided in terms for equitable rights or expressly bound courts of equity. Although the distinction between courts of equity and courts of law has been abolished (see *Warner* v. *Murdoch*, *Murdoch* v. *Warner* (1877), 4 Ch. D. 750, 752, C. A.), the distinction between rules of equity and rules of law remains (*Joseph* v. *Lyons* (1884), 15 Q. B. D. 280, C. A.; *Re Greaves, Deceased, Bray* v. *Tofield* (1881), 18 Ch. D. 551, 554). It is, therefore, still of importance to consider the way in which courts of equity before the Judicature Acts viewed the Statutes of Limitation when these statutes did not expressly bind those courts (see *Hovenden* v. *Annesley* (*Lord*) (1806), 2 Sch. & Lef. 607, *per* Lord REDESDALE, L.C., at p. 630; *Smith* v. *Clay* (1767), 3 Bro. C. C. 639, n., *per* Lord CAMDEN, L.C.; *Bond* v. *Hopkins* (1802), 1 Sch. & Lef. 413, 429; *Cholmondeley* (*Marquis*) v. *Clinton* (*Lord*) (1820), 2 Jac. & W. 1, 138; *Knox* v. *Gye* (1872), L. R. 5 H. L. 674; *Allcard* v. *Skinner* (1887), 36 Ch. D. 145, 186, C. A.; *Brooks* v. *Muckleston*, [1909] 2 Ch. 519, 522; *Molloy* v. *Mutual Reserve Life Insurance Co.* (1906), 94 L. T. 756, C. A.). These courts frequently had occasion incidentally to decide purely legal rights, as, for instance, in adjudicating on the validity of claims for debts brought in under decrees in administration suits. In such cases courts of equity decided all questions, including questions on the statutes, as if the claims were being enforced by an action at law, where there was an analogous legal remedy within some Statute of Limitation, and were bound to the exact period limited by the statutes, and all the exceptions as to disabilities, acknowledgments, or otherwise applied equally with the mere limitation of time, but in cases where there was no analogous legal remedy courts of equity were bound by no positive rules (*Smith* v. *Clay*, *supra*; *White* v. *Ewer* (1670), 2 Vent. 340; *Bonny* v. *Ridgard* (1784-88), cited in *Beckford* v. *Wade* (1805), 17 Ves. 87, 97; see *Hicks* v. *Sallitt* (1854), 3 De G. M. & G. 782, C. A.; *Thomas* v. *Thomas* (1855), 2 K. & J. 79; *McDonnell* v. *White* (1865), 11 H. L. Cas. 570). As to the effect of the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 3, see title COURTS, Vol. IX., pp. 51 *et seq.*

SECT. 1. In General.

Division (*m*). In the case of actions which are not within the terms of these statutes, courts when administering equity often apply by analogy the limitations provided by these statutes (*n*); but this principle will, as a rule, be applied only where the equitable remedy which it is sought to enforce has some relation or similarity to a concurrent legal remedy (*o*).

SECT. 2.—*Accounts.*

Accounts.

348. In actions for account the time for which an account will be granted may be (1) limited only by the accruer of the plaintiff's title, (2) limited to six years, or (3) limited to the period since the commencement of proceedings.

Trust.

349. (1) Where some person has been in the receipt of money, or in the management of property as trustee for the plaintiff in the suit, or in some other confidential capacity, the Statutes of Limitation do not apply, except in cases governed by the Trustee Act, 1888 (*p*), s. 8 (*q*).

Where no trust.

350. (2) Where there has been no trust, the right to an account in equity is usually limited to six years by analogy to the provisions of the Limitation Act, 1623 (*r*), which apply to actions of account at law (*s*). So if a purchaser for value has notice of the instruments on which the title of the rightful owner is founded and there is no fraud or suppression and no trust, the account of rents will, it seems, be limited to six years prior to the commencement of proceedings (*a*). If the plaintiff has been under disability for some part of the time during which the land has been in the

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(*m*) *Re Greaves, Deceased, Bray* v. *Tofield* (1881), 18 Ch. D. 551, 554; *Gibbs* v. *Guild* (1882), 9 Q. B. D. 59, *per* BRETT, L.J., at p. 67, C. A.; *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co.* v. *Sharpe*, [1892] 1 Ch. 154, 166, C. A.

(*n*) *Thomson* v. *Eastwood* (1877), 2 App. Cas. 215 (interest on a legacy secured by express trust); *Allcard* v. *Skinner* (1887), 36 Ch. D. 145, 186, C. A. (recovery of property obtained by undue influence); *Hodgson* v. *Williamson* (1880), 15 Ch. D. 87; *Re Hastings (Lady), Hallett* v. *Hastings* (1887), 35 Ch. D. 94, 105, C. A. (liability of separate estate of married woman); see *Rule* v. *Jewell* (1881), 18 Ch. D. 660, 667; *Firth* v. *Slingsby* (1888), 58 L. T. 481, 483 (specific performance).

(*o*) See title EQUITY, Vol. XIII., p. 175; *Mellersh* v. *Brown* (1890), 45 Ch. D. 225; *Charter* v. *Watson*, [1899] 1 Ch. 175; *Re Stucley, Stucley* v. *Kekewich*, [1906] 1 Ch. 67, 72, C. A.; and p. 40, *ante*.

(*p*) 51 & 52 Vict. c. 59; see pp. 161, note (*h*) 162, *ante*; *Williamson* v. *Barbour* (1887), 9 Ch. D. 529.

(*q*) *Mathew* v. *Brise* (1851), 14 Beav. 341; *Sturgis* v. *Morse* (1858), 3 De G. & J. 1, C. A.; *Wright* v. *Chard* (1859), 4 Drew. 673, 680. In a suit for an account by a *cestui que trust* against a trustee on an express trust, where there had been great delay in taking proceedings, it was held that the account should not go further back than the filing of the bill (*Smith* v. *Smith* (1877), 1 L. R. Ir. 206, C. A.; *Re Hastings (Lady), Hallett* v. *Hastings, supra*.

(*r*) 21 Jac. 1, c. 16; see p. 38, *ante*.

(*s*) *Lockey* v. *Lockey* (1719), Prec. Ch. 518; see *Knox* v. *Gye* (1872), L. R. 5 H. L. 674; *Smith* v. *Smith* (1876), 1 L. R. Ir. 206; *Reade* v. *Reade* (1801), 5 Ves. 744; *Harmood* v. *Oglander* (1801), 6 Ves. 199, 215; *Burnell* v. *Burnell* (1879), 11 Ch. D. 213; and p. 38, *ante*.

(*a*) *Hicks* v. *Sallitt* (1854), 3 De G. M. & G. 782, C. A.; see *Nanney* v. *Williams* (1856), 22 Beav. 452.

possession of the defendant, and commences an action within six years after the disability ceased, he is entitled to carry back the account through the whole period of disability (*b*). If he does not sue till more than six years after the cessation of disability, the disability will not avail him at all so far as mesne profits are concerned (*c*). So, in an action brought by a remainderman to recover land from a mortgagee of the life interest, the remainderman is only entitled to rents for six years before the commencement of proceedings (*d*).

Adverse possession without notice.

351. (3) When a person equitably entitled to an estate recovers it from one who has held it under a *bonâ fide* adverse possession without notice of the plaintiff's title, and there is no trust, or infancy, and no fraud or suppression, an account of the rents will not be carried back beyond the commencement of the proceedings (*e*).

Partners.

352. In actions for an account between partners the statute does not run until the partnership is determined (*f*). In actions for an account between a surviving partner and the executor of a deceased partner the statute runs from the death of the partner and the right of action is barred at the expiration of six years from the death (*g*). But if a partnership is determined by death and the surviving partners carry on the new partnership without taking the accounts of the old and without interruption or settlement, the statute has no application as between the surviving partners and the representatives of the deceased partner (*h*). If one partner unlawfully excludes another from the management or control of the partnership property, time begins to run against a claim based on such exclusion from the act of exclusion (*i*).

Claim against lunatic.

353. Lunacy is, generally speaking, no obstacle to an action being brought against a lunatic (*k*). Therefore, in ordinary cases, the Statutes of Limitation will run against a creditor of the lunatic (*l*). But if the creditor of a lunatic was, or would have been, restrained

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(*b*) *Thomas* v. *Thomas* (1855), 2 K. & J. 79; *Pelly* v. *Bascombe* (1863), 4 Giff. 390; *Wright* v. *Chard* (1860), 29 L. J. (CH.) 415, C. A.

(*c*) *Lockey* v. *Lockey* (1719), Prec. Ch. 518.

(*d*) *Hickman* v. *Upsall* (1876), 4 Ch. D. 144, C. A.

(*e*) *Hicks* v. *Sallitt* (1854), 3 De G. M. & G. 782, C. A.; see *Penny* v. *Allen* (1857), 7 De G. M. & G. 409; *Morgan* v. *Morgan* (1870), L. R. 10 Eq. 99.

(*f*) *Noyes* v. *Crawley* (1878), 10 Ch. D. 31; *Knox* v. *Gye* (1872), L. R. 5 H. L. 656; *Miller* v. *Miller* (1869), L. R. 8 Eq. 499; *Millington* v. *Holland* (1869), 18 W. R. 184; *The Pongola* (1895), 73 L. T. 512; see title PARTNERSHIP.

(*g*) *Knox* v. *Gye*, *supra*. The clause of the Limitation Act, 1623 (21 Jac. 1, c. 16), excepting merchants' accounts from the operation of the Act, was abolished by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 9; see note (*e*), pp. 37, 38, *ante*.

(*h*) *Betjemann* v. *Betjemann*, [1895] 2 Ch. 474, C. A.

(*i*) *Barton* v. *North Staffordshire Rail. Co.* (1888), 38 Ch. D. 458, 463; *Clegg* v. *Edmonson* (1857), 8 De G. M. & G. 787, C. A. This is also the case in the analogous action by a shareholder against a company for refusal to register him as a shareholder; see title COMPANIES, Vol. V., p. 698.

(*k*) *Brockwell* v. *Bullock* (1889), 22 Q. B. D. 567, C. A.; see title LUNATICS AND PERSONS OF UNSOUND MIND, pp. 462 *et seq.*, *post*.

(*l*) See *Boldero* v. *Halpin*, *Ex parte Hawes* (1871), 19 W. R. 320; *Re Watson*, *Stamford Union* v. *Bartlett*, [1899] 1 Ch. 72; *Wandsworth Union* v. *Worthington*, [1906] 1 K. B. 420; *Re Harris* (1880), 49 L. J. (CH.) 327, C. A.; *Re Weaver* (1882), 21 Ch. D. 615, C. A.; *Re J.* (*a Person of Unsound Mind*), [1909] 1 Ch. 574, C. A.

SECT. 2. **Accounts.**

from proceeding, the statute will not run against him during the lunacy (*m*). The bringing forward of a claim in lunacy after the death of the lunatic, even though the claim is followed by a report in support of the claim, is not sufficient to prevent the claim from being barred by the statute as against the heir of the lunatic, if the heir was not a party to the proceedings in lunacy (*n*). If a claim is made in lunacy in the lifetime of a lunatic and disallowed, the statute continues to run, and, on the expiration of the statutory period, the claimant will be barred in equity as well as at law (*o*). In passing the accounts of the committee of a lunatic, a debt which is owing from the lunatic to the committee in his private capacity, and which is statute-barred, should be disallowed (*p*).

SECT. 3.—*Fraud.*

Equitable relief against fraud.

354. In a case of fraud, where a precise limitation of time is not provided by statute, it is impossible to define when the person applying for relief in equity would be held to be too late (*q*); and, even in a case within the Statutes of Limitation, the right of a person to upset a transaction on the ground of fraud or undue influence will not be barred, while he remains ignorant of the fraud or while the undue influence continues (*r*).

Fraud which takes a case out of the statutes.

In order to constitute such a case of fraud as will, in equity, be taken out of the Statutes of Limitation, it is not enough that there should be merely a tortious act unknown to the injured party, or enjoyment of property without title, while the rightful owner is ignorant of his right; there must be some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts (*s*).

Time runs from discovery of fraud.

When the facts have once been discovered, time begins to run from the date of such discovery, as from the accrual of a new right, and, if the party entitled to relief then suffers the prescribed period to elapse without pursuing his remedy, his right of action is entirely barred (*t*).

(*m*) *Stedman* v. *Hart* (1854), Kay, 607.

(*n*) *Wilkinson* v. *Wilkinson* (1851), 9 Hare, 204.

(*o*) *Rock* v. *Cooke* (1847), 1 De G. & Sm. 675.

(*p*) See *Congreve* v. *Power* (1828), 1 Mol. 121; Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116, and *Re Kenrick, a Lunatic*, [1907] 1 I. R. 480.

(*q*) *Morse* v. *Royal* (1806), 12 Ves. 355, 374.

(*r*) *Roche* v. *O'Brien* (1810), 1 Ball & B. 330; *Blennerhassett* v. *Day* (1812), 2 Ball & B. 104; *Hatch* v. *Hatch* (1804), 9 Ves. 292. See, as regards land and rent, Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 26, p. 143, *ante*. As to fraud and undue influence, see titles EQUITY, Vol. XIII., pp. 15 *et seq.*, 169 *et seq.*; FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 103 *et seq.*; MISREPRESENTATION AND FRAUD.

(*s*) *Dean* v. *Thwaite* (1855), 21 Beav. 621; see *Lewellin* v. *Mackworth* (1740), 2 Eq. Cas. Abr. 579; *Gordon* v. *Gordon* (1821), 3 Swan. 400; *Rolfe* v. *Gregory* (1865), 34 L. J. (CH.) 274; *Alden* v. *Gregory* (1764), 2 Eden, 280; *Hatch* v. *Hatch* (1804), 9 Ves. 292; *Roche* v. *O'Brien* (1810), 1 Ball & B. 330; *Charter* v. *Trevelyan* (1844), 11 Cl. & Fin. 714, H. L.; *Gresley* v. *Mousley* (1858), 1 Giff. 450; *Robertson* v. *Norris* (1858), 1 Giff. 421; *Pooley's Trustee* v. *Whetham* (1886), 33 Ch. D. 111, 123, C. A.; *Farrar* v. *Farrars, Ltd.* (1888), 40 Ch. D. 395, 409, C. A.; *Vernon* v. *Vawdry* (1741), 2 Atk. 119; *Allfrey* v. *Allfrey* (1849), 1 Mac. & G. 87; *Cheese* v. *Keen*, [1908] 1 Ch. 245; *Blair* v. *Bromley* (1847), 2 Ph. 354; *Gibbs* v. *Guild* (1882), 9 Q. B. D. 59; and see title EQUITY, Vol. XIII., p. 170, notes (*b*), (*c*); and pp. 49, 143, *ante*.

(*t*) *South Sea Co.* v. *Wymondsell* (1732), 3 P. Wms. 143; *Medlicott* v. *O'Donel*

SECT. 4.—*Mistake.*

SECT. 4. Mistake.

355. The payment of money or transfer of property under a mistake may be a ground for equitable relief, but such relief will not be granted, if the application is made more than six years after the discovery of the mistake or the time when, with reasonable diligence, it might have been discovered (*a*).

Mistake.

SECT. 5.—*Mortgages of Personalty and Advowsons.*

356. There is no statutory period of limitation applicable to an action for the foreclosure or redemption of a mortgage of personalty, and no statute which a court, when administering equity, can apply in such a case, the statutory limitation applicable to an action for the foreclosure or redemption of land not being applicable by analogy to a mortgage of personalty (*b*). But if real estate and personal estate are comprised in one mortgage for one sum, the two properties being subject to the same proviso for redemption, and the mortgagor's right to redeem the real estate is barred, equity will not decree a redemption of the personal estate (*c*).

Mortgage of personalty.

Mortgage of personalty and realty.

There is no statutory period of limitation for an action for the foreclosure or redemption of a mortgage of an advowson, but a person bringing such an action may fail if he has been guilty of such delay as to amount to laches (*d*).

Mortgage of advowson.

SECT. 6.—*Agreement not to Sue.*

357. If creditors enter into a binding agreement not to sue a debtor for a certain time, such an agreement can be pleaded as a defence to an action by the creditors, and no Statute of Limitation will run during its pendency. Thus if a deed between a debtor and his creditors provides that, in consideration of the debtor giving up his life interest in certain property for the payment of his debts, licence should be given to the debtor to carry on his business without suit or molestation to his person or property, and that if any of the creditors take proceedings to enforce their claims

Agreement not to sue.

(1809), 1 Ball & B. 156; *Clanricarde* (*Marquis*) v. *Henning* (1861), 30 Beav. 175; see *Beaden* v. *King* (1852), 9 Hare, 499, 532; *Metropolitan Bank* v. *Heiron* (1880), 5 Ex. D. 319, C. A.; *Re Fitzroy Bessemer Steel etc. Co., Ltd.* (1884), 50 L. T. 144; *Molloy* v. *Mutual Reserve Life Insurance Co.* (1906), 94 L. T. 756, C. A.

(*a*) *Brooksbank* v. *Smith* (1836), 2 Y. & C. (EX.) 58; *Denys* v. *Shuckburgh* (1840), 4 Y. & C. (EX.) 42; *Harris* v. *Harris* (No. 2) (1861), 29 Beav. 110; see *Baker* v. *Courage & Co.*, [1910] 1 K. B. 56. An action brought by one *cestui que trust* against another to recover money wrongly paid to the latter by the trustee under a common mistake of fact is barred after six years from the payment; but if such claim is made in an action in which the court is administering the trust estate, and there are assets to which the overpaid *cestui que trust* is entitled, the court will adjust the accounts between the parties and lapse of time will be no bar (*Re Robinson, McLaren* v. *Public Trustee*, [1911] 1 Ch. 502); see, further, titles EQUITY, Vol. XIII., pp. 22 *et seq.*; MISTAKE.

(*b*) *London and Midland Bank* v. *Mitchell*, [1899] 2 Ch. 161; *Charter* v. *Watson*, [1899] 1 Ch. 175; *Mellersh* v. *Brown* (1890), 45 Ch. D. 225; *Re Stucley, Stucley* v. *Kekewich*, [1906] 1 Ch. 67, C. A.; *Re Hancock, Hancock* v. *Berrey* (1888) 59 L. T. 197; *Re Lake's Trusts* (1890), 63 L. T. 416.

(*c*) *Charter* v. *Watson*, [1899] 1 Ch. 175; see p. 149, *ante*.

(*d*) *Brooks* v. *Muckleston*, [1909] 2 Ch. 519, 522; see pp. 106, 153 *ante*.

SECT. 6. Agreement not to Sue.

their debts should be forfeited, creditors suing within the statutory period after his death can rely on the agreement as an answer to a plea of the statute (*e*).

SECT. 7.—*Laches and Acquiescence.*

Laches.

358. In some cases equitable relief will be refused on the ground of laches if the person seeking it has not come into court with reasonable speed after the facts have come to his knowledge, especially if by his supineness the position of other persons has become changed (*f*).

Part VIII.—Penal Actions and other Proceedings.

SECT. 1.—*Penal Actions.*

Proceedings on penal statutes.

359. All actions, indictments, and informations brought for any forfeiture upon any penal statute, where the forfeiture is limited to the Crown only, must be brought within two years after the commission of the offence against such statute. When the benefit is limited to the Crown and to any other person who prosecutes in that behalf, the proceedings must be brought by any person who may lawfully sue, within one year after commission of the offence, and, in default of such proceedings, the action may be brought for the Crown within two years after the expiration of that year (*g*). If an action is limited by any penal statute to be brought within a shorter period than the times above specified, the action must be brought within such shorter period (*h*).

Where penalty given to party grieved.

360. All actions for penalties, damages, or sums of money given to the party grieved must be commenced within two years after the accrual of the cause of such actions, unless the time for bringing such actions is specially limited by any statute (*i*), and subject in this case to the exceptions in favour of disabilities provided by the Civil Procedure Act, 1833 (*k*), s. 4, as amended

(*e*) *O'Brien* v. *Osborne* (1852), 10 Hare, 92; see *Iven* v. *Elwes* (1854), 3 Drew. 25, and p. 65, *ante*.

(*f*) See title EQUITY, Vol. XIII., p. 168. This jurisdiction is not affected by the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27); see *ibid.*, s. 27, and pp. 144, 173, *ante*.

(*g*) Stat. (1588-9) 31 Eliz. c. 5, s. 5. If an act for which a penalty is imposed by statute is also an offence at common law, the prosecution for such an act as an offence at common law is restrained by the stat. (1588-9) 31 Eliz. c. 5 (Buller, Law of Nisi Prius, 190). See, further, title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 294, note (*c*).

(*h*) Stat. (1588-9) 31 Eliz. c. 5, s. 5.

(*i*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 3.

(*k*) 3 & 4 Will. 4, c. 42; see p. 78, *ante*. An action by a shareholder of a company to recover compensation from directors under the Companies (Consolidation) Act, 1908 (6 Edw. 7, c. 69), s. 84, is not within the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 4, but is within the Limitation Act, 1623 (21 Jac. 1, c. 16) (*Thomson* v. *Clanmorris* (*Lord*), [1900] 1 Ch. 718, C. A.; see p. 39, *ante*).

by the Mercantile Law Amendment Act, 1856 (*l*). When all the benefit goes to the informer and no part to the Crown, the proceeding must be brought by the informer within one year (*m*).

Action by officer of Goldsmiths' Company.

361. An action by an officer of the Goldsmiths' Company empowered by the Gold and Silver Wares Act, 1844 (*n*), to sue dealers who have in their possession wares with forged marks, is not within either of the above provisions, and can be brought more than two years after the accrual of the cause of action (*o*).

When time begins to run.

362. In the case of an information the proceedings are commenced by the filing of the information; it is, therefore, at the date of this step that the statutory period is to be reckoned (*p*).

SECT. 2.—*Criminal Proceedings and Crown Practice.*

Rights between Crown and subject.

363. The rights of the Crown against a subject and the rights of a subject against the Crown are not affected by the ordinary Statutes of Limitation. The Limitation Act, 1623 (*q*), the Civil Procedure Act, 1833 (*r*), and the Real Property Limitation Acts, 1833 and 1874 (*a*), do not bind the Crown. The old rule, *nullum tempus occurrit regi* (*b*), still prevails, except where it has been altered by statute (*c*).

Criminal prosecutions.

364. Except, therefore, where there is statutory provision to the contrary, prosecutions for felonies and misdemeanours may, in general, be commenced at any time after the commission of the crime (*d*).

(*l*) 19 & 20 Vict. c. 97, s. 10; see pp. 56, 78, *ante*.

(*m*) *Dyer* v. *Best* (1866), L. R. 1 Exch. 152; see *Lewis* v. *Davis* (1875), L. R. 10 Exch. 86, Ex. Ch.; *Robinson* v. *Currey* (1881), 7 Q. B. D. 465, C. A., *per* BRAMWELL, L.J., at p. 471; *Culliford* v. *Blandford* (1692), Carth. 232; S. C., *sub nom. Calliford* v. *Blawford* (1692), 1 Show. 353; *Lookup* v. *Frederick* (1767), 4 Burr. 2018; Buller, Law of Nisi Prius, 190; *Chance* v. *Adams* (1796), 1 Ld. Raym. 77; *R.* v. *Gall* (1699), 3 Salk. 199. As to cases where the penalty is to be divided between the informer and someone else other than the Crown, see *Barrett* v. *Johnson* (1836), 2 Jo. Ex. Ir. 197.

(*n*) 7 & 8 Vict. c. 22, s. 3; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 758, 759.

(*o*) *Robinson* v. *Currey* (1881), 7 Q. B. D. 465, C. A.; and see note (*n*), p. 77, *ante*.

(*p*) Crown Suits etc. Act, 1865 (28 & 29 Vict. c. 104), ss. 6, 8, 10; see, generally, title CROWN PRACTICE, Vol. X., pp. 20 *et seq.*; as to the old practice, see *A.-G.* v. *Hall* (1823), 11 Price, 760.

(*q*) 21 Jac. 1, c. 16; see p. 37, *ante*.

(*r*) 3 & 4 Will. 4, c. 42; see p. 174, *ante*.

(*a*) 3 & 4 Will. 4, c. 27, and 37 & 38 Vict. c. 57; see p. 159, *ante*.

(*b*) Hob. 347.

(*c*) See *Re J.* (*a Person of Unsound Mind*), [1909] 1 Ch, 574, C. A., and titles CONSTITUTIONAL LAW, Vol. VI., pp. 374, 375, 410; CROWN PRACTICE, Vol. X., p. 34; see also p. 41, *ante*. As to claims against the Heir Apparent, see title CONSTITUTIONAL LAW, Vol. VI., p. 369, note (*n*). As to the cases where the Crown is bound by the lapse of time, see pp. 41, 159, *ante*. As to the time at the expiration of which claims for estate and succession duties on real property in the hands of purchasers for value or mortgagees become barred, see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., pp. 223, 301.

(*d*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 294. As to a criminal information, see *ibid.*, p. 329.

SECT. 2. Criminal Proceedings and Crown Practice.

Summary proceedings.

Summary proceedings before justices must, in the absence of any special limitation, be instituted within six calendar months from the time when the matter of the complaint or information arose (*e*).

Special proceedings.

There are special rules as to periods of limitation applicable to special forms of procedure, for instance, election petitions (*f*), *certiorari* (*g*), mandamus (*h*), and *quo warranto* (*i*).

SECT. 3.—*Special Periods of Limitation.*

SUB-SECT. 1.—*Acts done under Statutory Authority.*

Acts done under statutory authority.

365. A special limitation of six months (*k*) is provided for any action, prosecution, or other proceeding against any person for any act done in pursuance, or execution, or intended execution, of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty or authority (*l*). This provision, it seems, does not apply to trading bodies, even if acting under statutory authority, but only to public bodies or public officers (*m*).

A number of statutes provide special limitations for proceedings in respect of acts done in pursuance of or in the execution of such statutes; and these statutes, though expressly repealed by the Public Authorities Protection Act, 1893 (*n*), are only so repealed as to

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(*e*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11; see *R.* (*O'Reilly*) v. *Fermanagh Justices*, [1904] 2 I. R. 18, C. A.; *West* v. *Downman* (1880), 14 Ch. D. 111, C. A.; and see generally title MAGISTRATES.

(*f*) See title ELECTIONS, Vol. XII., pp. 412, 493.

(*g*) See title CROWN PRACTICE, Vol. X., p. 208.

(*h*) *Ibid.*, p. 111.

(*i*) *Ibid.*, p. 137.

(*k*) In every Act passed after 1850, unless a contrary intention appears, "month" means "calendar month" (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3); and see title TIME.

(*l*) Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61) (which is a Statute of Limitation; see *Gregory* v. *Torquay Corporation*, [1911] 2 K. B. 556); see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*m*) *A.-G.* v. *Margate Pier and Harbour* (*Company of Proprietors*), [1900] 1 Ch. 749; *Lyles* v. *Southend-on-Sea Corporation*, [1905] 2 K. B. 1, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 13; *Kent County Council* v. *Folkestone Corporation*, [1905] 1 K. B. 620, C. A.; *O'Brien* v. *Mitchelstown Loan Fund*, [1903] 1 I. R. 282; *Humphries* v. *Worwood* (1894), 61 L. J. (Q. B.) 437. The Act applies to officials of a public authority when the officials are sued for an act done under statutory authority (*Greenwell* v. *Howell*, [1900] 1 Q. B. 535, C. A.; *Wilson* v. *1st Edinburgh City Royal Garrison Artillery Volunteers* (1904), 7 F. (Ct. of Sess.) 168), but not to the acts of independent contractors doing, under a contract with the authority, work which the authority has power to do (*Tilling* (*T.*), *Ltd.* v. *Dick Kerr & Co., Ltd.*, [1905] 1 K. B. 562; *Kent County Council* v. *Folkestone Corporation, supra*). As to actions for breach of contract, see *Lyles* v. *Southend-on-Sea Corporation, supra*; *Clarke* v. *Lewisham District Council* (1902), 19 T. L. R. 62; *National Telephone Co., Ltd.* v. *Kingston-upon-Hull Corporation* (1903), 1 L. G. R. 777. As to a private person acting in the performance of a public duty, see *Salisbury* v. *Gould* (1904), 68 J. P. 158.

(*n*) 56 & 57 Vict. c. 61, s. 2, and Schedule. *Ibid.*, s. 2, repeals so much of any public general Act as, in any proceeding to which the Act applies, fixes any period for the commencement of the proceeding; the schedule (*ibid.*) contains a list of enactments parts of which are "so repealed." As to the effect of such repeal, see note (*o*), p. 177, *post*.

Proceedings to which that Act applies, and are therefore, it seems, still in force as regards private persons (*o*).

SECT. 3. Special Periods of Limitation.

Limitation under local and personal Acts.

366. Various local and personal Acts contain different periods of limitation for actions brought for anything done in pursuance of such Acts, but as regards all such Acts passed before the 10th August, 1842 (*p*), one uniform period of limitation is provided, namely, two years, or, in case of continuing damage, one year after such damage has ceased (*q*).

(*o*) See Coinage Offences Act, 1861 (24 & 25 Vict. c. 99), s. 33 (repealed); Constables Protection Act, 1750 (24 Geo. 2, c. 44), s. 8 (see *Parton* v. *Williams* (1820), 3 B. & Ald. 330, 338; *Gosden* v. *Elphick* (1849), 4 Exch. 445; *Smith* v. *Wiltshire* (1821), 5 Moore (C. P.), 322; *Freegard* v. *Barnes* (1852), 7 Exch. 827); Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 26; County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 53 (repealed); County Rates Act, 1852 (15 & 16 Vict. c. 81), s. 44; Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92), s. 27 (repealed); Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 272 (repealed); Customs, Inland Revenue, and Savings Banks Act, 1877 (40 & 41 Vict. c. 13), s. 4 (repealed); Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 13; Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 47; Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), s. 31; Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 109; Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 28 (repealed); Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 113 (repealed); Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 331 (repealed); Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 71; Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), s. 108 (repealed) (see *Williams* v. *Golding* (1865)), L. R. 1 C. P. 69); Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 106 (repealed) (see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 40 (8); *Delany* v. *Metropolitan Board of Works* (1867), L. R. 2 C. P. 532; affirmed, L. R. 3 C. P. 111, Ex. Ch.; *Doust* v. *Slater* (1869), 38 L. J. (Q. B.) 159; *Poulsum* v. *Thirst* (1867), L. R. 2 C. P. 449; *Whatman* v. *Pearson* (1868), L. R. 3 C. P. 422; *Edwards* v. *St. Mary, Islington, Vestry* (1889), 22 Q. B. D. 338, C. A.); Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 53 (see *Barnett* v. *Cox* (1846), 9 Q. B. 617); Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 75, 224 (repealed); Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 104; Prison Act, 1865 (28 & 29 Vict. c. 126), s. 50 (repealed); Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 264 (see *Graham* v. *Newcastle-upon-Tyne Corporation*, [1893] 1 Q. B. 643, C. A.; *Burton* v. *Salford Corporation* (1883), 11 Q. B. D. 286; *Crumbie* v. *Wallsend Local Board*, [1891] 1 Q. B. 503, C. A.; *Lea* v. *Facey* (1887), 19 Q. B. D. 352, C. A.; *Midland Rail. Co.* v. *Withington Local Board* (1883), 11 Q. B. D. 788, C. A.; *Waterhouse* v. *Keen* (1825), 4 B. & C. 200; *Davies* v. *Swansea Corporation* (1853), 8 Exch. 808; *Dearle* v. *Petersfield Union Guardians* (1888), 21 Q. B. D. 447, 452, C. A.; *Foat* v. *Margate Corporation* (1883), 11 Q. B. D. 299; *Carr* v. *Royal Exchange Assurance* (1862), 1 B. & S. 956); Submarine Telegraph Act, 1885 (48 & 49 Vict. c. 49), s. 6 (3); Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 20 (repealed). The Acts which are marked in this note as repealed are repealed by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), but only, it seems, as to proceedings to which that Act applies; see note (*n*), p. 176, *ante*.

(*p*) Limitations of Actions and Costs Act, 1842 (5 & 6 Vict. c. 97), s. 5. This Act, so far as it relates to public authorities and public officers is, it seems, repealed by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 2, but remains in force as regards private persons.

(*q*) See *Richards* v. *Easto* (1846), 15 M. & W. 244; *Cock* v. *Gent* (1843), 12 M. & W. 234; *Moore* v. *Shepherd* (1854), 10 Exch. 424; *Shepherd* v.

SECT. 3.
Special Periods of Limitation.

Meaning of "act committed."

Continuance of injury or damage.

367. In many of the statutes which fix a special period of limitation, such period commences from the act or fact committed; these words mean substantially the same as "from the accrual of the cause of action" (*r*). Thus if the cause of action, as laid, is the happening of the damage and not the mere doing of the act which causes the damage, time will run not from the doing of the act, but from the happening of the damage (*s*).

In some of the statutes which fix special periods of limitation time runs either from the act committed or, if the injury or damage continues, from the ceasing of the injury or damage (*t*). An action for false imprisonment, if within the protection of a special statute, may be commenced at any time within the special statutory period from the end of the imprisonment, and the last day of the imprisonment is excluded in the computation of the period (*a*). In an action for illegal distress time runs from the sale of the goods and is not barred on the expiration of the special statutory period after the seizure (*b*). Continuance of injury or damage means continuance of a legal injury, and not merely continuance of the injurious effects of a legal injury. The continuance of the injurious effects of an accident is not a continuance of injury or damage within the meaning of the Public Authorities Protection Act, 1893 (*c*), s. 1 (*d*). If there is a continuance of a legal injury, for example, pollution of a stream, and the action is commenced within the special statutory period of the ceasing of the continuing injury, the plaintiff may recover damages not merely for the special statutory period, but for the whole period for which damages could be awarded under the Limitation Act, 1623 (*e*).

Sharp (1856), 1 H. & N. 115, Ex. Ch.; *Boden* v. *Smith* (1849), 18 L. J. (C. P.) 121; *Carr* v. *Royal Exchange Assurance Co.* (1862), 1 B. & S. 956.

(*r*) This is the expression used in the Limitation Act, 1623 (21 Jac. 1, c. 16), and the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42); see pp. 37, 77, *ante*.

(*s*) *Whitehouse* v. *Fellowes* (1861), 10 C. B. (N. S.) 765; see *Crumbie* v. *Wallsend Local Board*, [1891] 1 Q. B. 503, C. A.; *Fairbrother* v. *Bury Rural Sanitary Authority* (1889), 37 W. R. 544; *Bonomi* v. *Backhouse* (1861), 9 H. L. Cas. 503; *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127. As to the construction of statutes generally, see title STATUTES.

(*t*) See Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1; Limitations of Actions and Costs Act, 1842 (5 & 6 Vict. c. 97); *Kennet and Avon Canal Co.* v. *Great Western Rail. Co.* (1845), 7 Q. B. 824.

(*a*) *Hardy* v. *Ryle* (1829), 9 B. & C. 603; *Bailey* v. *Warden* (1815), 4 M. & S. 400; and see title TRESPASS.

(*b*) *Fraser* v. *Swansea Canal Co.* (1834), 1 Ad. & El. 354; *Collins* v. *Rose* (1839), 5 M. & W. 194 (distinguishing *Goding* v. *Ferris* (1791), 2 Hy. Bl. 14; *Crook* v. *M'Tavish* (1823), 1 Bing. 167; and *Saunders* v. *Saunders* (1802), 2 East, 254); see *Polley* v. *Fordham*, [1904] 2 K. B. 345. As to illegal distress, see title DISTRESS, Vol. XI., pp. 195 *et seq.*

(*c*) 56 & 57 Vict. c. 61.

(*d*) *Carey* v. *Bermondsey Borough Council* (1903), 2 L. G. R. 219, C. A.; *Williams* v. *Mersey Docks and Harbour Board*, [1905] 1 K. B. 804, C. A.; *Gawley* v. *Belfast Corporation*, [1908] 2 I. R. 34, C. A.; *Markey* v. *Tolworth Joint Isolation Hospital District Board*, [1900] 2 Q. B. 454; compare title DAMAGES, Vol. X., p. 310.

(*e*) 21 Jac. 1, c. 16; *Harrington* (*Earl*) v. *Derby Corporation*, [1905]

SECT. 3.
Special Periods of Limitation.

Act done under the authority of a statute.

368. A private person or company to whom special powers are given to carry out particular works, when sued for some unauthorised act, and when entitled to the benefit of a special period of limitation for an act done in pursuance or execution of the statute, generally comes within the protection of the statute, if in doing the act complained of the person or company was intending to carry out the particular works contemplated by the statute (*f*) or if, in the case of a person, he believed in the existence of a state of facts which, if it had existed, would have justified him in doing as he did (*g*). It is not necessary that he should have had reasonable grounds for his belief (*h*), or that he should have had the statute in his mind or have known of its existence (*i*).

Error of commission or omission.

An act may be done in pursuance of or in the execution of the powers granted by a statute, although such act is prohibited by the statute (*k*). A person acting under statutory powers may erroneously exceed the powers given, or inadequately discharge the duties imposed, by a statute, yet if he acts *bonâ fide* in order to execute such powers or to discharge such duties, he is considered as acting in pursuance of the statute (*l*). Where a statute imposes a duty, the omission to do something that ought to be done in order completely to perform the duty, or the continuing to leave any such duty unperformed, amounts to an act done or intended to be done within the meaning of a statute which provides a special period of limitation for such an act (*m*).

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1 Ch. 205; *Hague* v. *Doncaster Rural District Council* (1908), 100 L. T. 121; compare *Wilkes* v. *Hungerford Market Co.* (1835), 2 Bing. (N. C.) 281 (overruled, but not on this point, by *Ricket* v. *Metropolitan Rail. Co.* (*Directors etc.*) (1867), L. R. 2 H. L. 175, 187); *Blakemore* v. *Glamorganshire Canal Co.* (1829), 3 Y. & J. 60.

(*f*) It has even been held that a company is entitled to such protection even though the acts complained of had been done improperly and in bad faith (*Oakley* (*Lord*) v. *Kensington Canal Co.* (1833), 5 B. & Ad. 138; but see *R.* v. *Eastern Counties Rail. Co.* (1841), 1 Gal. & Dav. 589).

(*g*) *Chamberlain* v. *King* (1871), L. R. 6 C. P. 474; *Hughes* v. *Buckland* (1846), 15 M. & W. 346.

(*h*) *Roberts* v. *Orchard* (1863), 2 H. & C. 769, Ex. Ch.; *Hermann* v. *Seneschal* (1862), 13 C. B. (N. S.) 392; *Chamberlain* v. *King, supra,* explaining *Leete* v. *Hart* (1868), L. R. 3 C. P. 322; compare *Agnew* v. *Jobson* (1877), 47 L. J. (M. C.) 67.

(*i*) *Roberts* v. *Orchard, supra.* As to public officers, see *Hardwick* v. *Moss* (1861), 7 H. & N. 136; *Graves* v. *Arnold* (1812), 3 Camp. 242; *Irving* v. *Wilson* (1791), 4 Term Rep. 485; *Greenway* v. *Hurd* (1792), 4 Term Rep. 553; and see *Burns* v. *Nowell* (1880), 5 Q. B. D. 444, C. A.; *Selmes* v. *Judge* (1871), L. R. 6 Q. B. 724; and title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*k*) *Gaby* v. *Wilts and Berks Canal Co.* (1815), 3 M. & S. 580.

(*l*) *Smith* v. *Shaw* (1829), 10 B. & C. 277; see *Theobald* v. *Crichmore* (1818), 1 B. & Ald. 227; compare *Griffith* v. *Taylor* (1876), 2 C. P. D. 194, C. A.

(*m*) *Wilson* v. *Halifax Corporation* (1868), L. R. 3 Exch. 114; *Jolliffe* v. *Wallasey Local Board* (1873), L. R. 9 C. P. 62; *Poulsum* v. *Thirst* (1867), L. R. 2 C. P. 449; *Holland* v. *Northwich Highway Board* (1876), 34 L. T. 137; *Edwards* v. *St. Mary's, Islington, Vestry* (1889), 22 Q. B. D. 338, C. A. Most of these cases are now provided for by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1 of which not only relates to an act done in pursuance of a statute, but also to any neglect or default

SECT. 3. Special Periods of Limitation.

A person who is not acting under the orders or directions of a public authority, but who commits a trespass while doing work required by a notice received from the authority, is not acting under the statute under which the notice is given (*n*). But if a contractor who is employed by a public authority to carry out work which the authority is authorised by statute to do is guilty of neglect or misfeasance, he is entitled to any special protection given by that statute (*o*), unless the negligence or misfeasance is collateral to the thing done or intended to be done under the statute (*p*).

SUB-SECT. 2.—*Miscellaneous Limitations.*

Actions against guardians.

369. Any debt, claim, or demand which may be lawfully incurred by or become due from the guardians of any union or parish, or the board of management of any school or asylum district, is to be paid within the half-year in which it was incurred or became due, or within three months next after the expiration of such half-year, unless the Local Government Board extends the time; no action for such debt, claim, or demand will lie after the expiration of three months from the end of such half-year, unless the time of payment has been so extended (*q*), nor, in such circumstances, will a mandamus to pay such debt be granted (*r*). If any person claiming any debt, claim, or demand from such an authority commences proceedings within the period limited for payment, and prosecutes such proceedings to judgment with due diligence, the judgment may be satisfied although recovered after the expiration of that period, and all proceedings by mandamus or otherwise for enforcing the judgment without delay are to be deemed proceedings within the operation of the statute (*s*).

Expenses of highway authority.

370. Proceedings for the recovery of expenses incurred in repairing a highway by reason of damage caused by excessive weight

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in the execution of a statute, but these cases may still be of importance with reference to neglect by contractors who are employed by a public authority; see note (*m*), p. 176, *ante*. As to a mere act of nonfeasance, see *Umphelby* v. *M'Lean* (1817), 1 B. & Ald. 42, and as to words spoken, see *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, [1892] 1 Q. B. 431, C. A. As to what is an act done in pursuance of a statute, see *Carruthers* v. *Payne* (1828), 5 Bing. 270; *Edge* v. *Parker* (1828), 8 B. & C. 697.

(*n*) *Doust* v. *Slater* (1869), 38 L. J. (Q. B.) 159.

(*o*) *Poulsum* v. *Thirst* (1867), L. R. 2 C. P. 449. The contractor in such a case does not come within the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61); see p. 176, *ante*.

(*p*) See *Whatman* v. *Pearson* (1868), L. R. 3 C. P. 422.

(*q*) *Baker* v. *Billericay Union Guardians* (1863), 2 H. & C. 642. As to guardians of the poor, see title POOR LAW.

(*r*) *R.* v. *Stepney Union* (1874), L. R. 9 Q. B. 383.

(*s*) Poor Law (Payment of Debts) Act, 1859 (22 & 23 Vict. c. 49), s. 4. See *Rhodes* v. *Pateley Bridge Union Guardians* (1884), 51 L. T. 235; *West Ham Union* v. *Bath Union* (1889), 53 J. P. 292; *Midland Rail. Co.* v. *Edmonton Union*, [1895] A. C. 485; *West Ham Union Guardians* v. *St. Matthew, Bethnal Green* (*Churchwardens etc.*), [1895] 1 Q. B. 662, C. A.: *Manchester, Sheffield and Lincolnshire Rail. Co.* v. *Doncaster Union Guardians*, [1897] 1 Q. B. 117, C. A.; *Sharpington* v. *Fulham Guardians*, [1904] 2 Ch. 449; *Dearle* v. *Petersfield Union Guardians* (1888), 21 Q. B. D. 447, C. A. See title POOR LAW.

passing along the highway or extraordinary traffic thereon, or for the recovery of expenses of making a street, are subject to special statutory limitations (*a*).

SECT. 3. **Special Periods of Limitation.**

371. Proceedings taken before justices to recover a civil debt must be commenced within six months of the accrual of the cause of action (*b*).

Recovery of civil debt before justices.

372. An action under the Fatal Accidents Act, 1846 (*c*), must be commenced within twelve calendar months of the death of the person in respect of whose death compensation is claimed (*d*).

Compensation for fatal or other injury.

An action for the recovery of compensation under the Employers' Liability Act, 1880 (*e*), must be commenced within six months of the occurrence causing the injury, or, in case of death, within twelve months from the death.

Proceedings for the recovery of compensation under the Workmen's Compensation Act, 1897 (*f*), are not maintainable unless the claim for compensation with respect to the accident is made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the death (*g*).

Workmen's Compensation Act, 1897.

373. A creditor is not entitled by any means whatsoever to obtain payment of his debt out of the property of a deceased seaman or apprentice, if the debt accrued due more than three years before the death of the debtor, or if the demand is not made within two years after the death (*h*).

Claim against property of deceased seaman.

374. If an order is made by a court of summary jurisdiction (*i*)

Claim under the Police (Property) Act, 1897.

(*a*) See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 177 *et seq.*, 222 *et seq.*, 235. As to proceedings for the recovery of rates, see *Sweetman* v. *Guest* (1868), L. R. 3 Q. B. 262; *Keeton* v. *Sheffield Coal Co.*, [1901] 2 K. B. 26; and title RATES AND RATING.

(*b*) *R.* (*O'Reilly*) v. *Fermanagh Justices*, [1904] 2 I. R. 18, C. A.; *Harpin* v. *Sykes* (1885), 1 T. L. R. 307; *West* v. *Downman* (1880), 14 Ch. D. 111, C. A. An application for an affiliation order cannot in general be made after the expiration of twelve months from the birth of the child, unless the putative father has paid for the child's maintenance; see title BASTARDY, Vol. II., p. 444.

(*c*) 9 & 10 Vict. c. 93, s. 1; see title MASTER AND SERVANT.

(*d*) If the action is brought against a public authority which is within the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), the action must be brought within six months of the time of the injury which caused the death (*Williams* v. *Mersey Docks and Harbour Board*, [1905] 1 K. B. 804, C. A.; *Markey* v. *Tolworth Joint Isolation Hospital District Board*, [1900] 2 Q. B. 454).

(*e*) 43 & 44 Vict. c. 42, s. 4; see title MASTER AND SERVANT.

(*f*) 60 & 61 Vict. c. 37, s. 2 (1); see title MASTER AND SERVANT.

(*g*) See *Powell* v. *Main Colliery Co.*, [1900] A. C. 366; *Wright* v. *John Bagnall & Son, Ltd.*, [1900] 2 Q. B. 240, C. A.; and see p. 182, *post*. See also title MASTER AND SERVANT. As to the recovery of deductions or payments contrary to the Truck Act, 1896 (59 & 60 Vict. c. 44), see title FACTORIES AND SHOPS, Vol. XIV., p. 523.

(*h*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 178. This provision is, it seems, limited to property of a deceased seaman or apprentice with which the Board of Trade is empowered to deal; see *ibid.*, s. 169. As to summary proceedings under the Act, see titles MAGISTRATES; SHIPPING AND NAVIGATION.

(*i*) See title MAGISTRATES.

SECT. 3. Special Periods of Limitation.

under the Police (Property) Act, 1897 (*k*), for the delivery up of property which has come into the possession of the police in connection with any criminal charge or in similar circumstances (*l*), a person who claims such property may, in spite of such order, take legal proceedings against anyone in possession of property delivered by virtue of the order, but only within six months from the date of the order (*m*).

SUB-SECT. 3.—*Disabilities, Acknowledgments and Estoppel.*

No provision in special enactments for disabilities etc.

375. No provision for disabilities or acknowledgment is made in the enactments providing special periods of limitations.

Negotiations. Estoppel.

376. Negotiations between a claimant and a person against whom a claim is made, although such negotiations lead to delay and cause the claimant not to bring his action until the statutory period has passed, do not debar the defendant from setting up the statute (*n*). There is no estoppel in such a case, unless what has happened amounts to an agreement that the defendant is to be liable (*o*). Thus negotiations between a claimant and his employers shortly after an accident as to the amount of compensation to be paid under the Workmen's Compensation Act, 1897 (*p*), may be evidence of an agreement that compensation is to be paid, the only question left open being that of amount; in such a case the employer may be estopped from setting up the defence that a claim was not made within the prescribed time (*q*).

Part IX.—Pleadings and Process.

SECT. 1.—*Pleading the Statutes of Limitation* (*r*).

Statutes which bar the right, not the cause of action.

377. The effect of those Statutes of Limitation which relate to personal actions, other than actions on penal statutes (*s*), is not to extinguish the cause of action, but to bar the right to maintain the action. The defence of the statute in such cases must be specially pleaded, even if it appears on the face of the statement of claim that the cause of action accrued out of the time limited (*t*).

(*k*) 60 & 61 Vict. c. 30.

(*l*) *I.e.*, under the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 6; or the City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 48; or the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 103; or the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 34; see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 684 *et seq.*; POLICE.

(*m*) Police (Property) Act, 1897 (60 & 61 Vict. c. 30), s. 1.

(*n*) *Hewlett* v. *London County Council* (1908), 72 J. P. 136; see title ESTOPPEL, Vol. XIII., pp. 388 *et seq.*

(*o*) See *Wright* v. *Bagnall* (*John*) *& Sons, Ltd.*, [1900] 2 Q. B. 240, C. A.

(*p*) 60 & 61 Vict. c. 37.

(*q*) *Wright* v. *Bagnall* (*John*) *& Sons, Ltd.*, *supra.*

(*r*) As to pleading generally, see title PLEADING.

(*s*) See *Maugham* v. *Walker* (1793), Peake, 220 [163]; and as to penal statutes, see p. 174, *ante.*

(*t*) *Stile* v. *Finch* (1634), Cro. Car. 381; *Hawkings* v. *Billhead* (1636),

SECT. 1.
Pleading the Statutes of Limitation.

When statute must be pleaded.

378. In actions of contract and tort since the Judicature Acts, when it is wished to take advantage of the statute, it must be pleaded, except where the plea of the general issue by statute is admissible (*a*).

In actions for the recovery of land the defendant may plead that he is in possession, and that plea has the effect of the general issue (*b*).

General issue.

There are certain cases in which a person when sued is allowed by a special Act of Parliament to plead the general issue, that is not guilty by statute, and when a defendant is allowed to do this he cannot plead any other defence except with leave, but he can raise the defence of the statute under the general issue (*c*).

Actions for the recovery of land.

379. In actions for the recovery of land which have now taken the place, but retain many of the peculiarities, of the old actions of ejectment (*d*), the plaintiff must on the face of his pleading show, and must at the trial prove, a legal title to possession not barred by the statute (*e*). A statement of claim which does not on the face of

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Cro. Car. 404; *Chapple* v. *Durston* (1830), 1 Cr. & J. 1; see now R. S. C., Ord. 19, r. 15. Actions may in some cases be tried without pleadings (R. S. C., Ord. 18A. In such cases the defence of the statute must be raised by notice (*ibid.*, r. 5). In penal actions the defendant could formerly take advantage of the statute under a plea of the general issue; see notes to *Hodsden* v. *Harridge* (1670), 2 Wms. Saund. (ed. 1871) 150, 159; stat. (1623) 21 Jac. 1, c. 4, s. 4; *Spencer* (*Earl*) v. *Swannell* (1838), 3 M. & W. 154, at p. 161; Bullen and Leake, Precedents of Pleading, 3rd ed., 704; R. S. C., Ord. 19, r. 12; Ord. 21, r. 19); but see the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 2. As to the rules which relate to pleading under the present practice, see R. S. C., Ords. 19, 20, 21; as to the forms of the plea of the statute, see *ibid.*, Appendix D, ss. 2, 4; as to notice of the defence of the statute in an action in the county court, see County Court Act, 1888 (51 & 52 Vict. c. 43), s. 82; County Court Rules, 1895, Ords. 10, 14, Appendix, Form 95a; *Eaton* v. *Tapley*, [1899] 1 Q. B. 953; *Gregory* v. *Torquay Corporation*, [1911] 2 K. B. 556; title COUNTY COURTS, Vol. VIII., p. 485.

(*a*) R. S. C., Ord. 19, r. 15.

(*b*) See p. 184, *post*.

(*c*) R. S. C., Ord. 19, r. 15; Ord. 21, r. 19. The Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), abolishes the right to plead the general issue, wherever conferred by any of the enactments specified in the schedule to that Act, and also wherever conferred by any public general Act to which that Act applies (see p. 176, *ante*). But it seems that in cases to which the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), has no application (see p. 176, *ante*), if a person is sued and a statute which is still in force allows him to plead the general issue, he may still do so; see *The Ydun*, [1899] P. 236, C. A., *per* JEUNE, P., at pp. 240 *et seq.*; *A.-G.* v. *Margate Pier and Harbour* (*Company of Proprietors*), [1900] 1 Ch. 749, *per* KEKEWICH, J., at pp. 754, 755; *Lyles* v. *Southend-on-Sea Corporation*, [1905] 2 K. B. 1, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 13. The Limitations of Actions and Costs Act, 1842 (5 & 6 Vict. c. 97) (see p. 177, *ante*), repeals all provisions in local and personal Acts passed before 10th August, 1842, which enable a defendant to plead the general issue.

(*d*) See *Gledhill* v. *Hunter* (1880), 14 Ch. D. 492.

(*e*) See the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 34; and pp. 155, 158, *ante*.

SECT. 1. Pleading the Statutes of Limitation.

it show such a title may be struck out (*f*). The defendant need not plead the statute, but may simply plead that he is in possession (*g*). On such a plea the plaintiff can only take issue and proceed to trial; he cannot reply specially (*h*).

In actions in which the title to land incidentally comes in question, for example, in cases of trespass to land, there is no reason for specially setting up the statute, the proper mode of taking advantage of it being by a plea which denies that the land belongs to the party dispossessed (*i*). There may, however, be cases where in such actions the statute may with advantage be specially pleaded; for instance, if in an action for trespass there is a plea justifying under a grant, the plaintiff may reply that the grant is more than twelve years old, and that the defendant never went into possession under it, and that, therefore, his title was extinguished before the trespass was committed (*j*).

Pleas to a defence of set-off or counterclaim.

380. If the statute is pleaded to a defence of set-off, the plaintiff, in order to establish his plea, must prove at the trial that the set-off was barred when the plaintiff commenced his action; it is not enough to prove that the set-off was barred at the time when it was pleaded (*k*). The case of a counterclaim, it seems, is different, and it is enough for the plaintiff to prove that the counterclaim was barred when it was pleaded (*l*).

When issue joined.

381. When issue is joined on a plea of the statute, the burden of proving that the cause of action arose within the statutory period lies on the plaintiff (*m*).

Pleading disability.

382. A traverse of the plea of the statute only puts in issue the time at which the cause of action accrued. Therefore, if the plaintiff relies upon the existence of any disability as taking the case out of the statute, he must reply such disability specially (*n*); and the

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(*f*) R. S. C., Ord. 21, r. 4; *Dawkins* v. *Penrhyn* (*Lord*) (1878), 4 App. Cas. 51; *Philipps* v. *Philipps* (1878), 4 Q. B. D. 127, C. A.; *Darbyshire* v. *Leigh*, [1896] 1 Q. B. 554, C. A.

(*g*) R. S. C., Ord. 21, r. 21; *Heath* v. *Pugh* (1881), 6 Q. B. D. 345, *per* LINDLEY, J., at p. 353.

(*h*) *Danford* v. *McAnulty* (1883), 8 App. Cas. 456; *Miller* v. *Kirwan*, [1903] 2 I. R. 118. As to the onus of proof, see *Cole* v. *Heydon* (1860), 1 L. T. 439. As to pleading in actions by the Crown, see stat. (1623) 21 Jac. 1, c. 14; *A.-G. to the Prince of Wales* v. *St. Aubyn* (1811), Wight. 167, 236; *A.-G.* v. *Ward* (1832), Hayes, 555; *A.-G.* v. *Parsons* (1836), 2 M. & W. 23; *A.-G. for Trinidad and Tobago* v. *Bourne*, [1895] A. C. 83, P. C.

(*i*) *De Beauvoir* v. *Owen* (1847), 16 M. & W. 547. As to trespass generally, see title TRESPASS.

(*j*) *Keyse* v. *Powell* (1853), 2 E. & B. 132; see *Jones* v. *Jones* (1847), 16 M. & W. 699; and p. 157, *ante*. A reply can now only be pleaded by leave of the court or a judge (R. S. C., Ord. 23, r. 1); see title PLEADING.

(*k*) *Walker* v. *Clements* (1850), 15 Q. B. 1046; *Ord* v. *Ruspini* (1797), 2 Esp. 569; *Re Ballard, Lovell* v. *Forester*, [1890] W. N. 64. As to pleading the statute to part of a claim of set-off, see *Mead* v. *Bashford* (1850), 5 Exch. 336; and, generally, see title SET-OFF AND COUNTERCLAIM.

(*l*) See R. S. C., Ord. 19, r. 3; *McGowan* v. *Middleton* (1883), 11 Q. B. D. 464, C. A.

(*m*) *Wilby* v. *Henman* (1834), 2 Cr. & M. 658; *Beale* v. *Nind* (1821), 4 B. & Ald. 568, 571; *Hurst* v. *Parker* (1817), 1 B. & Ald. 92.

(*n*) No pleading subsequent to defence is now permitted except with

SECT. 1. Pleading the Statutes of Limitation.

reply should aver the existence of the disability at the time of the accrual of the cause of action, and also that the action was commenced within the proper period of the termination of the disability or while the disability was still subsisting (*o*). If the plaintiff to a plea of the statute replies alleging a disability, a rejoinder is bad which does not deny that the action was commenced while the disability was still subsisting or within the statutory period of the cessation of the disability. A rejoinder to such a reply is bad, if the rejoinder amounts to a denial of the plaintiff's cause of action: a plea of the statute admits the plaintiff's right to sue, but alleges that the remedy is barred by lapse of time (*p*); any matter that amounts to a denial of the plaintiff's right must be pleaded in the defence, and cannot be taken advantage of in rejoinder (*q*).

Pleading acknowledgment or part payment.

383. In cases of simple contract debts the liability may be revived by a promise to pay; and a promise to this effect is evidenced by an acknowledgment in writing or part payment (*r*). Such a promise is not a waiver of the statute, but a new cause of action, and therefore, if made within six years of action brought, it may be proved on a joinder of issue on a defence of the statute (*s*).

If in an action for a simple contract debt issue is joined on a defence of the statute, a promise made within six years cannot be relied on to defeat the plea of the statute, unless the parties to the promise are identical with those between whom the debt declared upon arose. Thus, if the original cause of action is a debt due from two persons jointly, and the promise relied on is a promise by

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the leave of the court or a judge (R. S. C., Ord. 23, r. 1); see title PLEADING.

(*o*) 1 Chitty's Pleading, 3rd ed., 475; Bullen and Leake, Precedents of Pleading, 3rd ed., 645.

(*p*) See *Margetts* v. *Bays* (1836), 4 Ad. & El. 489.

(*q*) *Scarpellini* v. *Atcheson* (1845), 7 Q. B. 864.

(*r*) See pp. 58, 67, *ante*.

(*s*) An acknowledgment or part payment is often pleaded by way of reply to a defence of the Limitation Act, 1623 (21 Jac. 1, c. 16), where the parties are the same; see *Skeet* v. *Lindsay* (1877), 2 Ex. D. 314; *Re Fountaine, Re Dowler, Fountaine* v. *Amherst* (*Lord*), [1909] 2 Ch. 382, 384, C. A. (amendment allowed at time); R. S. C., Ord. 19, r. 15; Yearly Practice of the Supreme Court, 1912, Vol. I., 245; Bullen and Leake, Precedents of Pleading, 6th ed., 728; Odgers, Principles of Pleading and Practice, 6th ed., 247. Before the Judicature Act, 1873 (36 & 37 Vict. c. 66), it never was the practice in an action under the Limitation Act, 1623 (21 Jac. 1, c. 16), to plead such an acknowledgment or part payment by way of reply to a defence of the statute; nor was it necessary to plead such an acknowledgment specially in the declaration (*Upton* v. *Else* (1827), 12 Moore (C. P.), 303; see *Ridd* v. *Moggridge* (1857), 2 H. & N. 567; *Tanner* v. *Smart* (1827), 6 B. & C. 603). As to pleading a conditional promise, see *Haydon* v. *Williams* (1830), 7 Bing. 163; *Hopkins* v. *Logan* (1839), 5 M. & W. 241, 248; *Hunter* v. *Hunter* (1869) 3 I. R. C. L. 138. As to actions on bills of exchange etc., see *Tanner* v. *Smart, supra;* Chitty on Bills of Exchange, 3rd ed., Part II., 279; 2 Chitty's Pleading, 4th ed., 144, 338. Now, however, the best course would seem to be to set out such an acknowledgment or part payment in the statement of claim; see R. S. C., Ord. 19, r. 4. As to allegations in the statement of claim that there has been an acknowledgment or part payment, see *Hollis* v. *Palmer* (1836), 2 Bing. (N. C.) 713.

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one to pay his proportion, this must be declared on specially, and cannot be used in an action against both to defeat a defence of the statute pleaded by the one who made the new promise (*t*).

Pleading in representative character.

In an action by an executor or administrator, if the plaintiff relies on an acknowledgment or part payment made to him as the personal representative of the deceased, the statement of claim should allege that the promise was made to the plaintiff in his representative capacity (*u*). If the plaintiff relies on a promise made by the defendant in his representative capacity, he must allege such a promise as the cause of action (*u*).

Actions on specialties.

In actions on specialties governed by the Civil Procedure Act, 1833 (*a*), an acknowledgment or part payment should either be alleged in the statement of claim or pleaded in reply to a defence of the statute, and should state whether the acknowledgment relied on is by writing signed by the defendant, or writing signed by his agent, or by part payment (*b*). The acknowledgment need not be set out (*c*). A plea to an action on a specialty should state not only that the debt had become payable more than twenty years before and that no acknowledgment had been given nor part payment made, but also that there had been no payment of interest (*d*).

Promise not to plead the statute.

384. A promise not to plead the Limitation Act, 1623 (*e*), whether in writing or not, if it is founded on good consideration

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(*t*) *Lechmere* v. *Fletcher* (1833), 1 Cr. & M. 623, 626, n.; *Pittam* v. *Foster* (1823), 1 B. & C. 248 (this case, where one party was a married woman, was before the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), but the law since that Act seems the same (*Beck* v. *Pierce* (1889), 23 Q. B. D. 316, C. A.).

(*u*) *Hickman* v. *Walker* (1737), Willes, 27; *Dean* v. *Crane* (1704), 1 Salk. 28; S. C. *sub nom. Green* v. *Crane* (1705), 11 Mod. Rep. 37; *Marlborough's* (*Duke*) *Executors* v. *Widmore* (1731), 2 Stra. 890; *Sarell* v. *Wine* (1803), 3 East, 409; *Ward* v. *Hunter* (1815), 6 Taunt. 210; *Short* v. *M'Carthy* (1820), 3 B. & Ald. 626, 631; *Bodger* v. *Arch* (1854), 10 Exch. 333; *Tanner* v. *Smart* (1827), 6 B. & C. 603. There is one decision to the contrary effect, *Williams* v. *Gun* (1701), Fortes. Rep. 177 (see *Heylin* v. *Hastings* (1698), Carth. 470), but it cannot be considered as law. As to the proper defence to such an allegation, see R. S. C., Appendix D, s. 5; *Rolleston* v. *Dixon* (1845), 2 Dow. & L. 892; *Browning* v. *Paris* (1839), 5 M. & W. 117, 120). The statements to the contrary in *Timmis* v. *Platt* (1837), 2 M. & W. 720 (also reported *sub nom. Gilbert* v. *Platt*, 5 Dowl. 748), are inconsistent with general principles and opposed to the weight of authority.

(*a*) 3 & 4 Will. 4, c. 42.

(*b*) *Kempe* v. *Gibbon* (1846), 9 Q. B. 609; *Forsyth* v. *Bristowe* (1853), 8 Exch. 347. In an application for the revivor of a judgment which is more than twelve years old the affidavit in support should show that there has been an acknowledgment or payment within twelve years (*Loveless* v. *Richardson* (1856), 2 Jur. (N. S.) 716); or that the judgment debt only became payable within twelve years, see *Kennedy* v. *Whaley* (1848), 12 I. L. R. 54. As to the old practice as to revivor of judgments, see *Farran* v. *Beresford* (1843), 10 Cl. & Fin. 319, H. L.; *Conlan* v. *Bodkin* (1845), 7 I. L. R. 467; *Kennedy* v. *Whaley*, *supra*. As to the modern practice relating to revivor of judgments, see R. S. C., Ord. 42, rr. 22, 23.

(*c*) *Kempe* v. *Gibbon* (1848), 12 Q. B. 662.

(*d*) *Molony* v. *O'Brien* (1842), 5 I. L. R. 577.

(*e*) 21 Jac. 1, c. 16.

which has been subsequently performed, may, it seems, be a good reply to a defence of the statute (*f*).

SECT. 1. Pleading the Statutes of Limitation.

Suing some only of persons liable.

385. If there are several persons originally liable on a contract and one or more of such persons can take advantage of one of the Statutes of Limitation and the others cannot, those persons to whom the defence of the statute is not open may, it seems, be sued without joining the others (*g*).

Fraud.

386. Since the Judicature Act, 1873 (*h*), in all actions founded on fraud, which before that Act could be brought either in a court of common law or in a court of equity, or in a court of equity alone, if the statute is pleaded, a reply that the fraud was actively and deliberately concealed by the defendant's act until within six years of action would be a good reply (*i*). But a reply that the fraud was not discovered till within six years of action would now be a good reply only in actions which, before the Judicature Act, 1873 (*h*), could have been brought in a court of equity alone. In a pure common law action, *e.g.*, an action for negligence which before the Judicature Act, 1873 (*h*), could not have been brought in a court of equity at all, a reply of fraudulent concealment of the cause of action is, it seems, even now bad, unless it alleges that the concealment was the fraudulent act of the defendant (*k*). If a plaintiff wishes to rely on an allegation of concealed fraud in order to bring himself within the Real Property Limitation Act, 1833 (*l*), s. 26, he must in his statement of claim fully allege facts which reasonably lead to the inference that the fraud was the cause of his being deprived of the land which he claims (*m*).

Omission to plead statute.

Amendment.

387. If a defendant, to whom a defence of the statute is open, omits through inadvertence to plead it, the court, if of opinion that the plea of the statute is in the circumstances a meritorious one, will allow an amendment of the pleadings so that the defendant may avail himself of the defence (*n*).

SECT. 2.—*Process to Prevent the Statutory Bar.*

SUB-SECT. 1.—*In General.*

What is commencement of action.

388. The Statutes of Limitation prohibit the bringing of an action on the lapse of certain periods after the right of action has accrued. For the purposes of the statutes an action is brought when a writ or originating summons is issued (*o*). If a writ is issued within the required time and not properly continued, and a

(*f*) *Lade* v. *Trill, Trill* v. *Lade* (1842), 6 Jur. 272; see p. 65, *ante*.

(*g*) See R. S. C., Ord. 16, r. 11, and Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), s. 2 (repealed by the Statute Law Revision Act, 1890 (53 & 54 Vict. c. 33); but see *ibid.*, s. 3).

(*h*) 36 & 37 Vict. c. 66.

(*i*) *Gibbs* v. *Guild* (1882), 9 Q. B. D. 59, C. A.

(*k*) *Armstrong* v. *Milburn* (1885), 54 L. T. 247, 723; *Barber* v. *Houston* (1885), 18 L. R. Ir. 475, C. A.

(*l*) 3 & 4 Will. 4, c. 27; see p. 143, *ante*.

(*m*) *Lawrance* v. *Norreys* (1890), 15 App. Cas. 210.

(*n*) *Bone* v. *Smith* (1868), 2 I. R. C. L. 244; *Archbold* v. *Howth* (*Earl*), (1864), 15 I. C. L. R. 420. As to the amendment of writ, see pp. 188, 189, *post*.

(*o*) See title PRACTICE AND PROCEDURE.

SECT. 2. Process to Prevent the Statutory Bar.

fresh writ is afterwards issued on which the plaintiff proceeds, the commencement of the action is the issuing of the last writ, and if this is out of time the plaintiff is barred (*p*).

Renewal of writs.

389. An original writ of summons is in force for and, except when a solicitor agrees to accept service, must be served within twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named is not served with the writ, the court, upon the application of the plaintiff before the expiration of the twelve months, may order that the writ be renewed for six months, and so from time to time during the currency of the renewed writ. A writ so renewed is available to prevent the operation of any Statute of Limitation from the date of the issuing of the original writ (*a*).

When renewal refused.

If by any mistake of the plaintiff, or his solicitor, a writ has not been renewed within the proper time, the court will not, except in very special circumstances, allow the writ to be afterwards renewed in order to save the case from the bar of the statute (*b*). Nor will the court allow a renewal, when an attempt has been made to get the writ renewed before the lapse of the prescribed period and has failed only because the office was closed for the vacation, if there is no default on the part of any public officer (*c*).

Loss of writ.

The court may, where the original writ is lost, order its officer to seal a verified copy of the writ, as if it were the original (*d*).

Service out of jurisdiction.

If a writ of summons for service within the jurisdiction has been issued, but not served, and has been renewed from time to time, and is still in force, the court will enlarge the time for applying for a concurrent writ of summons for service out of the jurisdiction (*e*).

What amendments will be refused.

390. A writ will not, except in very special circumstances, be amended by dating it before the day on which it was actually issued, although it was by a mistake that the writ was not issued before (*f*); and a plaintiff will not be allowed

(*p*) *Pratt* v. *Hawkins* (1846), 15 M. & W. 399.

(*a*) R. S. C., Ord. 8, r. 1. This rule applies to writs issued before as well as after the Judicature Act, 1875 (38 & 39 Vict. c. 77) (*Hume* v. *Somerton* (1890), 25 Q. B. D. 239). It seems that if there are several defendants in an action, some of whom might have been served, although others could not, the renewal of the writ would prevent the statute operating in favour of any of the defendants (*Dickson* v. *Capes* (1860), 11 I. C. L. R. 334, decided under the Common Law Procedure Amendment (Ireland) Act, 1853 (16 & 17 Vict. c. 113), s. 28). As to an agreement by a solicitor to accept service, see *Re Kerly, Son and Verden* [1901] 1 Ch. 467, C. A.; and see generally title PRACTICE AND PROCEDURE.

(*b*) *Nazer* v. *Wade* (1861), 1 B. & S. 728; *Bailey* v. *Owen* (1860), 9 W. R. 128; *Doyle* v. *Kaufman* (1877), 3 Q. B. D. 7, 340, C. A.; *Hewett* v. *Barr*, [1891] 1 Q. B. 98, C. A.; *Magee* v. *Hastings* (1891), 28 L. R. Ir. 288; see *Smalpage* v. *Tonge* (1886), 17 Q. B. D. 644, C. A.

(*c*) *Evans* v. *Jones* (1862), 2 B. & S. 45; *Anon.* (1862), 31 L. J. (Q. B.) 61; see *Anon.* (1854), 24 L. J. (Q. B.) 23; *Markey* v. *Dowdell* (1852), 2 I. C. L. R. 117.

(*d*) R. S. C., Ord. 8, r. 3, which meets the case of *Davies* v. *Garland* (1876), 1 Q. B. D. 250.

(*e*) See R. S. C., Ord. 6; *Smalpage* v. *Tonge, supra*; and see, generally, title PRACTICE AND PROCEDURE.

(*f*) *Clarke* v. *Smith* (1858), 2 H. & N. 753; *Campbell* v. *Smart* (1847), 5 C. B. 196.

SECT. 2.
Process to Prevent the Statutory Bar.

to amend his pleadings so as to introduce a cause of action which is barred by the statute at the time of the attempted amendment (*g*). The assignee of a chose in action who has not given to the debtor notice of the assignment (*h*), and has brought an action against the debtor in his own name, will not be allowed to amend his writ by adding the assignor as a plaintiff, when the statutory period has elapsed between the issue of the writ and the time of the attempted amendment (*i*). It is doubtful whether a writ will be amended by the alteration of the names of the parties, when the effect of the amendment is to save the operation of the statute (*j*). If a writ has been amended, the original writ, not the amendment, is the commencement of the action (*k*).

Amendments without leave

Under the Common Law Procedure Act, 1852 (*l*), a plaintiff before service of a writ might, without an order of the court, correct a mistake in the name of a defendant or the number of the defendants whom he had sued, the writ being resealed, but the original date remaining unaltered (*m*). The plaintiff can now, by leave of a master, before service, make any alteration in a writ (*n*), except that he cannot alter the day of the issue of the writ (*m*).

Effect of one action on another.

The issue of a writ in one action, before the expiration of the statutory period, only keeps alive the cause of action in the action in which it was issued, and if another action for the same cause is commenced after the expiration of the statutory period, the second action will be barred (*o*).

A report by a master establishing a debt in one action is not an acknowledgment which will take the case out of the statute if it be set up as a defence to any independent action by the creditor (*p*). Neither the pendency of any action in which the claim of any person, whether a party or not, might be or has been decided, nor any order or proceeding in such action, can in any circumstances affect the operation of the statute on the claim of such person in an independent action instituted by him to enforce his claim (*q*).

(*g*) *Weldon* v. *Neal* (1887), 19 Q. B. D. 394, C. A.; *Lancaster* v. *Moss* (1899), 15 T. L. R. 476, C. A.; see *Steward* v. *North Metropolitan Tramways Co.* (1886), 16 Q. B. D. 556, C. A.

(*h*) See Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6), and title CHOSES IN ACTION, Vol. IV., p. 372.

(*i*) *Hudson* v. *Fernyhough* (1889), 61 L. T. 722; affirmed (1890), 34 Sol. Jo. 228, C. A.; see *A.-G.* v. *Pontypridd Waterworks Co.*, [1908] 1 Ch. 388; *Byron* v. *Cooper* (1844), 11 Cl. & Fin. 556, H. L.; *Plowden* v. *Thorpe* (1840), 7 Cl. & Fin. 137, H. L.

(*j*) See *Crawfurd* v. *Cocks* (1851), 20 L. J. (EX.) 169; *Challinor* v. *Roder* (1885), 1 T. L. R. 527; *Re Jones, Cox* v. *Eye* (1877) 46 L. J. (CH.) 316.

(*k*) *Coombs* v. *Bristol and Exeter Rail. Co.* (1858), 1 F. & F. 206; *Ryan* v. *Sheehy* (1847), 12 I. L. R. 44.

(*l*) 15 & 16 Vict. c. 76.

(*m*) *Clarke* v. *Smith* (1858), 2 H. & N. 753. As to the practice before the Judicature Act, 1873 (36 & 37 Vict. c. 66), see *Gibson* v. *Varley* (1856), 26 L. J. (Q. B.) 79.

(*n*) See Practice Masters' Rules (13).

(*o*) See *Manby* v. *Manby* (1876), 3 Ch. D. 101.

(*p*) See p. 93, *ante*.

(*q*) See *Manby* v. *Manby, supra;* but see *Barrett* v. *Birmingham* (1842), 4 I. Eq. R. 537, 548; *Greenway* v. *Bromfield, Handley* v. *Wood* (1851), 9 Hare, 201.

SECT. 2.

Process to Prevent the Statutory Bar.

Proceedings on behalf of plaintiff and others.

SUB-SECT. 2.—*Proceedings by One Party as affecting Others.*

391. If an action is brought by a plaintiff on behalf of himself and other persons, the bringing of the action enures to the benefit of the other persons who know of and consent to it, but not, it seems, to the benefit of other persons who know nothing of it (*r*); and there are some proceedings which enure for the benefit of persons other than those who commenced them (*s*).

Administration proceedings.

392. If administration proceedings under the present practice are commenced by an executor who is also a creditor of the testator, and a claim is brought in by a creditor for a simple contract debt, which was more than six years old at the time of the judgment but not at the time of the commencement of the action, the claim is barred by the statute (*t*). An ordinary administration judgment operates as a judgment in favour of creditors and prevents time running against them (*u*); and an administration judgment or order operates from its date, not merely in favour of a creditor, but in favour also of the right of set-off against a creditor's demand (*a*).

Action must be one for the recovery of demand sought to be saved from bar

393. An action, by whomsoever commenced, must, to save the operation of the statute, be in its nature one for the recovery of the demand sought to be saved from the bar of the statute (*b*). Therefore, if in a foreclosure action an inquiry is directed as to incumbrances, no incumbrancer coming in under the judgment can get any benefit from the commencement of the action, so far as the statute is concerned (*c*). If an incumbrancer is made a defendant, it is doubtful whether he can avail himself of the commencement of

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(*r*) *Sterndale* v. *Hankinson* (1827), 1 Sim. 393. See *Berrington* v. *Evans* (1835), 1 Y. & C. (EX.) 434; *Brown* v. *Lynch* (1841), 4 I. Eq. R. 316; *Tatam* v. *Williams* (1844), 3 Hare, 347; *Watson* v. *Birch* (1847), 15 Sim. 523; *O'Kelly* v. *Bodkin* (1840), 2 I. Eq. R. 361; (1841), 3 I. Eq. R. 390; *Hutchins* v. *O'Sullivan* (1847), 11 I. Eq. R. 443; *Carroll* v. *Darcy* (1847), 10 I. Eq. R. 321; *Bermingham* v. *Burke* (1845), 2 Jo. & Lat. 699, 714; *Bennett* v. *Bernard* (1848), 12 I. Eq. R. 229, 234; *Thompson* v. *Hurly*, [1905] 1 I. R. 588.

(*s*) See *Archdall* v. *Anderson* (1890), 25 L. R. Ir. 433 (legatees obtaining the benefit of an action brought by a mortgagee to raise the sum due on an equitable mortgage, when a sale under the judgment in the action realised more than sufficient to pay the plaintiff's demand); *Murphy* v. *Sterne* (1838), 1 Dr. & Wal. 236. As to proceedings in Ireland, in the Incumbered Estates Court, see *Re Colclough* (1858), 8 I. Ch. R. 330, C. A.; *Re Nixon's Estate* (1874), 9 I. R. Eq. 7, C. A.; *Re Glover* (1857), 6 I. Ch. R. 587; in the Landed Estates Court, see *Irish Land Commission* v. *Davies* (1891), 27 L. R. Ir. 334; *Re Ebbs' Estate* (1893), 31 L. R. Ir. 95; *Re Wade's Estate* (1884), 13 L. R. Ir. 515; *Re Taaffe's Estate* (1878), 1 L. R. Ir. 387; *Re Stinson's Estate* (1892), 29 L. R. Ir. 490; in the Land Commission, *Re Bateson's Estate*, [1895] 2 I. R. 559; *Re Smithwick's Estate*, [1896] 2 I. R. 401; *Re Swanton's Estate*, [1898] 1 I. R. 157; *Re Morrison's Estate*, [1907] 1 I. R. 15, C. A.

(*t*) *Re Greaves, Deceased, Bray* v. *Tofield* (1881), 18 Ch. D. 551; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 340.

(*u*) *Finch* v. *Finch* (1876), 45 L. J. (CH.) 816; see *Harrison* v. *Kirk*, [1904] A. C. 1, 5. As to an administration action by residuary legatees, see *Prowse* v. *Spurgin* (1868), L. R. 5 Eq. 99; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 278, 341.

(*a*) *Re Ballard, Lovell* v. *Forester*, [1890] W. N. 64.

(*b*) See *Thompson* v. *Hurly*, [1905] 1 I. R. 588.

(*c*) *Bennett* v. *Bernard* (1848), 12 I. Eq. R. 229.

the proceedings against him so as to save the operation of the statute on his claim; the better course for him on his being made defendant would, it seems, be to counterclaim for an order for payment of his incumbrance (*d*).

Effect of appointment of receiver.

394. The appointment of a receiver does not save the rights of any persons but the parties to the action in which the receiver was appointed (*e*). Where money is paid into court by a receiver appointed in an action, the money, until appropriated to some particular demand, is held *in usum jus habentium*, and, from the time of payment in, the statute does not run against the right of a person entitled (*f*).

Bankruptcy and winding up.

395. Proceedings in bankruptcy or for the winding up of a company are for the benefit of all creditors, and prevent the statute from running in favour of the person or company indebted (*g*). If as a condition of rescinding a receiving order money is paid into court to provide for all debts in full, such debts are not barred by the statute, although payment is not claimed within six years of the rescinding of the order (*h*). Proceedings in bankruptcy and winding up have, with reference to the statute, no effect as regards debts due to the bankrupt or company (*i*).

Change of parties.

396. Provision is made for the carrying on of an action by or against the proper persons in the event of a change, after the commencement of the action in the parties in whom the cause of action is vested or against whom the action is brought (*k*). These rules have not interfered with the equitable construction of the Limitation

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(*d*) *Watson* v. *Birch* (1847), 15 Sim. 523; Sugden on the Statutes relating to Real Property, 2nd ed., 124; *Humble* v. *Humble* (1857), 24 Beav. 535.

(*e*) See p. 190, *ante*, and title RECEIVERS.

(*f*) *Howlin* v. *Sheppard* (1870), 6 I. R. Eq. 38; *Re Nugent's Trusts* (1885), 19 L. R. Ir. 140; *Re Belton's Estate*, [1894] 1 I. R. 537; see *Lancaster* v. *Evors* (1846), 10 Beav. 154; *Micklethwaite* v. *Vavasour* (1893), 9 T. L. R. 376; *Ballard* v. *Milner*, [1895] W. N. 14; *Re Dennis, Ex parte Dennis*, [1895] 2 Q. B. 630; *Harrison* v. *Kirk*, [1904] A. C. 1, 5. Compare the effect of paying money into court under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18); see p. 156, *ante*; and title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 116; *Re Stead's Mortgaged Estates* (1876), 2 Ch. D. 713; *Re Blackrock Commissioners, Ex parte Forde*, [1894] 1 I. R. 156.

(*g*) See titles BANKRUPTCY AND INSOLVENCY, Vol. II., p. 202; COMPANIES, Vol. V., p. 509; compare pp. 92, 93, *ante*. As to proceedings in lunacy, see p. 171, *ante*.

(*h*) *Re Dennis, Ex parte Dennis*, [1895] 2 Q. B. 630; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 91.

(*i*) As to motions in bankruptcy, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 315.

(*k*) R. S. C., Ord. 18, rr. 2—10; see title PRACTICE AND PROCEDURE. As to bills of review and supplement in Chancery before the Judicature Act, 1873 (36 & 37 Vict. c. 66), see Mitford, Pleadings in Chancery, 272; *Hollingshead's Case* (1721), 1 P. Wms. 742; *Hercy* v. *Dinwoody* (1793), 4 Bro. C. C. 257; *Hovenden* v. *Annesley* (*Lord*) (1806), 2 Sch. & Lef. 607, 632—639; *Egremont* (*Earl*) v. *Hamilton* (1811), 1 Ball & B. 516, 531; *Higgins* v. *Shaw* (1842), 2 Dr. & War. 356; *Alsop* v. *Bell* (1857), 24 Beav. 451; *Patch* v. *Holland* (1873), 29 L. T. 419; *Dunne* v. *Doyle* (1860), 10 I. Ch. R. 502; *Onge* v. *Truelock* (1873), 2 Mol. 31, 38.

SECT. 2.
Process to Prevent the Statutory Bar.

Act, 1623 (*l*), s. 4, or of the Civil Procedure Act, 1833 (*m*), s. 6, but have only supplied an additional remedy (*n*). An order will not be made for the purpose of reviving the remedy on a judgment which has been barred by the Real Property Limitation Act, 1874 (*o*), s. 8. But where the court holds money that has been paid in to the credit of a suit, lapse of time, however long, is no ground for refusing an order for revivor (*p*); and, where owing to lapse of time it is impossible to trace the representatives of original defendants, and there is a fund in court, revivor may be dispensed with and the fund paid out (*q*).

Action in the nature of a bill of review.

It seems that even since the Judicature Acts the Chancery Division of the High Court of Justice can grant leave to bring an action in the nature of a bill of review (*r*) to reopen a case that has already been decided where the judgment has been obtained by fraud, or where since the judgment fresh material evidence has been obtained which could not previously have been procured (*s*). Leave may be refused, if application were made more than twelve years from the date of the judgment (*t*).

(*l*) 21 Jac. 1, c. 16; see p. 55, *ante*.

(*m*) 3 & 4 Will. 4, c. 42; see p. 78, *ante*.

(*n*) *Swindell* v. *Bulkeley* (1886), 18 Q. B. D. 250, C. A.; see *Arnison* v. *Smith* (1889), 40 Ch. D. 567, C. A.

(*o*) 37 & 38 Vict. c. 57; *Jay* v. *Johnstone*, [1893] 1 Q. B. 25, 189, C. A.; *Evans* v. *O'Donnell* (1886), 18 L. R. Ir. 170, C. A.

(*p*) In *Micklethwaite* v. *Vavasour* (1893), 9 T. L. R. 376, CHITTY, J., granted an order of revivor after the lapse of 150 years, the applicant seeking the order for the purpose of getting at funds which were in court, but the order was limited to the funds in court.

(*q*) *Ballard* v. *Milner*, [1895] W. N. 14; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 91.

(*r*) As to bills of review in Chancery before the Judicature Acts, see *Smith* v. *Clay* (1767), 3 Bro. C. C. 639, n.

(*s*) *Bright (Charles) & Co.* v. *Sellar*, [1904], 1 K. B. 6, C. A.; *Sturrock* v. *Littlejohn* (1898), 68 L. J. (Q. B.) 165; *Birch* v. *Birch*, [1902] P. 130; *Boswell* v. *Coaks* (1894), 6 R. 167; *Falcke* v. *Scottish Imperial Insurance Co.* (1887), 57 L. T. 39; *Re Scott and Alvarez's Contract, Scott* v. *Alvarez*, [1895] 1 Ch. 596, 622, C. A.; compare *Re St. Nazaire Co.* (1879), 12 Ch. D. 88, C. A.; see title ESTOPPEL, Vol. XIII., pp. 333, 334.

(*t*) See Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8. Before the Judicature Acts bills of review were barred in twenty years from the date of the decree and five years after the removal of the disability of the plaintiff in error, if any; this rule was adopted by analogy to the limitation prescribed for writs of error by stat. (1698) 10 Will. 3, c. 20 (*Kelly* v. *Lennon* (1844), 1 Jo. & Lat. 305).

LIMITATION OF LIABILITY.

See ADMIRALTY; SHIPPING AND NAVIGATION.

LIQUIDATED DAMAGES.

See BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS; DAMAGES

LIQUIDATION.

See Companies; Partnership.

LIS PENDENS.

See Judgments and Orders; Sale of Land.

LITERARY AND SCIENTIFIC INSTITUTIONS.

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Part I.—Nature and Constitution.

Introductory.

397. A considerable number of the learned societies in this country are incorporated by Royal Charter, the oldest of them, the Royal Society of London, having been thus incorporated by Charles II. in 1662. Others have taken advantage of the provisions of the Companies Act, 1867 (*a*). The majority of the literary and scientific institutions, however, are not incorporated.

Charitable institutions.

398. Institutions such as the Royal Society of London, which was founded for the purpose of "improving natural knowledge," and the Royal Geographical Society, the object of which is "the improvement and diffusion of geographical knowledge," are charitable institutions, and gifts to them for their general purposes are charitable (*b*).

Operation of the Literary and Scientific Institutions Act, 1854.

399. The increasing number of literary and scientific institutions and the importance of their work led to the passing of the Literary and Scientific Institutions Act, 1854 (*c*) (referred to in this title, where the context permits, as "the Act"), which applies to all institutions, whether incorporated or not, for the time being (*d*) established for the promotion of science (*e*), literature, the fine arts, for adult instruction, the diffusion of useful knowledge, the foundation or maintenance of libraries (*f*), reading rooms

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(*a*) 30 & 31 Vict. c. 131, s. 23 (repealed and re-enacted by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 20). See title COMPANIES, Vol. V., pp. 77, 78, note (*t*). As to the power conferred upon the Charity Commissioners by the Charitable Trustees Incorporation Act, 1872 (35 & 36 Vict. c. 24), to incorporate the trustees of "any charity for religious, educational, literary, scientific, or public charitable purposes," see title CHARITIES, Vol. IV., pp. 230, 283, 285, 314.

(*b*) See title CHARITIES, Vol. IV., p. 111. As to the jurisdiction of the Charity Commissioners over estates purchased with money arising from the voluntary contributions of members of a society, see *Royal Society of London and Thompson* (1881), 17 Ch. D. 407, and title CHARITIES, Vol. IV., pp. 305—308.

(*c*) 17 & 18 Vict. c. 112 (referred to in this title as "the Act").

(*d*) *I.e.*, existing at the time of the passing of the Act or in the future (*Re Russell Institution, Figgins* v. *Baghino*, [1898] 2 Ch. 72).

(*e*) As to the meaning of "science," see *Inland Revenue Commissioners* v. *Forrest* (1890), 15 App. Cas. 334; *Weir* v. *Crum-Brown*, [1908] A. C. 162, 168.

(*f*) See further, as to libraries, Public Libraries Acts, 1892—1901 (55 & 56 Vict. c. 53; 56 & 57 Vict. c. 11; 1 Edw. 7, c. 19); pp. 204, note (*e*), 205, *post*; title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

for general use among the members or open to the public, of public museums and galleries of paintings and other works of art, collections of natural history, mechanical and philosophical inventions, instruments or designs (*g*).

The Act (*h*) is not confined to institutions of a public or charitable nature (*i*), but it extends also to private institutions established for the purposes of the Act (*j*).

Institutions not within the Act.

The Act(*h*) does not apply to the Royal Institution or the London Institution for the Advancement of Literature and the Diffusion of Useful Knowledge (*k*). Nor does it authorise the establishment of institutions for recreation or enjoyment as distinguished from instruction (*l*).

Registration as a friendly society.

400. A society established for the promotion of literature, science, and the fine arts may be registered as a friendly society (*m*).

Part II.—Property.

SECT. 1.—*Land.*

SUB-SECT. 1.—*Conveyance of Site.*

Assurance of land not exceeding an acre.

Grant by tenant for life.

401. Freehold or copyhold land, not exceeding an acre, with or without buildings, may be assured by way of gift, sale, or exchange, in fee simple or for a term of years, as a site for a literary or scientific institution, but a grant by a tenant for life of such land is not valid without the concurrence of the person (if any, and if legally competent) next entitled in remainder, in fee simple or fee tail (*n*).

Conveyance of waste lands by lord of manor.

Where any portion of waste or commonable land is gratuitously conveyed as a site by a lord of the manor, the rights of commoners (*o*) are barred (*p*), if the grant is (1) specially authorised by Act of Parliament, or (2) made to or by any Government department, or

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(*g*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 33.

(*h*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112).

(*i*) Compare title CHARITIES, Vol. IV., p. 120.

(*j*) *Re Russell Institution, Figgins* v. *Baghino*, [1898] 2 Ch. 72, reported more fully, *sub nom. Re Russell Literary and Scientific Institution, Figgins* v. *Baghino*, 67 L. J. (CH.) 411.

(*k*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 33.

(*l*) *Re Badger, Mansell* v. *Cobham (Viscount)*, [1905] 1 Ch. 568 (*e.g.*, playing of cards, billiards etc.).

(*m*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 8 (5), re-enacting Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), s. 8 (5); Treasury Special Authority, 5th July, 1878. See title FRIENDLY SOCIETIES, Vol. XV., p. 125, note (*b*).

(*n*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 1. Compare the Places of Worship Sites Act, 1873 (36 & 37 Vict. c. 50), s. 1; and see title ECCLESIASTICAL LAW, Vol. XI., p. 725. As to grants of land in the Duchies of Cornwall and Lancaster to literary and scientific institutions, see title CONSTITUTIONAL LAW, Vol. VII., pp. 222, 256.

(*o*) As to the rights of commoners, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 499 *et seq.*

(*p*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 1.

SECT. 1.
Land.

(3) made with the consent of the Board of Agriculture and Fisheries (*q*).

Sites granted for separate institutions.

Any number of sites exceeding in the aggregate one acre in extent may be granted for distinct and separate institutions, so long as no institution gets a site exceeding one acre (*r*).

Where conveyance made to trustees.

402. Where an institution is not a corporation the grant of any land, under the Act (*s*) or otherwise, may be made to trustees for the purpose of the institution. The trustees may be individuals or corporate bodies, sole or aggregate (*s*).

Copyholds.

A conveyance of copyholds or lands of customary tenure for the purpose of an institution, by any deed in which the copyholder and the lord respectively grant and convey their interests, vests the freehold interest in the grantee without any surrender, or admittance, or enrolment in the lord's court. But any fees payable by the custom of the manor upon enfranchisement must be paid to the steward (*t*).

Form of conveyance.

Assurances of sites under the Act (*u*) should follow the statutory form given therein as closely as circumstances allow (*u*).

Death of donor within twelve months.

403. The death of the donor within twelve months of the execution of the deed of gift does not invalidate a grant under the Act (*v*).

SUB-SECT. 2.—*Conveyance by Particular Persons.*

Equitable owners.

404. An equitable owner may convey land for the purposes of the Act (*w*) without the trustee or trustees in whom the legal estate is vested being parties to the conveyance (*w*).

Infants and lunatics.

In the case of a purchase of land belonging to an infant or a lunatic, the guardian or curator of the infant (*x*) or the committee of the lunatic (*a*) may convey the property and receive and give valid discharges for the purchase-money. The purchaser is under no obligation to see to the application of the purchase-money (*b*).

(*q*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 1; Commons Act, 1899 (62 & 63 Vict. c. 30), s. 22 (1), Sched. I.; title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 510.

(*r*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 10. For form of grant of a site for a literary institution, see Encyclopædia of Forms and Precedents, Vol. III., p. 431.

(*s*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 11. The provisions of the Trustee Appointment Act, 1850 (13 & 14 Vict. c. 28) (Sir Morton Peto's Act), apply in the case of non-corporate trustees (Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 12). See titles CHARITIES, Vol. IV., p. 262; TRUSTS AND TRUSTEES.

(*t*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 15. As to such fees, see title COPYHOLDS, Vol. VIII., p. 63.

(*u*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 13.

(*v*) *Ibid.*, s. 14. Compare Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 4 (7). As to the effect of Part II. of the latter statute upon assurances in favour of literary or scientific institutions, see title CHARITIES, Vol. IV., p. 140.

(*w*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 5. Presumably such a conveyance vests the legal estate in the grantee, though the section does not expressly say so. As to conveyance of land generally, see title SALE OF LAND.

(*x*) As to the guardianship of infants, see title INFANTS AND CHILDREN, Vol. XVII., pp. 121 *et seq.*

(*a*) As to the powers of a committee of a lunatic, see title LUNATICS AND PERSONS OF UNSOUND MIND, pp. 432 *et seq.*, *post*.

(*b*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 5.

Corporations, officers, and trustees.

Any corporation, ecclesiastical or lay, sole or aggregate, and any officers, justices of the peace, trustees or commissioners, holding land for public, ecclesiastical, parochial, charitable or other purposes or objects may, subject to certain conditions, grant (*c*), convey, or enfranchise for the purpose of the Act (*d*) sites not exceeding one acre each in extent (*d*). The conditions are as follows :—(1) no ecclesiastical corporation sole, below the dignity of a bishop, may make such a grant without the written consent of the bishop of the diocese (*e*); (2) a grant of parochial property in a rural parish requires the consent of the parish meeting and of the poor law guardians (*f*); (3) a grant of property held upon a charitable trust requires the consent of the Charity Commissioners or Board of Education, as the case may be (*g*).

Conveyance by majority.

Grants by officers, trustees, or commissioners, other than parochial trustees, are valid, if a majority or quorum authorised to act, assembled at a meeting duly convened, assent to the grant, and execute the deed of conveyance, although they may not constitute a majority of the actual body (*h*).

Consent by justices.

Justices of the peace may give their consent to a grant of land or premises belonging to a county, riding, or division by vote at quarter sessions (*i*).

SUB-SECT. 3.—*Effect of Conveyance.*

Lands subject to rent

Apportionment.

405. Where a portion only of freehold land, subject to a perpetual rent, or of leasehold land is being conveyed for the purposes of the Act (*k*), the rent and any renewal fines are apportionable as between the portion conveyed and the remainder of the land (*k*). The apportionment may be settled by agreement between :— (1) the person for the time being entitled to the rent where the land is freehold, or the lessor or other owner subject to the lease of the lands comprised in the lease; (2) the person entitled to the fee subject to the rent, or the lessee or other party entitled to the land under the lease, or any assignment for the residue of the term; and (3) the party to whom the conveyance is being made (*k*). An apportionment so made is binding on all underlessees and others, whether parties to the agreement or not (*k*).

Effect of apportionment and conveyance.

Apportionment followed by execution of the conveyance renders the person entitled to the fee or other estate in the lands subject to the rent, the lessee, and the persons entitled under him, liable as

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(*c*) *Quære* whether the word "grant" includes a grant by way of sale. In the Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 1, the words "by way of sale" are found.

(*d*) *Ibid.*, s. 6.

(*e*) *Ibid.*

(*f*) *Ibid.*; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 52 (1); see Poor Law Act, 1889 (52 & 53 Vict. c. 56), s. 8.

(*g*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 6; Board of Education Act, 1899 (62 & 63 Vict. c. 33), and the Order in Council, 1902, made thereunder (Stat. R. & O. Rev., Vol. IV., Education, England, p. 6).

(*h*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 7.

(*i*) *Ibid.*

(*k*) *Ibid.*, s. 8.

SECT. 1. Land.

regards future accruing rents and renewal fines only in respect of the lands not included in the conveyance (*l*). Similarly the parties entitled have the same rights and remedies for the recovery of their apportioned rents as they previously had for the entire rents. Except as to the amount of rent and renewal fines, the covenants, conditions, and agreements remain in force with respect to the lands not included in the conveyance (*l*).

SUB-SECT. 4.—*Application of Purchase-money.*

Sale by ecclesiastical corporation sole.

406. If the purchase-money of land sold by an ecclesiastical corporation sole for the purposes of the Act (*m*) does not exceed £20, the party conveying may retain the money for his own benefit. If it exceeds £20, the money is applicable for the benefit of the corporation sole as the bishop of the diocese directs, by writing registered in the diocesan registry. The purchaser is not concerned with the proper application of the purchase-money (*m*).

Purchase of land from incapacitated persons, corporations, and trustees.

407 Where sites are purchased from incapacitated persons, corporations, and trustees authorised by the Act to sell, other than the Chancellor and Council of the Duchy of Lancaster and the officers of the Duchy of Cornwall, the application of the purchase-money is regulated by the Lands Clauses Consolidation Act, 1845 (*n*).

SUB-SECT. 5.—*Dealings by Trustees of Institution.*

Sale or exchange of land.

408. Land or buildings held in trust for a literary and scientific institution may, if a sale or exchange is deemed advisable, be sold by trustees having the legal estate, by the direction or with the consent of the governing body, if any, or exchanged for other land or building suitable to the purposes of the trust. Moneys received to equalise an exchange, and moneys arising from a sale are applicable in the purchase of another site or in the improvement of other premises to be used for the purposes of the trust (*o*).

Leasing of premises.

Similarly, trustees with the legal estate may, with like direction or consent, let portions of the premises belonging to the institution, not required for its purposes, and apply the rents for the benefit of the institution (*p*).

No general power to borrow.

409. A literary and scientific institution, unlike a commercial or trading undertaking, has no implied powers to borrow money for the purposes of its business. Nor does the power of sale above mentioned include a power to borrow (*q*).

Power to borrow for rates, taxes, charges, costs, and expenses.

The trustees of such an institution may, however, to indemnify themselves against the payment of any rate, tax, charge, costs or expenses, to which as such trustees and legal owners of the building

(*l*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 9.
(*m*) *Ibid.*, s. 16.
(*n*) 8 & 9 Vict. c. 18, ss. 69—74, 78 ; see Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 17; and, generally, title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 116 *et seq.*
(*o*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 18.
(*p*) *Ibid.*
(*q*) *Re Badger, Mansell* v. *Cobham* (*Viscount*), [1905] 1 Ch. 568.

or premises they have become liable (*r*), mortgage or sell the premises or a part thereof, free from the trusts of the institution, and apply the proceeds to their reimbursement, and any balance to the benefit of the institution (*s*). This power enables trustees to borrow in order to pay for necessary repairs to the premises of the institution, but not for enlarging and improving them, at any rate where the improvement consists in providing a billiard room (*t*).

Extent of power.

SUB-SECT. 6.—*Provisions applicable when Site ceases to be used.*

Reverter.

410. If land, or any part of land, given for the purposes of an institution, ceases to be so used, it immediately reverts to and becomes a portion of the estate or manor or possessions of the Duchy of Lancaster or Cornwall out of which it was carved (*a*). But where the institution is removed to another site, the land previously occupied, unless it originally formed part of the possessions of the Duchies of Lancaster or Cornwall, may be exchanged or sold for the benefit of the institution, and money received for equality of exchange, or on a sale, may be applied towards the erection or establishment of the institution upon the new site (*a*).

SECT. 2.—*Personalty.*

In whom vested.

411. Money, securities for money, goods, chattels, and personal effects belonging to an institution and not vested in trustees, in the case of incorporated institutions where there is no provision applicable to their personal property, and in all cases of unincorporated institutions, are deemed to be vested for the time being in the governing body (*b*).

Part III.—Internal Regulation.

SECT. 1.—*Governing Body.*

Constitution.

412. The governing body of an institution are the council, directors, committee, or other body to whom, by Act of Parliament, charter, or the rules and regulations of the institution, the management of its affairs is entrusted (*c*). If on the establishment of the

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(*r*) It is the duty of the governing body to indemnify the trustees (Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 19).

(*s*) *Ibid.* This power is subject to the restrictions contained in the Act with regard to lands given and land belonging to the Duchies of Lancaster and Cornwall (*ibid.*), as to which, see *ibid.*, s. 4, and the text, *infra.*

(*t*) *Re Badger, Mansell* v. *Cobham* (*Viscount*), [1905] 1 Ch. 568.

(*a*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 4. For other instances of reverter clauses, see titles CHARITIES, Vol. IV., p. 180, note (*m*); EDUCATION, Vol. XII., p. 119; and see Places of Worship Sites Act, 1873 (36 & 37 Vict. c. 50); Places of Worship Sites Amendment Act, 1882 (45 & 46 Vict. c. 21), s. 2; *A.-G.* v. *Shadwell*, [1910] 1 Ch. 92.

(*b*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 20.

(*c*) *Ibid.*, s. 32.

SECT. 1. Governing Body.

institution no such body was constituted, the members may upon due notice create a governing body (*d*).

Powers of governing body to make bye-laws.

413. In any institution the governing body, if not otherwise legally empowered to do so, may at a meeting specially convened according to its regulations (1) make bye-laws to regulate the institution, its members, and officers, and to further its objects, and (2) impose a reasonable penalty for breach of any bye-law (*e*).

Recovery of penalties for breach of bye-laws.

Penalties for the breach of bye-laws, when accrued, are recoverable at the option of the governing body in any local court of the district where the defendant resides or the institution is situated; but no pecuniary penalty imposed by any bye-law is recoverable unless the bye-law has been confirmed by the votes of three-fifths of the members present at a meeting specially convened (*e*).

SECT. 2.—*Members and their Liabilities.*

Who are members.

414. For the purposes of the Act (*f*) a member of an institution is a person who (1) has been admitted according to the rules of the institution, and (2) has paid a subscription, or (3) has signed the roll or list of members (*f*).

No member is entitled to vote or to be counted a member in any proceedings under the Act (*g*) if his current subscription is for the time being in arrear.

Liability to be sued.

415. A member may be sued by an institution (1) if his subscription is in arrear, (2) for possessing himself of and detaining property belonging to the institution contrary to the rules, and (3) for injuring or destroying property belonging to the institution (*h*). If the action against the member so sued fails, and he is adjudged his costs, he may elect to recover them from the officer in whose name the proceedings were taken or from the institution. In the latter case the member is entitled to have process against the property of the institution (*i*).

Liability to be prosecuted.

A member of an institution may be prosecuted for theft or embezzlement of the money, securities for money, goods and chattels of the institution, or for wilful and malicious destruction or injury to the property of the institution, or for forgery exposing the funds of the institution to loss, and, if convicted, punished in like manner as any non-member found guilty of a like offence (*k*).

SECT. 3.—*Alteration of Purposes, and Amalgamation.*

Alteration of purpose.

416. Where an institution (other than an institution having a royal charter or established by or acting under a statute) has been established for some particular purpose, and the governing body

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(*d*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 32.
(*e*) *Ibid.*, s. 24.
(*f*) *Ibid.*, s. 31.
(*g*) *Ibid.*
(*h*) *Ibid.*, s. 25. Compare title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 787.
(*i*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 25.
(*k*) *Ibid.*, s. 26. See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 650, 768.

thinks that an alteration, extension, or abridgment of that purpose, or an amalgamation with any other institution, is advisable, the proposed modification or amalgamation may be submitted by the governing body to the members in a written or printed report, and a special meeting may be convened to consider it. But no proposition may be carried into effect unless (1) the report has been delivered or sent by post to every member ten days before the special meeting, or (2) the proposition has been approved by the votes of three-fifths of the members present at such meeting and has been confirmed in like manner at a second special meeting held one month afterwards (*l*).

SECT. 3. Alteration of Purposes, and Amalgamation.

Amalgamation.

If not less than two-fifths of the members of an institution consider that a proposition carried in the above manner is calculated to injure the institution, they may within three months after the confirmation apply in writing to the Board of Trade, and the Board may at its discretion forbid the proposition being carried into effect. But such decision will not prevent the members from reconsidering the same proposition on a future occasion (*m*).

Appeal to Board of Trade against approved proposition.

SECT. 4.—*Transfer to Local Authority.*

417. The managers (*n*) of any institution to which the Act (*o*) applies may make an arrangement with any local authority (*p*) for transferring the institution to the authority, which may assent and give effect to the arrangement (*q*).

Transfer to local authority.

Part IV.—Legal Proceedings.

418. In all legal proceedings the moneys, securities, goods, chattels, and effects belonging to incorporated institutions which have no provision for the vesting of their personal property, or belonging to unincorporated institutions, and not vested in trustees, may be described as belonging to the governing body (by their proper title) (*r*).

Description of personal property in legal proceedings.

(*l*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 27.

(*m*) *Ibid.*, s. 28. The Board of Trade has taken the place of the Lords of the Committee of the Privy Council for Trade and Foreign Plantations; see title CONSTITUTIONAL LAW, Vol. VII., p. 102.

(*n*) This expression includes all persons who have the management of any institution, whether the legal interest in the site and buildings of the institution is vested in them or not (Schools for Science and Art Act, 1891 (54 & 55 Vict. c. 61), s. 1 (3)).

(*o*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 33.

(*p*) *I.e.*, "the council of any county or borough and any urban sanitary authority within the meaning of the Public Health Acts" (Technical Instruction Act, 1889 (52 & 53 Vict. c. 76), s. 4; Schools for Science and Art Act, 1891 (54 & 55 Vict. c. 61), s. 1 (1)).

(*q*) Schools for Science and Art Act, 1891 (54 & 55 Vict. c. 61), s. 1 (1). As to the provisions applicable to arrangements for transfer, see *ibid.*, s. 1 (2), and title EDUCATION, Vol. XII., p. 24.

(*r*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 20.

PART IV. Legal Proceedings.

Name by which to sue and be sued.

419. Incorporated institutions, which are not entitled to sue and be sued by any corporate name, and unincorporated institutions may sue or be sued in the name of the president, chairman, principal secretary, or clerk, as determined by the rules of the institution, or if the rules are silent, in the name of the person appointed for this purpose by the governing body. Any person having a claim or demand against the institution may sue the president or chairman, if upon application to the governing body some other officer or person is not nominated to be the defendant (*s*).

Abandonment of suit.

The death or retirement from office of a plaintiff or defendant does not cause the abatement or discontinuance of civil proceedings brought by or against an institution. The proceedings are continued in the name of or against the successor of such person (*t*).

Judgments recovered against the nominees of an institution are enforceable against the property of the institution, and not against the property or bodies of their nominees (*a*).

Part V.—Privileges.

SECT. 1.—*Exemption from Rates.*

Exemptions under Scientific Societies Act, 1843.

420. The Scientific Societies Act, 1843 (*b*), exempts from the payment of rates such societies as comply with the following four conditions:—the society must be (1) instituted for the purpose of science, literature, or the fine arts exclusively; (2) supported wholly or in part by annual voluntary contributions; (3) one which does not and may not by its laws make any dividend, gift, division, or bonus in money to or between any of its members; (4) one which has obtained the prescribed certificate from the Registrar of Friendly Societies (*c*).

Municipal library.

A free library owned and occupied by a municipal corporation through a library committee is not exempt, as it is not owned by a society for the purposes of science, literature, or the fine arts (*d*).

(*s*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 21.

(*t*) *Ibid.*, s. 22.

(*a*) *Ibid.*, s. 23. As to writ of revivor, see *ibid.*, and R. S. C., Ord. 17, r. 4 (order to carry on proceedings). As to execution, see title EXECUTION, Vol. XIV., p. 14.

(*b*) 6 & 7 Vict. c. 36.

(*c*) *Ibid.*, s. 1. See *Savoy Overseers etc.* v. *Art Union of London*, [1896] A. C. 296, reversing S. C., *sub nom. Art Union of London* v. *Savoy Overseers*, [1894] 2 Q. B. 609, C. A.; *Inland Revenue Commissioners* v. *Forrest* (1890), 15 App. Cas. 334, 339, as to general purport of exemption; and see, generally, title RATES AND RATING.

(*d*) *Liverpool Corporation* v. *West Derby Union* (1905), 69 J. P. 277, explained by RIDLEY, J., in *Hornsey School of Art* v. *Edmonton Union Assessment Committee and Hornsey Overseers* (1905), 70 J. P. 121, at p. 124. *Secus* as regards property tax, see *Manchester Corporation* v. *McAdam*, [1896] A. C. 500, and p. 208, *post*.

SECT. 1. Exemption from Rates.

Established exclusively for disseminating or propagating science etc.

421. To be entitled to exemption a society in the first place must be established exclusively (*e*) for the purpose of disseminating or propagating (*f*) science (*g*), literature, or the fine arts (*h*).

If the advantage and acquisition of science taken generally is the main and substantial object of an association, the necessary concomitant of advantage and enjoyment to the individual members does not destroy the exemption (*i*). But societies founded for the gratification or convenience of members only, and not for the good of others, are not within the exemption (*k*).

(*e*) The word "exclusively" is "anxiously introduced both into the preamble and the enactment" (*R.* v. *Cockburn* (1852), 16 Q. B. 480, *per* Lord CAMPBELL, C.J., at p. 491). Societies held exempt as being exclusively established for the purposes mentioned in the Scientific Societies Act, 1843 (6 & 7 Vict. c. 36), include the Linnæan Society (*St. Anne, Westminster* (*Churchwardens*) v. *Linnæan Society of London* (1854), 3 E. & B. 793); the Geological Society (Ryde, Metropolitan Rating, 24); the Royal College of Music (*Royal College of Music* v. *Westminster Vestry*, [1898] 1 Q. B. 809, C. A.); the Institution of Civil Engineers (*R.* v. *Institution of Civil Engineers* (1879), 5 Q. B. D. 48, where this institution was held not exempt, but according to HAWKINS, J., in *Royal College of Music* v. *Westminster Vestry*, [1898] 1 Q. B. 304, 313, the earlier case was virtually overruled by *Inland Revenue Commissioners* v. *Forrest* (1890), 15 App. Cas. 334); Botanic Gardens, Oxford (*Oxford Poor Rate Case* (1857), 8 E. & B. 184); Hornsey School of Art (*Hornsey School of Art* v. *Edmonton Union* (1905), 94 L. T. 203). Certain circulating libraries (*Birmingham* (*Churchwardens*) v. *Shaw* (1849), 10 Q. B. 868; *Bradford Library Society* v. *Bradford* (*Churchwardens*) (1858), 1 E. & E. 88; *Liverpool Library* v. *Liverpool Corporation* (1860), 5 H. & N. 526) were also held exempt as being exclusively established for the purposes mentioned in the Act, but having regard to the judgment of the House of Lords in *Savoy Overseers etc.* v. *Art Union of London*, [1896] A. C. 296, the cases cited above relating to circulating libraries must be deemed of doubtful authority. The London Library lost the right to exemption owing to part of its premises being underlet (*Clarendon* (*Earl*) v. *St. James's, Westminster* (*Rector etc.*) (1851), 10 C. B. 806).

Societies held not exempt include societies for diffusion of religious principles (*R.* v. *Jones* (1846), 8 Q. B. 719); societies for promoting the education of the labouring classes (*R.* v. *Pocock* (1846), 8 Q. B. 729; *Scott* v. *St. Martin in the Fields* (*Churchwardens*) (1855), 5 E. & B. 558); libraries with newsrooms attached (*R.* v. *Phillips* (1848), 8 Q. B. 745; *R.* v. *Gaskell* (1851), 16 Q. B. 472; *Russell Institution* v. *St. Giles in the Fields Vestry* (1854), 3 E. & B. 416; *Purchas* v. *Holy Sepulchre, Cambridge* (*Churchwardens*) (1854), 4 E. & B. 156); musical societies for amusement of members (*R.* v. *Brandt* (1851), 16 Q. B. 462); the United Service Institution (*R.* v. *Cockburn, supra*; S. C., *sub nom.* (*R.* v. *St. Martin in the Fields* (*Churchwardens and Overseers*), 21 L. J. (M. C.) 53; the Zoological Society (*R.* v. *Zoological Society of London* (1854), 23 L. J. (M. C.) 139 (held, not a society for purposes of science only)); the Jenner Institute (*Jenner Institute of Preventive Medicine* v. *St. George's, Hanover Square, Assessment Committee and Surveyor of Taxes* (1900), 69 L. J. (Q. B.) 814); Leighton House (*Leighton House Management Committee* v. *Kensington Corporation* (1905), 1 Konstam's Rating Appeals, 1).

(*f*) *Royal College of Music* v. *Westminster Vestry, supra*, at p. 818.

(*g*) The term "science" includes physic, surgery, "pure science," and "applied science" (*R.* v. *Royal Medical and Chirurgical Society of London* (1857), 21 J. P. 789, 791). See, further, as to meaning of "science," *Inland Revenue Commissioners* v. *Forrest, supra*, at pp. 339, 353, 354.

(*h*) The difference between "fine art" and "professional art" was pointed out in *R.* v. *Cockburn, supra*, and between the "arts" and the "fine arts" in *R.* v. *Institution of Civil Engineers, supra*, at p. 52. Music is one of the "fine arts" (*Royal College of Music* v. *Westminster Vestry, supra*, at p. 817).

(*i*) *R.* v. *Institution of Civil Engineers, supra*, at pp. 52, 53; *Bradford Library Society* v. *Bradford* (*Churchwardens*), *supra*.

(*k*) *R.* v. *Brandt, supra*; *R.* v. *Gaskell, supra*; *R.* v. *Cockburn, supra*.

SECT. 1. Exemption from Rates.

Supported wholly or in part by annual voluntary contributions.

Government grant, a voluntary contribution.

422. When the contributions of members are the price paid for a purchase either of goods or advantages, the institution cannot properly be said to be supported by voluntary contributions merely because the persons making the payments are under no obligation to do so (*l*). In this connection the expression "voluntary contributions" conveys the essential idea that the payments are a gratuitous offering for the benefit of others, and not the price of an advantage purchased by a contributor (*m*). A Government grant (*n*) and a sum paid by a county council under the powers of the Education Act, 1902 (*a*), are annual voluntary contributions within the meaning of the Scientific Societies Act, 1843 (*b*). A society otherwise entitled to exemption does not lose that right by receiving money in respect of the exhibition and sale of works of art on its premises (*c*). In order that a society may be entitled to exemption, the amount of the annual voluntary contribution received by it must form a substantial part of its income (*d*).

Prohibition against dividends.

423. A society is not exempted unless its rules expressly provide against any money dividend being distributed among its members. It is not sufficient that no dividend has in fact ever been made (*e*). The word "division" points to something in the nature of a dividend, gift, or bonus which is paid to members of the society as such, and does not include payments made to members of the society by way of remuneration for services, such as teaching (*f*).

Occupation of buildings by society.

424. To enable a society to obtain exemption, the buildings belonging to it must be occupied by the society for the transaction

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(*l*) *Savoy Overseers etc.* v. *Art Union of London*, [1896] A. C. 296, *per* Lord HERSCHELL, at p. 307. In that case the society was admittedly established for the purposes of the fine arts exclusively, but every member received each year in return for his subscription of a guinea a copy of an engraving, and in addition one chance in the annual distribution of prizes, thereby preventing the society being one supported wholly or in part by annual voluntary contributions.

(*m*) *Ibid.*, *per* Lord HERSCHELL, at p. 310; *A.-G.* v. *Smyth*, [1905] 2 I. R. 553, 564; *R.* v. *Zoological Society of London* (1854), 23 L. J. (M. C.) 139; compare *Re New University Club Estate Duty* (1887), 18 Q. B. D. 720 ("funds voluntarily contributed" within the meaning of the Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 11 (6)).

(*n*) *Royal College of Music* v. *Westminster Vestry*, [1898] 1 Q. B. 809, C. A.; S. C. (1897), 67 L. J. (Q. B.) 80, 84.

(*a*) 2 Edw. 7, c. 42; *Hornsey School of Art* v. *Edmonton Union Assessment Committee and Hornsey Overseers* (1905), 70 J. P. 121.

(*b*) 6 & 7 Vict. c. 36.

(*c*) *R.* v. *Manchester Overseers* (1851), 16 Q. B. 449.

(*d*) *Leighton House Management Committee* v. *Kensington Corporation* (1905), 1 Konstam's Rating Appeals, 1.

(*e*) See *R.* v. *Jones* (1846), 8 Q. B. 719 (Religious Tract Society).

(*f*) *Royal College of Music* v. *Westminster Vestry*, *supra*, at p. 819. The Scientific Societies Act, 1843 (6 & 7 Vict. c. 36), does not, however, prevent a division upon dissolution among the members. See *Birmingham* (*Churchwardens*) v. *Shaw* (1849), 10 Q. B. 868; *R.* v. *Manchester Overseers*, *supra*. But as to dissolution of literary and scientific institutions, see p. 209, *post*.

of its business (*g*). A society otherwise entitled to exemption loses that right by subletting its buildings or some part of them (*h*), unless the occupation of the subordinate occupier is of such a character as to render him separately rateable (*i*). The residence of a librarian or porter on the premises of a society (*k*), or the lending on one occasion only of a building for purposes other than those of the society to which it belongs, does not take away the right of exemption (*l*).

Effect of letting buildings.

425. The certificate of the Registrar of Friendly Societies (*m*) is not made conclusive proof of the other statutory requisites (*n*) having been complied with. It merely is one of the several conditions precedent which must all concur to give a right of exemption (*o*).

Certificate of Registrar of Friendly Societies.

To be entitled to the exemption, a society must submit to the Registrar of Friendly Societies three copies of its rules, signed by the chief officer, three members of the council or committee of management, and the secretary (*p*). The Registrar must either give a certificate (*q*) on each copy that the society is entitled to exemption, or he must state in writing his reason for withholding the certificate. If the certificate is granted, one certified copy of the rules is returned to the society, another retained by the registrar, and the third sent to the clerk of the peace for the borough or county in which the land or buildings claimed to be exempted is or are situated (*r*). The rules are filed by the county or borough council, no fee being payable for registration (*s*).

Submission of rules to Registrar of Friendly Societies.

Registration of rules.

If alterations are made in the certified rules of a society, affecting the property or constitution of the society, the alterations must within one month be submitted for certification by the Registrar of Friendly Societies, the society being in the meanwhile entitled to

Alteration of certified rules certificate.

(*g*) Scientific Societies Act, 1843 (6 & 7 Vict. c. 36), s. 1.

(*h*) *Purvis* v. *Traill* (1849), 3 Exch. 344; *Clarendon* (*Earl*) v. *St. James's, Westminster* (*Rector etc.*) (1851), 10 C. B. 806 (London Library: portions of premises let to other scientific societies); *R.* v. *Royal Medical and Chirurgical Society of London* (1857), 21 J. P. 789.

(*i*) *Jenner Institute of Preventive Medicine* v. *St. George's, Hanover Square, Assessment Committee and Surveyor of Taxes* (1900), 69 L. J. (Q. B.) 814, *per* CHANNELL, J., at p. 819; *R.* v. *Manchester Overseers* (1851), 16 Q. B. 449. See *St. Anne, Westminster* (*Churchwardens*) v. *Linnœan Society of London* (1854), 3 E. & B. 793.

(*k*) *St. Anne, Westminster* (*Churchwardens*) v. *Linnœan Society of London, supra.*

(*l*) *R.* v. *Brandt* (1851), 16 Q. B. 462, 471.

(*m*) This official takes the place of the barrister appointed to certify the rules of friendly societies; see Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 2, and title FRIENDLY SOCIETIES, Vol. XV. p. 129.

(*n*) As to the statutory requisites, see p. 204, *ante.*

(*o*) *R.* v. *Pocock* (1846), 8 Q. B. 729; *R.* v. *Phillips* (1848), 8 Q. B. 745. For form of certificate, see *Hornsey School of Art* v. *Edmonton Union Assessment Committee and Hornsey Overseers* (1905), 70 J. P. 121, 123.

(*p*) See note (*m*), *supra.*

(*q*) The fee payable to the Registrar for perusing rules and alterations and granting a certificate must not exceed one guinea (Scientific Societies Act, 1843 (6 & 7 Vict. c. 36), s. 4).

(*r*) *Ibid.*, s. 2.

(*s*) *Ibid.*; Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 3 (xv), 34 (1) (c), 35 (1), 36 (1), 37, 38 (5).

SECT. 1. Exemption from Rates.

exemption. A refusal to certify the alteration, subject to an appeal by the society, deprives the society of exemption as from the date when the alteration came into operation (*t*).

Appeal from refusal to grant certificate.

An appeal by a society lies to quarter sessions from a refusal by the registrar to grant a certificate (*u*). Any person assessed to any rate from which a society is exempted may appeal from the decision of the registrar granting the certificate to quarter sessions (*a*).

Appeal against exemption.

Appeal against rate wrongfully made.

Where a society which has received the prescribed certificate is, nevertheless, rated, an appeal must be made, as no reliance can be placed upon the statutory exemption as a ground for refusing to pay the rate (*b*). There is nothing to prevent a local authority from rating a society, even though exemption has been allowed for many years under the certificate (*c*).

SECT. 2.—*Exemption from Property Tax.*

Exemption from property tax.

426. The extent to which buildings, the property (*d*) of a literary and scientific institution (*e*), are exempt from property tax is dealt with elsewhere (*f*).

Where the scientific or literary purposes of a society tend to the advancement of objects of general public utility, such society is a charitable institution (*g*), and as such its income is exempt from income tax under the Income Tax Act, 1842 (*h*)

SECT. 3.—*Exemption from Corporation Tax.*

Exemption from corporation tax.

427. The duty imposed on the property of bodies corporate and unincorporate to compensate the revenue for the loss of probate (now estate), legacy, or succession duties for which such bodies escape liability is not payable in the case of property appropriated

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(*t*) Scientific Societies Act, 1843 (6 & 7 Vict. c. 36), s. 3.

(*u*) *Ibid.*, s. 5.

(*a*) *Ibid.*, s. 6. As to courts of quarter sessions, see title MAGISTRATES. If the order of the sessions is good on the face of it the King's Bench Division will not interfere on *certiorari* (*R.* v. *Stacey* (1850), 14 Q. B. 789). As to the time within which an appeal must be made, see Scientific Societies Act, 1843 (6 & 7 Vict. c. 36), s. 6; *R.* v. *Pocock* (1846), 8 Q. B. 729.

(*b*) *Birmingham* (*Churchwardens*) v. *Shaw* (1849), 10 Q. B. 868.

(*c*) *Ibid.* See *Russell Institution* v. *St. Giles in the Fields Vestry* (1854), 3 E. & B. 416.

(*d*) The word "property" in the Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 61, does not necessarily import ownership, it means also appropriation to the purposes of the institution (*Manchester Corporation* v. *McAdam*, [1896] A. C. 500).

(*e*) The essential idea conveyed by the word "institution" in connection with such adjectives as "literary" and "scientific" is often no more than a system, scheme, or arrangement by which literature or science is promoted without reference to the persons with whom the management may rest, or in whom the property appropriated for these purposes may be vested, save in so far as these may be regarded as a part of such system, scheme, or arrangement (*Manchester Corporation* v. *McAdam*, *supra*, *per* Lord HERSCHELL, at p. 507).

(*f*) See titles CHARITIES, Vol. IV., p. 208; INCOME TAX, Vol. XVI. pp. 629, 630.

(*g*) *Beaumont* v. *Oliveira* (1869), 4 Ch. App. 309; *Royal Society of London* v. *Thompson* (1881), 17 Ch. D. 407; *Thomas* v. *Howell* (1874), L. R. 18 Eq. 198.

(*h*) 5 & 6 Vict. c. 35, ss. 88, Sched. C; see also *ibid.*, Sched. C, r. 3, s. 100, Sched. D, s. 105; and title CHARITIES, Vol. IV., pp. 208, 209.

and applied for the promotion of literature, science, or the fine arts (*i*). If the main object of an institution is the promotion of science, the existence of subsidiary objects does not deprive the institution of the exemption (*k*). The property of the Institution of Civil Engineers is exempt (*l*), but not that of the Royal College of Surgeons of England (*m*) or the Royal College of Surgeons, Edinburgh (*n*), or of the Society of Writers to the Signet (*o*).

SECT. 3. Exemption from Corporation Tax.

SECT. 4.—*Exemption from Reversion Duty, Undeveloped Land Duty, and Increment Value Duty.*

Exemption from taxes on land values.

428. Land or any interest in land held by a governing body constituted for charitable purposes, including corporations sole, universities, colleges, schools and other institutions for the promotion of literature, science or art, is exempt from reversion and undeveloped land duty, while the land is occupied and used for the purposes of such body; similarly such land is exempt from increment value duty whether it is occupied or used by such body or not (*p*).

Part VI.—Dissolution.

Under Literary and Scientific Institutions Act, 1854.

429. Three-fifths or any larger number of members may determine that an institution shall be dissolved, either immediately or at the time then agreed upon. In such event all necessary steps must be taken for the disposal and settlement of the property of the institution, its claims and liabilities, according to the rules, or, if the rules are inapplicable, then at the discretion of the governing body (*q*). In the event of a dispute among the governing body or members, the adjustment of the affairs of the institution is to be referred to the county court judge of the district where the principal building of the institution is situated. The judge may make the requisite orders, or, if he finds it necessary, may direct proceedings to be taken in the Chancery Division of the High Court (*r*).

Application of property.

430. Upon the dissolution of an institution to which the Act (*s*) applies, the property remaining, after all debts and liabilities have been satisfied, is not divisible among the members. It must be

(*i*) Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 11 (3). See also title CORPORATIONS, Vol. VIII., p. 377.

(*k*) *Inland Revenue Commissioners* v. *Forrest* (1890), 15 App. Cas. 334.

(*l*) *Ibid.*, affirming *Re Institution of Civil Engineers Estate Duty* (1888), 20 Q. B. D. 621, C. A.

(*m*) *Re Royal College of Surgeons of England*, [1899] 1 Q. B. 871, C. A.

(*n*) *Sulley (Surveyor of Taxes)* v. *Royal College of Surgeons* (1892), 29 Sc. L. R. 620.

(*o*) *Society of Writers to the Signet, Petitioners* (1886), 24 Sc. L. R. 27.

(*p*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 37 (1). See, further, title REVENUE.

(*q*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 29.

(*r*) *Ibid.* And see title COUNTY COURTS, Vol. VIII., pp. 665, 666.

(*s*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 30. See *Re Dutton* (1878), 4 Ex. D. 54, 59.

PART VI. Dissolution.

given to some kindred institution, chosen by the members of the dissolving institution, or in default by the county court judge (*t*), notwithstanding that the rules contain a provision for the division of the property of the society upon dissolution among the shareholders (*u*). This rule does not apply to an institution founded or established by the contributions of shareholders in the nature of a joint-stock company (*v*).

Under Companies Consolidation Act, 1908.

As a literary institution carries on no business, probably it cannot be wound up as an unregistered company (*w*).

Part VII.—Particular Institutions.

SECT. 1.—*The British Museum.*

SUB-SECT. 1.—*Constitution.*

Trustees.

431. The trustees of the British Museum (*x*) are a corporate body, consisting of (1) official trustees, namely, the holders for the

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(*t*) See note (*r*), p. 209, *ante*.

(*u*) *Re Bristol Athenæum* (1889), 43 Ch. D. 236.

(*v*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 30. *E.g.*, a literary and scientific institution founded and established by the issue of transferable shares, entitling their holders to the property of the institution, but bearing no dividend (*Re Russell Institution, Figgins* v. *Baghino*, [1898] 2 Ch. 72), or an institution having a common property arising out of the subscriptions of members, such property being held by numerous persons in transferable shares (*Re Jones, Clegg* v. *Ellison*, [1898] 2 Ch. 83). In both these cases the *dictum* of KAY, J., in *Re Bristol Athenæum, supra*, at p. 239, that an institution which was not a joint-stock company was not within the proviso of the Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 30, was commented upon with disapproval.

(*w*) See *Re Bristol Athenæum, supra* (a case decided on the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 199); *Re Jones, Clegg* v. *Ellison, supra; Re Russell Institution, Figgins* v. *Baghino, supra.* As to winding up of unregistered companies, see title COMPANIES, Vol. V., pp. 647 *et seq.*

(*x*) The British Museum was established in 1753. The stat. (1753) 26 Geo. 2, c. 22, which incorporated the trustees of the British Museum and vested the management of the museum in them, authorised the purchase of the museum or collection of Sir Hans Sloane (for £20,000) and the Harleian collection of manuscripts (for £10,000). It further provided for the erection of a general repository for the reception of the collections mentioned above and all additions, and of the Cottonian Library, for preservation for public use. The necessary moneys were to be raised by lottery (*ibid.*, ss. 24—49). The Cottonian Library, consisting of manuscripts and other writings, was acquired by the nation, with a number of coins, medals, and other rarities, from Sir Robert Cotton in 1700; see stat. (1700) 12 & 13 Will. 3, c. 7; amended by stat. (1706) 6 Ann. c. 30. Other special collections forming part of the British Museum include the Townley collection (see stat. (1805) 45 Geo. 3, c. 127); the Elgin Marbles (see stat. (1816) 56 Geo. 3, c. 99); and the Payne Knight collection of coins, medals etc. (see stat. (1824) 5 Geo. 4, c. 60). Among other important accessions to the contents of the museum may be mentioned the Royal Library of printed books and manuscripts collected by former Sovereigns of the Realm from the time of King Henry VII., presented by George II. (see recital to stat. (1832) 2 & 3 Will. 4, c. 46); a collection of pamphlets and periodical papers presented by George III. (see recital to stat. (1832) 2 & 3 Will. 4, c. 46); a library of 70,000 volumes and a collection of coins

time being of certain high offices of state, including the Archbishop of Canterbury, the Lord Chancellor, the Speaker of the House of Commons, and many other distinguished persons (*y*); (2) certain family trustees representing the donors of the more important collections belonging to the museum (*z*); (3) a trustee appointed by the Crown (*a*), and fifteen elected trustees (*b*).

Appointment of new trustees in case of vacancies.

432. On the death or retirement (*c*) of a trustee other than an *ex officio* trustee or a family trustee, a new trustee to fill the vacancy may be elected by a majority of the official, family and royal trustees, of whom at least seven, including the Archbishop of Canterbury, the Lord Chancellor, and the Speaker of the House of Commons, or any two of them, must be present. The elected trustees do not take part in such election (*d*).

Family trustees are chosen by the respective families which they represent (*e*).

Appointment of principal librarian.

433. The principal official is the principal librarian, who is appointed by the Crown from two persons recommended by the Archbishop of Canterbury, the Lord Chancellor, and the Speaker of the House of Commons, or any two of them (*f*).

Nomination of staff.

The nomination of the rest of the staff is made by the Archbishop of Canterbury, the Lord Chancellor, and the Speaker, or any two of them (*g*).

SUB-SECT. 2.—*Powers of the Trustees.*

General powers.

434. Acts done or orders given by a majority of the British Museum trustees, of whom at least seven are present at a general meeting, have the same effect as if done by the majority of the whole number of the trustees (*h*).

The trustees may sue and be sued in their corporate name, use a common seal, and make bye-laws and rules for administering the museum and preserving the various collections (*i*). They may fix the salaries of and suspend or dismiss officers and servants (*j*).

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and medals etc. presented by George IV. (see recital to stat. (1832) 2 & 3 Will. 4, c. 46). In 1755 Old Montagu House, Great Russell Street, Bloomsbury, subsequently known as the British Museum, was vested in the museum trustees for the purposes of a general repository (Private Act (1755) 28 Geo. 2, c. 3; see stat. (1753) 26 Geo. 2, c. 22, s. 21). The acquisition by the trustees of other lands for the enlargement of the museum was authorised by later statutes; see stats. (1824) 5 Geo. 4, c. 39; (1839), 2 & 3 Vict. c. 10; British Museum (Purchase of Land) Act, 1894 (57 & 58 Vict. c. 34).

(*y*) Stats. (1753) 26 Geo. 2, c. 22, s. 4; (1824) 5 Geo. 4, c. 39.

(*z*) Stats. (1753) 26 Geo. 2, c. 22, s. 4 (Cotton, Harley, and Sloane families); (1805) 45 Geo. 3, c. 127 (Townley family); (1816) 56 Geo. 3, c. 99 (Earl of Elgin); (1824) 5 Geo. 4, c. 60 (Payne Knight family).

(*a*) Stat. (1832) 2 & 3 Will. 4, c. 46.

(*b*) Stat. (1753) 26 Geo. 2, c. 22, s. 4. The fifteen trustees are nominated by the non-elected trustees.

(*c*) Originally the trustees were appointed for life, but by stat. (1824) 5 Geo. 4, c. 39, they were empowered to retire.

(*d*) Stat. (1753) 26 Geo. 2, c. 22, s. 4; stat. (1754) 27 Geo. 2, c. 16, s. 3.

(*e*) Stat. (1753), 26 Geo. 2, c. 22, ss. 5—8.

(*f*) *Ibid.*, s. 16.

(*g*) *Ibid.*, s. 17.

(*h*) Stat. (1754) 27 Geo. 2, c. 16, s. 3.

(*i*) Stat. (1753) 26 Geo. 2, c. 22, ss. 14, 15.

(*j*) *Ibid.*, s. 15.

SECT. 1. The British Museum.

Power to take land to any amount.

435. The trustees of the British Museum have power to purchase, take, hold, and enjoy any gifts, grants, devises, and bequests of lands and any interest therein, and any money charged thereon, and to arise from the sale of lands, and to any value and amount (*k*).

Power to dispose of duplicates.

436. Duplicate works, objects, or specimens not required for the purposes of the museum may, with certain exceptions (*l*), be given away by the trustees (*m*). The trustees, or any five of them, may exchange, sell, or dispose of any duplicates of printed books, medals, coins, or other curiosities, and lay out the moneys arising from a sale in the purchase of other things required for the museum (*n*).

Power to exchange or dispose of any articles.

Any seven or more of the trustees, including the Archbishop of Canterbury, the Lord Chancellor, and the Speaker of the House of Commons, or any two of them, may, at a meeting specially convened for the purpose, order that any articles in the museum which they consider unfit to be preserved shall be exchanged for manuscripts, books, medals, coins, statues, or other things more suited in their opinion to the existing collections, or may direct them to be sold or disposed of (*o*).

Removal of portion of collection to South Kensington;

to National Gallery and National Portrait Gallery.

Powers to remove newspapers for storage.

437. Owing to the extension of the literary, science, and art departments of the British Museum, further housing space was required, and the trustees were authorised, with the consent of the Treasury Commissioners, to remove certain collections (*p*) to the Natural History Museum then being erected at South Kensington (*q*).

The trustees of the British Museum were further authorised, subject to the same consent, to deliver all or any of the pictures belonging to them to the trustees and directors of the National Gallery or to the trustees of the National Portrait Gallery (*r*).

The trustees of the British Museum may, with the consent of the Treasury, remove newspapers and other printed matter which appear to be rarely required for public use to a building at Hendon, erected to provide the necessary storage space. The newspapers and printed matter so removed must be made available for public use at the present British Museum buildings on due notice being given (*s*).

(*k*) Stats. (1753) 26 Geo. 2, c. 22, s. 14 (lands not exceeding in yearly value £500); (1824) 5 Geo. 4, c. 39 (lands of any value). Prior to the later Act a gift of the produce of land for the British Museum was void (*British Museum (Trustees)* v. *White* (1826), 2 Sim. & St. 594).

(*l*) The exceptions are duplicate works in the Royal Library of George IV., or in the Cracherode, Grenville, or Banksian Libraries, and objects presented to the museum for use and preservation therein (British Museum Act, 1878 (41 & 42 Vict. c. 55), s. 3). Questions as to which collection any particular object in the British Museum belongs are determinable finally by the trustees (*ibid.*, s. 4).

(*m*) *Ibid.*, s. 3.

(*n*) Stat. (1767) 7 Geo. 3, c. 18.

(*o*) Stat. (1807), 47 Geo. 3, sess. 2, c. 36.

(*p*) Namely, collections belonging to the following departments: Zoology, Geology and Palæontology, Mineralogy and Botany.

(*q*) British Museum Act, 1878 (41 & 42 Vict. c. 55), s. 1.

(*r*) *Ibid.*, s. 2. As to these institutions, see p. 213, and note (*a*), *ibid.*, *post*.

(*s*) British Museum Act, 1902 (2 Edw. 7, c. 12), s. 1.

SUB-SECT. 3.—*Privileges of the Museum.*

SECT. 1. The British Museum.

438. A printed copy of every published book and of every subsequent edition containing alterations must within a certain period after publication be delivered on behalf of the publisher at the British Museum (*t*). This provision does not apply to books first published in a foreign country, and afterwards copyrighted within His Majesty's dominions (*u*).

Right to copies of books.

The British Museum is exempt from the jurisdiction of the Charity Commissioners (*v*).

Exemption from Charitable Trusts Acts.

Lands vested in the trustees of the British Museum are exempt from property tax (*w*).

Exemption from property tax.

SECT. 2.—*The National Gallery.*

SUB-SECT. 1.—*Constitution.*

439. The National Gallery was established in 1824 (*x*). The governing body consists of (1) ten trustees who are honorary, and (2) a director appointed for five years, who is a salaried official with a seat on the board (*y*). Both the trustees and the director are appointed by the First Lord of the Treasury (*a*).

Constitution.

440. The Commissioners of His Majesty's Works and Public Buildings are empowered by statute to acquire by purchase or otherwise, by agreement (*b*), lands for the enlargement or improvement of the National Gallery (*c*) In the exercise of this power the Lands Clauses Consolidation Acts (*d*) are made to apply, except in so far as they relate to the purchase of lands otherwise than by agreement (*c*). The consent of the Treasury to any purchase is necessary (*e*). The conveyance or assignment of the lands purchased is made to His Majesty, his heirs and successors (*f*). No deeds, bonds, or other instruments made by, to, or with the Commissioners for the above purpose are subject to stamp duty (*g*).

Acquisition of land for enlargement of National Gallery.

Consent of Treasury.

Stamp duty.

(*t*) See Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 6; and title COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., pp. 174, 175; and see *ibid.*, p. 141, note (*j*).

(*u*) International Copyright Act, 1844 (7 & 8 Vict. c. 12), s. 3.

(*v*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62; Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 47. As to the jurisdiction of Charity Commissioners, see title CHARITIES, Vol. IV., pp. 302 *et seq.*

(*w*) See title INCOME TAX, Vol. XVI., p. 629.

(*x*) By a Treasury Minute, 24th March, 1824.

(*y*) *Ibid.*; Treasury Minutes, 27th March, 1855; 26th April, 1894. The Tate Gallery is a branch of the National Gallery, and is governed by the same board. The National Portrait Gallery is a separate organisation established by a Treasury Minute, 2nd December, 1856, and governed by a board of trustees and a director appointed by the First Lord of the Treasury.

(*a*) See title CONSTITUTIONAL LAW, Vol. VII., p. 101.

(*b*) As to compulsory purchase, see p. 214, *post.*

(*c*) National Gallery Enlargement Act, 1866 (29 & 30 Vict. c. 83), s. 16. Power to acquire land for the National Portrait Gallery was conferred by the National Portrait Gallery Act, 1889 (52 & 53 Vict. c. 25). See also the National Gallery and St. James's Park Act, 1911 (1 & 2 Geo. 5, c. 23), by which certain lands, heretofore used for the purposes of St. George's Barracks, are to be appropriated for the purposes of the National Gallery and the National Portrait Gallery.

(*d*) See title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 1 *et seq.*

(*e*) National Gallery Enlargement Act, 1866 (29 & 30 Vict. c. 83), s. 20.

(*f*) *Ibid.*, s. 27.

(*g*) *Ibid.*, s. 26.

SECT. 2. The National Gallery.

Enrolment.

Conveyances, assignments, and other deeds and instruments conveying or assigning land for the above purposes must be enrolled (*h*).

Compulsory acquisition of lands.

Several statutes have been enacted enabling lands to be compulsorily acquired for the National Gallery (*i*).

Control of funds.

441. The board has control of the subsidy annually voted by Parliament for the purchase of pictures, and also of the various funds which have from time to time been granted for the same purpose.

SUB-SECT. 2.—*Powers of Trustees and Directors.*

Sale of pictures in National Gallery.

442. The trustees and director of the National Gallery, or any three or more of them, including the director, at a special meeting for that purpose, may, from time to time, with the consent of the Treasury Commissioners, order the sale of certain pictures and works of art for the time being under the care of the trustees and director, and which they adjudge to be unfit or not required as part of the national collection. This provision does not apply to works bequeathed or given to the nation. The sale must be by public auction, and copies of the order to make the sale, and of the Treasury's consent, must be laid on the table of both Houses of Parliament six weeks prior to the sale (*k*). The proceeds of sale are payable into the Exchequer, and form part of the Consolidated Fund (*l*).

Proceeds of sale.

Vesting of pictures given to the nation.

443. Pictures and works of art given or bequeathed to or for the benefit of the public or nation, in the absence of a contrary provision by the donor or testator, vest in and are under the care of the trustees and director of the National Gallery. In case of a bequest, the trustees and director may select the pictures or works of art which they deem fit to become part of the national collection. The remainder of the works comprised in the bequest, in the absence of a contrary provision, will form part of the residuary estate of the testator (*m*).

Power of trustees and director to lend pictures etc.

444. Any two or more of the trustees, with the director, of the National Gallery, present at a meeting specially held for the purpose, may from time to time authorise the loan of any pictures or works of art belonging to them or under their control to authorised public galleries (*n*), for such time, and subject to such conditions as

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(*h*) National Gallery Enlargement Act, 1866 (29 & 30 Vict. c. 83), s. 27.

(*i*) National Gallery Enlargement Act, 1866 (29 & 30 Vict. c. 83); National Gallery Enlargement Act, 1867 (30 & 31 Vict. c. 41); National Gallery (Purchase of Adjacent Land) Act, 1901 (1 Edw. 7, c. 16).

(*k*) National Gallery Act, 1856 (19 & 20 Vict. c. 29), s. 1.

(*l*) *Ibid.* s. 2.

(*m*) *Ibid.*, s. 3. As to remission of death duties on bequests of national, scientific, or historic interest, see titles, CHARITIES, Vol. IV., p. 206; ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 182; and see *ibid.*, pp. 202, 214, 251, 252.

(*n*) National Gallery (Loan) Act, 1883 (46 & 47 Vict. c. 4), s. 2. The public galleries authorised by the Act are galleries "situate in the United Kingdom belonging to or under the control of Government or any municipal authority or of any society or body approved by any two or more of the said trustees of the National Gallery together with the director" (*ibid.* s. 5). The expression "municipal authority" is also defined in the same section.

they may determine at the meeting (*o*). The net profits derived from any exhibition of pictures or works of art at any gallery to which such a loan may be made must be devoted altogether to the promotion of science and art (*p*).

Profits on exhibition.

Pictures and works of art acquired by the trustees and director under any gift or bequest may not be lent under the statutory powers until the expiration of fifteen years from the date of acquisition (*q*); and where any such gift or bequest is made conditionally on the articles being kept together, or on terms inconsistent with a loan, the statutory powers of lending are not exercisable for twenty-five years from the date of acquisition (*r*).

Restrictions on loans.

(*o*) National Gallery (Loan) Act, 1883 (46 & 47 Vict. c. 4), s. 3.
(*p*) *Ibid.* The Act does not state by whom the profits are to be so applied.
(*q*) *Ibid.*, s. 4.
(*r*) *Ibid.*

LITERARY PROPERTY.

See COPYRIGHT AND LITERARY PROPERTY.

LIVERY SERVANTS.

See REVENUE.

LIVERY STABLE KEEPERS.

See BAILMENT; INNS AND INNKEEPERS.

LLOYD'S.

See INSURANCE.

LLOYD'S BONDS.

See BONDS; INSURANCE.

LOAN SOCIETIES.

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Part I.—Nature and Constitution.

SECT. 1.—*Nature.*

Nature.

445. A loan society is an institution for establishing loan funds for the benefit of the labouring or industrious classes, the repayment of the moneys lent usually being made by weekly instalments (*a*).

(*a*) Loan Societies Act, 1835 (5 & 6 Will. 4, c. 23), preamble and s. 1; Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 3. See Sched. E of the later Act (referred to in this title, where the context permits, as "the Act") for scheme of repayment by instalments.

SECT. 1. Nature.

The object of a loan society is in most cases to afford assistance to members only, but its operation need not be so restricted (*b*). Indeed, the original intention of the Loan Societies Act, 1835 (*c*), appears to have been to encourage societies of a semi-charitable type; but these are now almost wholly superseded by the mutual societies termed "Friends of Labour."

Loan societies certified under the Loan Societies Act, 1840 (*d*) (in this title referred to as "the Act"), are entitled to certain benefits (*e*). Where not otherwise expressed the word "society" in this title applies to such certified societies only.

SECT. 2.—*Constitution.*

SUB-SECT. 1.—*In General.*

Formation.

446. Any number of persons not less than three may establish themselves as a loan society (*f*). But to obtain the benefits of the provisions of the Act (*g*) the rules of the society must be certified, deposited, and enrolled as thereby directed; and this applies in the case of a society already established and of one about to be formed (*h*).

Acts must be done by officers enabled to act for society.

447. A loan society is not a corporation, and, therefore, every act of an undissolved loan society must be done, not by itself, but by or in the name of the treasurer, trustees, secretary, or some other officer enabled to act for it (*i*).

(*b*) *R.* v. *Scott* (1844), 13 L. J. (M. C.) 70, 72.

(*c*) 5 & 6 Will. 4, c. 23.

(*d*) 3 & 4 Vict. c. 110, repealing and superseding the Loan Societies Act, 1835 (5 & 6 Will. 4, c. 23). The Loan Societies Act, 1840 (3 & 4 Vict. c. 110), was passed as a temporary measure, but was made perpetual by stat. (1863) 26 & 27 Vict. c. 56. As to the illegality of a loan society having for its object the gain of individual members, and not registered under any Act, see *Shaw* v. *Benson* (1883), 11 Q. B. D. 563, C. A.; *Re Thomas, Ex parte Poppleton* (1884), 14 Q. B. D. 379, and title COMPANIES, Vol. V., pp. 765, 767.

(*e*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 3. "It is difficult," says the Chief Registrar of Friendly Societies in his Report for 1905, p. 4, "to perceive the use of the Loan Societies Act of 1840 (3 & 4 Vict. c. 110), under which a few societies are certified each year. The Act is obsolete, and the societies which avail themselves of it serve no useful purpose, as they are a form of antiquated friendly society, their principal business being money-lending. The Act contains references to the usury laws which have long been repealed, a fate which might well overtake the principal Act without much regret." Notwithstanding the special authority dated 16th May, 1876, granted by the Treasury for the registry of societies under the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), for the express purpose of making loans (see title FRIENDLY SOCIETIES, Vol. XV., p. 165), a few societies are certified annually under the Act. In 1910, for example, four societies were certified under the Loan Societies Act, 1840 (3 & 4 Vict. c. 110) (information received at the Central Office, as to which see p. 219, *post*). The expression "money-lender" in the Money-lenders Act, 1900 (63 & 64 Vict. c. 51), does not apply to loan societies certified under the Loan Societies Act, 1840 (3 & 4 Vict. c. 110) (see Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 6 (b)).

(*f*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 3.

(*g*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110).

(*h*) *Ibid.*, s. 3; see p. 219, *post*.

(*i*) See *O'Reilly* v. *Connor, Same* v. *Allen*, [1904] 2 I. R. 601, 617, C. A.

Actions can be brought or defended by trustees.

448. The trustees or trustee for the time being of a society are authorised to bring or defend any criminal or civil suit concerning the property or any claim of such society. They or he may sue and be sued in their proper names or name, as trustees or trustee of the society, without further description (*k*). The death of a trustee, or his removal from office, does not entail the discontinuance of any proceedings which may be pending. Such proceedings may be continued by or against the succeeding trustee or trustees (*l*).

Security to be given by officers.

449. Treasurers and other persons entrusted with the receipt or custody of any money or securities for money belonging to a society must enter into a bond with sureties given to the trustees or trustee for the time being of the society, for the faithful execution of the trust, in the sum of money required by the rules (*m*). In case of forfeiture the trustees or trustee may sue on the bond at the cost of the society. No bond or security so given need be stamped (*n*).

SUB-SECT. 2.—*Rules.*

Effect of rules.

450. The powers and sphere of action of a society depend upon its rules, which must be regarded as its memorandum of association or charter (*o*). The rules, so far as they are not contrary to a statute, are binding on the members and officers of, and the persons receiving loans from, the society and their representatives, and on parties who become sureties for the repayment of any loan (*p*). Such persons and parties are deemed to have full notice of the enrolled rules, upon enrolment and entry in the society's books (*q*).

Enrolment of rules and amendments.

451. To secure the benefits of the Act (*r*) three copies of the rules and amendments of rules of a loan society must be submitted to the Central Office of the Registry of Friendly Societies (*s*). If satisfied that they are in conformity with the Act (*r*), the registrar (*t*) certifies them, returns one copy to the society, sends one to the county council (*u*) for enrolment, and retains the third. The rules take effect from the date of certificate, not of enrolment (*v*).

(*k*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 8.
(*l*) *Ibid.*
(*m*) *Ibid.*, s. 12. For form of bond, see *ibid.*, Sched. D.
(*n*) *Ibid.*, s. 12.
(*o*) *Enniskillen Loan Fund Society* (*Treasurer*) v. *Green*, [1898] 2 I. R. 103, 112, 113.
(*p*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 7.
(*q*) *Ibid.*; see note (*u*), *infra*.
(*r*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110).
(*s*) See title FRIENDLY SOCIETIES, Vol. XV., p. 129.
(*t*) *Ibid.*, note (*r*).
(*u*) Formerly a copy of the rules was required to be enrolled by the clerk of the peace for the county, city, or borough wherein the society was formed, with the rolls of the session of the peace in his custody (Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 4). This business was in 1888 transferred to the county council (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (xv.); see *ibid.*, ss. 31, 35 (1), 36, 38).
(*v*) *Bradburne* v. *Whitbread* (1843), 5 Man. & G. 439, a case decided on the

SECT. 2. Constitution.

Rules to be entered in a book, open for inspection.

452. All rules in force for the time being for the management of a society duly enrolled must be entered in a book to be kept by an officer of the society appointed for that purpose. The book must be open to the inspection of the members and of persons receiving loans from the society (*a*).

Evidence of rules.

453. In all cases the entry of the rules in the society's books, or a transcript deposited with the county council, or a true copy of such transcript examined with the original, or the copy certified by the registrar, are received as evidence of such rules, and no *certiorari* may be brought or allowed to remove any such rules into any court of record (*b*).

Copies of transcripts deposited with a county council must be supplied on payment of no other fee than the actual expense of copying (*c*).

Alteration or rescission of rules.

454. Rules may not be altered, rescinded, or repealed except at a general meeting of the members of the society. The meeting must be convened by written or printed notice, signed by the secretary or president or other principal officer or clerk of the society, in pursuance of the rules, or in pursuance of a requisition for that purpose signed by three or more members of the society. The notice must be sent by post or otherwise to every member of the society seven clear days at least before the day appointed for the meeting. Subject to these conditions, alterations or repeal of rules may be made with the concurrence of the majority of members then present (*d*).

Part II.—Administration.

SECT. 1.—*In General.*

Vesting of property in trustees.

455. Moneys, securities for money, and chattels belonging to a society must be vested in a trustee or trustees for the use and benefit of the society and its members according to their interests (*e*). On the death, resignation, or removal of any trustee or trustees, such property vests in the surviving or succeeding trustee or trustees for the same interest and subject to the same

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repealed Loan Societies Act, 1835 (5 & 6 Will. 4, c. 23,) s. 2, which is similar to the Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 4. In the case cited the rules had been enrolled before action brought on an unstamped note given as a security for a loan, but after issue of the note.

(*a*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 7.

(*b*) *Ibid.* As to *certiorari*, see title CROWN PRACTICE, Vol. X., p. 155.

(*c*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 7. Copies are not subject to stamp duty (*ibid.*).

(*d*) *Ibid.*, s. 5. As to fees payable to the registrar in respect of any amendment of rules, see *ibid.*, s. 6. As to certifying amendments of rules, see p. 219, *ante*.

(*e*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 8.

trusts, without assignment or conveyance (*f*), and for the purposes of all criminal or civil proceedings is deemed to be the property of the trustees or trustee for the time being of the society, in their or his names or name, without further description (*g*).

Issue of debentures.

Registration.

456. A society may issue a debenture for every sum of money deposited with it, otherwise than by way of gift. Registration of the debenture in the books of the society is necessary (*h*).

Liability for payment of debentures.

Debentures are chargeable only on the capital and property of the society. A treasurer, trustee, or other officer of a society subscribing a debenture is neither in person, nor in property, individually responsible for the payment of the same, or any interest thereon, unless in the instrument or by writing at the foot or on the back thereof he agrees to be so liable. Such declaration would apply only to the specific sum guaranteed (*i*).

Payment on death of debenture-holder where no grant of representation made.

Three calendar months after the death of a debenture-holder, depositor, or other claimant entitled to receive any sum not exceeding £50 out of the funds of a society, the trustees may, if satisfied that no will was made or left by the deceased, and that no letters of administration of his effects have been or will be taken out, pay the money in question to any person appearing to the trustees to be the person or one of the persons entitled under the Statutes of Distribution (*k*) to the effects of the deceased intestate. Such payment is valid and effectual against the demand of any other person claiming as next of kin, so far as the funds, trustees, or officers of the society are concerned. But the next of kin are not thereby debarred from recovering the money from the person to whom it has been paid (*l*).

Annual abstract of accounts.

457. The trustees of a society must annually cause an abstract of the society's accounts to be made out up to the 31st December, with a statement of the effects and liabilities of the society, and an estimate of the clear net profit or loss up to that period. The abstract, statement, and estimate must be drawn up in such forms and contain such particulars as may be required by the registrar (*m*). A society refusing or neglecting to deliver an account is liable to a penalty of £50, recoverable in a suit by the registrar against the trustees of the society. Where judgment is obtained in such suit, execution can issue only against the property of the society in the hands or under the control of the trustees and not against the trustees personally (*n*).

(*f*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 8.

(*g*) *Ibid.*

(*h*) *Ibid.*, s. 9.

(*i*) *Ibid.*, s. 10. As to debentures under the Companies (Consolidation) Act, 1908 (8 Edw, 7, s. 69), see title COMPANIES, Vol. V., pp. 345 *et seq.*

(*k*) As to which see title DESCENT AND DISTRIBUTION, Vol. XI., p. 16.

(*l*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 11. As to dispensing with letters of administration, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 191.

(*m*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 27; Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), ss. 2, 6; and see title FRIENDLY SOCIETIES, Vol. XV., p. 173.

(*n*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 27. As to execution generally, see title EXECUTION, Vol. XIV., pp. 1 *et seq.*

SECT. 1. In General.

Exemptions from stamp duty.

458. Debentures issued by a society are not liable to stamp duty or parliamentary impositions (*o*). Similarly notes signed for the repayment of any loan made under the Act (*p*), receipts or entries in any book of receipt for money lent or paid, drafts and orders, appointments of agents, and other instruments required to be made by the Act (*p*), or by the rules of the society, are not chargeable with stamp duty (*q*). A note issued after certification, but prior to enrolment, of the rules is exempt from stamp duty, at any rate if the rules are enrolled before action brought on the note (*r*). A note not made in accordance with the provisions of the Act (*p*) requires to be stamped (*s*).

SECT. 2.—*Loans.*

SUB-SECT. 1.—*Granting of Loans.*

Limit to loans.

459. A society may not lend to any person at the same time a sum greater than £15. No second or other loan may be made to the same person until the former loan has been repaid (*t*).

Applications for loans. Preliminary fees.

The trustees may require from any person applying for a loan from a society payment of a sum specified in the enrolled rules, not exceeding 1*s.* 6*d.*, for the form of application, and for the expenses of making inquiries into the character and solvency of the applicant and his proposed sureties. Such sum is not repayable though no loan be granted. The inquiries referred to must be made within fourteen days from the date of the return to the society's office of the form of application duly filled up in accordance with the rules (*u*).

Inquiries as to character etc. of borrower.

All charges covered by certain payments.

The sum of 1*s.* 6*d.* (*a*) and the sum paid by way of interest (*b*) cover all charges which may be made by the society for the following items, namely: (1) cost of inquiry (*c*); (2) cost of execution of note (*d*); (3) purchase of borrower's pass-book and copy of rules, and all other books, papers, and things which he is required by the society to have; and (4) the cost of all business connected with the granting of the loan (*e*).

(*o*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 9.
(*p*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110).
(*q*) *Ibid.*, s. 14.
(*r*) *Ibid.*
(*s*) *Bradburne* v. *Whitbread* (1843), 5 Man. & G. 439.
(*t*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 13. Compare the corresponding provisions for loans under the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 46; see title FRIENDLY SOCIETIES, Vol. XV., p. 165. As to usurious loans by a society, see *Burbidge* v. *Cotton* (1851), 21 L. J. (CH.) 201; *Silver* v. *Barnes* (1839), 6 Bing. (N. C.) 180; approved in *Cutbill* v. *Kingdom* (1847), 1 Exch. 494, 504 (loan by building society).
(*u*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 20.
(*a*) *Ibid.*
(*b*) *Ibid.*, s. 22.
(*c*) See the text, *supra.*
(*d*) See p. 223, *post.*
(*e*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 23. Any clerk, officer, agent, or servant of a society who by any device, directly or indirectly, knowingly and in consideration of granting a loan obtained from a borrower or any surety payment of any other sum than was allowed by the Act, by way of charge, contribution, or liquor ticket, or for making any inquiry, giving any

A society is prohibited from receiving from any borrower any sum by way of instalment or otherwise (*f*) before the actual advancing of the loan.

Loans by ballot illegal.

460. It is illegal for a society to cause applicants for loans to ballot for precedence, or in any way to make the granting of any loan dependent upon chance, lot, or other gambling device. A society which offends against this rule forfeits all the benefit of the provisions of the Act (*g*).

SUB-SECT. 2.—*Repayment.*

Discount.

461. The trustees or trustee of a society are authorised at the time the loan is made to exact from every borrower discount as specified by the enrolled rules, not exceeding 12 per cent. per annum (*h*).

Repayment by instalments.

462. The trustees may also receive repayment by instalments, at the times and in manner provided by the rules, but the first instalment may not be paid sooner than the eleventh day after the date of the loan (*i*). The time and manner of paying instalments must be taken into account in the calculation of the interest to be paid (*k*).

Note of hand for whole loan.

A society may take a note of hand for the whole amount lent, and recover upon it the amount lent, or the balance remaining due, immediately on failure of the payment of any instalment, without being liable on that account to any of the forfeitures or penalties imposed by any statute relating to usury (*l*).

No fines allowed for irregularity in paying instalments.

No fine or penalty may be imposed by the rules of a society for any irregularity in making payment of the instalments of the loan, except by requiring the balance then owing or any part of it to be paid either immediately or within such time as may be allowed by the rules (*m*).

Instalments and interest regulated by the Act.

463. The instalments and rates of interest payable on any loan made by a society are regulated by the Act (*n*). Any one of the schemes in Schedule E to the Act (*n*) may be adopted, and

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notice, writing, or sending any letter, or for any other purpose, rendered himself liable to the penalties of usury. This rule applied whether the overcharge was made for the benefit of the party making the overcharge, or for the benefit of the society, or of any other person (Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 23). Owing to the repeal of the usury laws this provision is ineffective. See title MONEY AND MONEY-LENDING.

(*f*) Except the sum of 1*s.* 6*d.*, or less, for the form of application and expenses of inquiry (Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 24).

(*g*) *Ibid.*, s. 24; see *R.* v. *Scott* (1844), 13 L. J. (M. C.) 70. But an unlimited mutual society registered under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), the object of which is to receive subscriptions from its members and make advances to them on securities, and ultimately to divide the profits, is not rendered illegal under the Lottery Acts from the fact that it selects by lot the members who are to receive advances (*Wallingford* v. *Mutual Society* (1880), 5 App. Cas. 685; and see title COMPANIES, Vol. V. p. 347); and see also title GAMING AND WAGERING, Vol. XV., pp. 299 *et seq.* As to bond investment companies, see Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 34, and title COMPANIES, Vol. V., p. 623, note (*p*).

(*h*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 21.

(*i*) *Ibid.*

(*k*) *Ibid.*

(*l*) *Ibid.*, s. 21; see title MONEY AND MONEY-LENDING.

(*m*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 23.

(*n*) *Ibid.*, s. 22; see *ibid.*, Sched. E.

SECT. 2. Loans.

when adopted must be fully and clearly set forth in the rules of the society, stating the actual number of shillings and pence taken by way of interest for every loan (*o*).

Rules containing scheme not set forth in the Act.

Rules which contain a scheme differing from all the schemes in Schedule E may not be certified by the registrar (*p*), until a certificate has been obtained from the actuary to the National Debt Office to the effect that the rate of interest proposed to be taken, including therein all charges, except the sum of 1*s*. 6*d*. for the form of application and expenses of inquiry, is not greater than is allowed by the Act (*q*).

Entries to be made in borrower's pass-book.

464. It must be expressly stated in the enrolled rules of every society that an entry must be made in the borrower's pass-book of every payment made to the society by the borrower, including the payment made for inquiries. Entries must be made in accordance with the rule (*r*).

Notes for repayment of loans.

465. Notes for the repayment of loans, signed by borrowers or sureties, must be made payable to the treasurer for the time being of the society (*s*), and any society may add to or embody in such note the allegations made by the parties respecting their property, such allegations, if made under the hand of a party, being admissible in evidence against him in any proceedings under the Act (*t*).

Securities not transferable.

466. Notes of hand, bills, or other securities for the payment of money, taken by a society, are not transferable by indorsement or otherwise, nor may they be sued upon except by the treasurer or trustees of the society to which they have been made (*u*).

Summary jurisdiction.

Procedure.

467. If the borrower fails to repay the loan or any part of it after a proper demand in writing has been made by the treasurer of the society, he may be summoned before a justice of the peace and ordered to pay the sum for which he is liable, with costs not exceeding 5*s*. (*a*). This summary jurisdiction is apparently restricted to authorised advances (*b*). An unauthorised loan is not necessarily illegal or irrecoverable, though there may be some difficulty if the note is unstamped. But such a loan is not recoverable in a court of summary jurisdiction (*c*).

(*o*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 22; see *ibid.*, Sched. E.

(*p*) As to such certifying, see p. 219, *ante*.

(*q*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 22. The charge for the actuary's certificate is one guinea (*ibid.*).

(*r*) *Ibid.*, s. 23.

(*s*) *Ibid.*, s. 16. For form of note, which is optional, see *ibid.*, Sched. A.

(*t*) *Ibid.*, s. 16.

(*u*) *Ibid.*, s. 15. The Forged Transfers Acts, 1891 (54 & 55 Vict. c. 43) (see *ibid.*, s. 3) and 1892 (55 & 56 Vict. c. 3[illegible]) which enable companies to make compensation for losses arising from forged transfers, apply to loan societies incorporated by or in pursuance of any Act of Parliament as if the society were a company.

(*a*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 16. For form of complaint, see *ibid.*, Sched. B. As to jurisdiction, see *Anon.* (1911), 131 L. T. Jo. 342 (magistrate's decision).

(*b*) See *Enniskillen Loan Fund Society* (*Treasurer*) v. *Green*, [1898] 2 I. R. 103, 112, 113.

(*c*) *Ibid.*, at pp. 113, 116; see also *Re Coltman, Coltman* v. *Coltman* (1881), 19 Ch. D. 64, C. A.; *Cunliffe, Brooks & Co.* v. *Blackburn Benefit Society* (1884), 9 App. Cas. 857; *Moore* v. *Donagher*, [1903] 2 I. R. 290, 300.

The treasurer or clerk in office at the date of the commencement of proceedings is the proper person to take such proceedings to recover the amount payable under a promissory note to the treasurer for the time being of such a society. The person who was treasurer at the date of the note, but has since ceased to hold office, cannot take proceedings (*d*).

Sureties may be sued.

If the society thinks fit, the sureties or any one of them, in the absence of any provision to the contrary in the rules, may be sued in preference to the actual borrower (*e*). A surety cannot escape liability on the plea that there has been a deviation from the rules in the management of the society, unless it be of such a nature as to affect the particular contract with him (*f*).

Distress.

Payment of the amount adjudged due, with costs, may be enforced by an order for distress and sale of the goods of the party neglecting to pay (*g*). No such proceedings are removable by *certiorari* into any of the superior courts of record (*h*).

Certiorari.

Proceedings in the county court.

468. The treasurer or clerk of a society may also take proceedings in any county court for the recovery of the sum due against the party or parties liable to pay (*i*). If the sum appearing to be due exceeds the amount within the jurisdiction of the court, and the treasurer or clerk declares his willingness to accept such sum as the court is enabled to adjudge, an order may be made for the payment of the latter sum, in which event no further proceedings can be taken elsewhere to recover the balance of the debt (*k*).

Proceedings in superior courts.

469. In the case of a society whose rules have been duly certified, proceedings may be taken for the recovery of any loan by the treasurer or clerk for the time being (*l*).

It seems that the trustees of a society also can sue at common law for the recovery of a loan, there being no express words in the Act (*m*) ousting the jurisdiction of the superior courts (*n*).

Where a promissory note is given by two named individuals to

(*d*) *Timms* v. *Williams* (1842), 3 Q. B. 413, a case decided on the Loan Societies Act, 1835 (5 & 6 Will. 4, c. 23), s. 8. Under that Act recovery of statutory loans was by summary jurisdiction only. As to procedure in the county court, see the text, *infra*.

(*e*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 16. See *Brown* v. *Langley* (1842), 4 Man. & G. 466.

(*f*) *Green* v. *Gosden* (1841), 3 Man. & G. 446.

(*g*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 16. For form of distress warrant, see *ibid.*, Sched. C. As to distress generally, see title DISTRESS, Vol. XI., pp. 115 *et seq.*

(*h*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 16; as to *certiorari*, see title CROWN PRACTICE, Vol. X., p. 155.

(*i*) *Ibid.*, s. 17. See title COUNTY COURTS, Vol. VIII., p. 666.

(*k*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 18.

(*l*) *Ibid.*, s. 19; compare *Addey* v. *Woolley* (1819), 8 Taunt. 691. The contrary was decided in a case under the Loan Societies Act, 1835 (5 & 6 Will. 4, c. 23), which contained no such provision (*Timms* v. *Williams*, *supra*; see *Enniskillen Loan Fund Society* (*Treasurer*) v. *Green*, [1898] 2 I. R. 103, 119).

(*m*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110).

(*n*) *Albon* v. *Pyke* (1842), 4 Man. & G. 421; see also *Timms* v. *Williams*, *supra*, where the point was raised but left undecided.

SECT. 2. Loans.

secure an advance by a society, which is not enrolled, it is unnecessary to join all the members as plaintiffs in any proceedings taken on the note (*o*).

Defendants.

470. Proceedings to recover the amount secured by a promissory note given to a society may be taken against the personal representative of a deceased borrower (*p*).

The language of a bond given to a society is strictly construed (*q*).

Part III.—Winding Up.

Winding up.

471. The Act (*r*) contains no provisions relating to the winding up of loan societies. A loan society which consists of more than seven members at the date of the winding-up petition (*s*) may be wound up as an unregistered association under the Companies (Consolidation) Act, 1908 (*t*). Where the court orders a loan society certified under the Act (*r*) to be wound up as an unregistered company, the order may direct the proceedings to be transferred to the county court (*u*).

Set-off.

Where a loan society is being wound up as an unregistered company, a member cannot set off an amount deposited by him with the society against an amount borrowed by him from the society on a bond which is being sued upon by the official liquidator. This rule applies even where the borrower has given due notice of withdrawal, and the society has failed to meet its obligations (*a*).

(*o*) *Bawden* v. *Howell* (1841), 4 Scott (N. R.), 331, *per* MAULE, J., at p. 334: "Policies of insurance are usually signed by three directors, and who ever heard it suggested that the whole society must sue or be sued?"

(*p*) *Atthill* v. *Woods*, [1903] 2 I. R. 305; *R.* (*O'Reilly*) v. *Fermanagh Justices*, [1904] 2 I. R. 18, C. A.

(*q*) *Three Towns British Mutual Deposit and Loan Society, Ltd.* v. *Doyle* (1862), 13 C. B. (N. S.) 290. In this case a borrower gave a bond to a loan society to secure a loan repayable by monthly instalments, the condition being that on failure to pay any instalment the borrower should pay "one shilling in the pound for each and every pound of the instalment left unpaid," and the society was held not entitled to anything in respect of fractional parts of a pound unpaid.

(*r*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110).

(*s*) *Re Bolton Benefit Loan Society, Coop* v. *Booth* (1879), 12 Ch. D. 679.

(*t*) 8 Edw. 7, c. 69, ss. 267—269, replacing the Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 199, 200. See *Re Sherwood Loan Company, Ex parte Smith* (1851), 1 Sim. (N. S.) 165; *Re Crown and Cushion Loan Fund Society* (1850), 14 Jur. 874; *Phillipson* v. *Hale* (1880), 43 L. T. 508; and titles COMPANIES, Vol. V., pp. 647—654; FRIENDLY SOCIETIES, Vol. XV., p. 202; INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES, Vol. XVII., p. 34; and the following cases relating to the winding up of loan societies under statutes which apply only to Ireland, but which are to some extent similar in principle, namely: *Independent Protestant Loan Fund Society, Ex parte Morton, Friendly Protestant Partnership Loan Fund Co., Ex parte Hall*, [1895] 1 I. R. 1; *Re Irish Mercantile Loan Society* [1907] 1 I. R. 98; *Re Belfast Tailors' Co-partnership, Ltd.*, [1909] 1 I. R. 49.

(*u*) *Phillipson* v. *Hale, supra.*

(*a*) *Ibid.*

PART III. Winding Up.

Dissolution as in partnership.

To enable the court to wind up a loan society consisting of less than seven members at the date of the petition, an action for dissolution of partnership is the correct procedure (*b*).

(*b*) *Re Bolton Benefit Loan Society, Coop* v. *Booth* (1879), 12 Ch. D. 679. For the procedure on dissolution of partnership, see title PARTNERSHIP.

LOCAL AUTHORITIES.

See CORPORATIONS; EDUCATION; ELECTIONS; LOCAL GOVERNMENT; METROPOLIS; POOR LAW; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

LOCAL COURTS.

See County Courts; Courts; Magistrates; Mayor's Court, London.

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Ferries - - - - -	,,	FERRIES.
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Industrial Schools - - -	,,	EDUCATION.
Inebriates - - - -	,,	INTOXICATING LIQUORS.
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For Infectious Diseases - - -	*See title*	ANIMALS; PUBLIC HEALTH AND LOCAL ADMINISTRATION.
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Joint Burial Boards - -	,,	BURIAL AND CREMATION.
Justices of the Peace - -	,,	CRIMINAL LAW AND PROCEDURE; MAGISTRATES.
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Light Railways - - -	,,	TRAMWAYS AND LIGHT RAILWAYS.
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Police - - - - -	,,	POLICE.
Poor Law - - - -	,,	POOR LAW.
Public Authorities Protection -	,,	PUBLIC AUTHORITIES AND PUBLIC OFFICERS.
Public Health - - -	,,	PUBLIC HEALTH AND LOCAL ADMINISTRATION.
Public Libraries - - -	,,	PUBLIC HEALTH AND LOCAL ADMINISTRATION.
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Rates and Rating - - -	,,	RATES AND RATING.
Refreshment Houses - -	,,	INNS AND INNKEEPERS; INTOXICATING LIQUORS; SALE OF GOODS; TRADE AND TRADE UNIONS.
Roads - - - - - -	,,	HIGHWAYS, STREETS, AND BRIDGES.
Sanitation - - - - -	,,	PUBLIC HEALTH AND LOCAL ADMINISTRATION.
Scavengers - - - - -	,,	PUBLIC HEALTH AND LOCAL ADMINISTRATION.
Sewers and Drains - - -	,,	SEWERS AND DRAINS.
Shop Hours - - - - -	,,	FACTORIES AND SHOPS.
Slaughter Houses - - -	,,	PUBLIC HEALTH AND LOCAL ADMINISTRATION.
Street Railways - - -	,,	TRAMWAYS AND LIGHT RAILWAYS.
Street Traffic - - -	,,	STREET AND AERIAL TRAFFIC.
Streets - - - - - -	,,	HIGHWAYS, STREETS, AND BRIDGES.
Telegraphs and Telephones -	,,	TELEGRAPHS AND TELEPHONES.
Theatres - - - - -	,,	THEATRES AND OTHER PLACES OF ENTERTAINMENT.
Trades - - - - -	,,	ANIMALS; FOOD AND DRUGS; INTOXICATING LIQUORS; TRADE AND TRADE UNIONS.
Tramways - - - - -	,,	TRAMWAYS AND LIGHT RAILWAYS.
Veterinary Surgeons - -	,,	ANIMALS; MEDICINE AND PHARMACY.
Water Supply - - -	,,	WATER SUPPLY.
Ways - - - - - -	,,	EASEMENTS AND PROFITS À PRENDRE; HIGHWAYS, STREETS, AND BRIDGES.
Working Classes, Housing of -	,,	PUBLIC HEALTH AND LOCAL ADMINISTRATION.
Workshops - - - - -	,,	FACTORIES AND SHOPS.

Part I.—Local Government Areas and their Means of Government (a).

SECT. 1.—*The Parish.*

SUB-SECT. 1.—*In General.*

Meaning of "parish."

472. The parish (b) is the unit of area for local government purposes. It is a place for which a separate poor rate is or can be

(a) For local government in London, see title METROPOLIS. In addition to the areas detailed in the text, there are some minor areas, comprised in the larger areas mentioned, which have been created for certain limited purposes, such as the areas of Commissioners of Sewers (see titles COURTS, Vol. IX., p. 220; SEWERS AND DRAINS), and drainage districts (see title SEWERS AND DRAINS), and the port sanitary district (see p. 292, *post*, and titles METROPOLIS; PUBLIC HEALTH AND LOCAL ADMINISTRATION). For poor law unions, see title POOR LAW. As to the union of local authorities for the purpose of providing for the reception and care of lunatics, see title LUNATICS AND PERSONS OF UNSOUND MIND, p. 484, *post*.

(b) In addition to the civil parish, which alone is treated above, there are the

made, or for which a separate overseer is or can be appointed (*c*), and every portion of England and Wales is in some parish (*d*).

Organisation.

473. The civil affairs of a rural parish are vested in the parish council or parish meeting; urban parishes possess neither parish councils nor parish meetings, and such civil powers as have not been transferred to the urban council are still exercised by the vestry, which, in rural parishes, practically has now no civil jurisdiction (*e*).

Boundaries.

474. Apart from statutory adjustments (*f*), including the right of the county council to alter and define parochial boundaries (*g*), the boundaries of the parish depend on ancient and immemorial custom (*h*), evidenced and perpetuated in many parts of the country by periodical perambulations in Rogation Week (*i*).

SUB-SECT. 2.—*Division and Union of Parishes.*

(i.) *Division.*

Purposes of division.

475. Parishes may be divided (1) to prevent their being partly situated in more than one county or sanitary district; (2) to secure more efficient administration; and (3) for election purposes.

Burial Act parish (see title BURIAL AND CREMATION, Vol. III., p. 448), the ecclesiastical parish (see title ECCLESIASTICAL LAW, Vol. XI., p. 442), the highway parish (see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 83), and the land tax parish (see title LAND TAX, Vol. XVIII., p. 308, note (*a*)).

(*c*) This is the meaning in which, unless a contrary intention appears, the expression is used in all statutes passed after the year 1866 (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 5). For similar definitions, see the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4; Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 4; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 7 (1); Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 100; Local Government Act, 1894 (56 & 57 Vict. c. 72), s. 75 (1).

(*d*) All places which were formerly extra-parochial have been absorbed in some parish. See the Land Drainage (Rating) Act, 1743 (17 Geo. 2, c. 37), ss. 1, 2; Extra-Parochial Places Act, 1857 (20 Vict. c. 19), ss. 1—8, 11; Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 27.

(*e*) See p. 261, *post.*

(*f*) As to the power of Inclosure Commissioners (now the Board of Agriculture and Fisheries) to ascertain and fix the boundaries of parishes which are doubtful, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 552, and as to the like power of the Tithe Commissioners (now the Board of Agriculture and Fisheries), see title ECCLESIASTICAL LAW, Vol. XI., p. 747, note (*a*).

(*g*) See Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 57; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 36 (8); and pp. 323, 377, *post.*

(*h*) Burn's Ecclesiastical Law, tit. "Parish." As to the alteration of parishes owing to the encroachment or receding of tidal waters, see title WATERS AND WATERCOURSES, and the following cases:—*R.* v. *Musson* (1858), 8 E. & B. 900; *R.* v. *Gee* (1859), 1 E. & E. 1068; *Ipswich Dock Commissioners* v. *St. Peter, Ipswich, Overseers* (1866), 7 B. & S. 310; *Bridgwater Trustees* v. *Bootle-cum-Linacre* (1866), L. R. 2 Q. B. 4; *Blackpool Pier Co., Ltd.* v. *Fylde Union* (*Assessment Committee*) (1877), 41 J. P. 344; the Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 27; and see also titles BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., pp. 112, 118, 141; EVIDENCE, Vol. XIII., p. 479.

(*i*) As to perambulations, see titles BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 148; CUSTOM AND USAGES, Vol. X., p. 245. A custom to enter houses during perambulation does not include a right to buy refreshments from such houses (Burn's Ecclesiastical Law, 9th ed., tit. "Parish," 75; *Welby* v. *Harbert* (1676), 3 Keb. 609). The expenses may be paid out of the

SECT. 1. The Parish.

The division may be made directly by statute, or by the order of a local or other authority under statutory powers (*j*).

Division by the Local Government Board.

476. The Local Government Board (*k*) may by an order under seal, confirmed by Parliament, divide parishes which require division for the better administration of the poor laws (*l*).

Parishes may also be divided by the Local Government Board under the powers transferred to it from county councils when the latter bodies have not exercised them within the limited time (*m*), subject to the holding of the necessary inquiries and the giving of the necessary notices (*n*), including notices to the parish council or parish meeting (*o*).

Division by county councils.

477. Parishes may be divided by county councils either generally under the powers conferred by the statute which created such councils (*p*), or for the purpose of giving effect to the Local Government Act, 1894 (*q*), in which case the power is also exercised under the former statute (*r*).

Division into wards.

County councils may by order divide parishes into wards, called "parish wards," for the purpose of the election of parish councillors, and may assign the boundaries and the number of councillors for each ward (*s*).

(ii.) *Union.*

Method.

478. Parishes may be united by the Local Government Board (*t*),

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poor rate if not made oftener than once in three years (Poor Law Act, 1844 (7 & 8 Vict. c. 101), s. 60).

(*j*) As to the divisions which took place consequent upon the Local Government Act, 1894 (56 & 57 Vict. c. 73), see *ibid.*, ss. 1, 36, 69. As to the form of order, see p. 239, *post*.

(*k*) For the constitution of the Local Government Board, see title CONSTITUTIONAL LAW, Vol. VII., p. 103.

(*l*) Poor Law Amendment Act, 1867 (30 & 31 Vict. c. 106), s. 3. The powers of the Local Government Board under this or any other statute in respect of the union, division, or alteration of parishes are not affected by the powers given to the county council for similar purposes (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 57 (7)).

(*m*) See the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 36. The limit of two years imposed by *ibid.*, s. 336, was repealed by the Statute Law Revision Act, 1908 (8 Edw. 7, c. 49). The powers of the county council under the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 57, and under the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 36 (10), as to the division of parishes, remain unaffected. As to these, see pp. 323, 377, *post*.

(*n*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 57.

(*o*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 36 (1), (7), (8), (13).

(*p*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 57; see p. 377, *post*.

(*q*) 56 & 57 Vict. c. 73.

(*r*) *Ibid.*, s. 36 (8).

(*s*) *Ibid.*, s. 18 (1). The order may be revoked or varied (*ibid.*, s. 18 (3)). For the circumstances to be considered in making the order, see *ibid.*, s. 18 (2). A separate election is held for each ward (*ibid.*, s. 18 (4)).

(*t*) See the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), ss. 1—9; Poor Law Act, 1879 (42 & 43 Vict. c. 54), ss. 4—7; Divided Parishes and Poor Law Amendment Act, 1882 (45 & 46 Vict. c. 58), s. 4. The powers under these Acts have been largely superseded in practice by those conferred upon county councils under the Local Government Acts, 1888 (51 & 52 Vict. c. 41) and 1894 (56 & 57 Vict. c. 73) (see p. 377, *post*), but the former

or by the county council, which has also power to transfer a part of one parish to another (*u*).

Requirements on union or division.

479. Where any parish is divided or united with another parish by an order (*a*), the order must specify the name which the new parish is to bear (*b*). The change of name must be notified to the Local Government Board (*c*) and to the Board of Agriculture and Fisheries (*d*). It does not affect legal proceedings, nor the rights and obligations of the parish (*e*).

SUB-SECT. 3.—*Organisation.*

(i.) *Rural Areas.*

Parish meetings and councils.

480. Every parish in a rural sanitary district is a rural parish (*f*), and has a parish meeting (*g*), and, if its population is or exceeds 300, a parish council also (*h*).

Creation of parish council by order.

481. The parish meeting of a rural parish with a population of at least 100 may resolve to have a parish council, and the county council must thereupon make an order, which need not be submitted to or confirmed by the Local Government Board (*i*), establishing the parish council (*k*). In the case of a parish with a population less than 100 the county council may, with the consent of the parish meeting, establish a parish council in the parish (*l*).

Petition for parish council.

482. The parish meeting of a parish whose population has increased so much as to justify the election of a parish council may petition the county council, and the latter may by a similar order direct the election of a parish council. If the parish has previously been grouped with other parishes (*m*), the order must provide for the separation of the parish from the group, for the alteration of the parish council of the group, and for the adjustment of property, rights and liabilities as between the group and the separated parish (*n*).

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powers still exist (see the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 57 (7)). As to the power of readjustment of portions of a parish for poor law administration, see the Poor Law Amendment Act, 1867 (30 & 31 Vict. c. 106), s. 3; title POOR LAW.

(*u*) See p. 377, *post.*

(*a*) Under the Local Government Act, 1894 (56 & 57 Vict. c. 73).

(*b*) *Ibid.*, s. 55 (1), (2).

(*c*) *Ibid.*, s. 55 (4).

(*d*) *Ibid.*, s. 71.

(*e*) *Ibid.*, s. 55 (5). As to the transfer of stock standing in the original name of the parish, see Local Government (Stock Transfer) Act, 1895 (58 & 59 Vict. c. 32), s. 1.

(*f*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 1 (2).

(*g*) *Ibid.*, s. 1 (1). As to the effect in 1894 of a rural parish being co-extensive with a rural sanitary district, see *ibid.*, s. 36 (4).

(*h*) *Ibid.*, s. 1 (1).

(*i*) *Ibid.*, s. 40.

(*k*) *Ibid.*, s. 1 (1) (a).

(*l*) *Ibid.* A parish with a population of less than 200 may apply to the county council for a parish council (*ibid.*, s. 38 (4)).

(*m*) See p. 240, *post.*

(*n*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 39 (1), 40. This

SECT. 1. The Parish.

Dissolution of parish council.

483. Where the population of a rural parish has fallen below 200 according to the current census, the parish meeting may petition the county council, and the latter may by a similar order dissolve the parish council, making by the order all necessary provisions for carrying it into effect, and for disposing of and adjusting the property, rights and liabilities of the dissolved council (*o*).

A rejected petition may not be renewed within two years from the previous presentation (*p*).

Grouping of parishes.

484. A parish may upon the application of a parish meeting be grouped with another or others under a common parish council by an order (*q*) of the county council. The consent of the parish meeting of each parish is necessary, and every parish grouped must have its own parish meeting (*r*). The grouped parishes must be within the same administrative and county district, unless the county council for special reasons otherwise directs (*s*).

Dissolution of group.

The county council may by order dissolve the group upon the application of the council for the group, or of the parish meeting of any of the grouped parishes (*t*).

(ii.) *Urban Areas.*

485. The vestry exercises civil functions save where they have been transferred to the borough or urban council (*u*).

SUB-SECT. 4.—*The Parish Council.*

(i.) *Constitution.*

The body corporate.

486. The parish council is a body corporate (*a*), consisting of a chairman (*b*) and of such number of councillors, not being less than five nor more than fifteen, as the county council may from time to time fix (*c*). It is styled "The Parish Council of ——." Doubts as to the name are settled by the county council after consultation with the parish meeting (*d*).

Style.

Nature.

It has perpetual succession and may hold land for the purpose of

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order is to be deemed to be an order under the Local Government Act, 1888 51 & 52 Vict. c. 41), s. 57 (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 36 (10)). As to the effect of this, see note (*h*), p. 377, *post*.

(*o*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 39 (2), 40.

(*p*) *Ibid.*

(*q*) As to the order, see *ibid.*, ss. 38, 40, 55, 71.

(*r*) *Ibid.*, s. 1 (1) (b). The order is deemed to be one under the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 57 (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 36 (10)). As to the effect of this, see note (*h*), p. 377, *post*.

(*s*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 38 (2).

(*t*) *Ibid.*, s. 38 (5).

(*u*) See p. 261, *post*.

(*a*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 3 (9).

(*b*) For the election of the chairman, see p. 241, *post*, and title ELECTIONS, Vol. XII., p. 389.

(*c*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 3 (1).

(*d*) *Ibid.*, s. 3 (9). As to a transfer of stock standing in the name of the council when the name is changed, see Local Government (Stock Transfer) Act, 1895 (58 & 59 Vict. c. 32), s. 1.

its powers and duties without licence in mortmain (*e*). It signifies its acts by an instrument executed at a meeting of the council, and under the hands and seals, when necessary, of the chairman presiding at the meeting of the council and two other members (*f*).

If at any time the parish council is unable to act owing to a want of councillors, whether from failure to elect or otherwise, the county council may order a new election, and may also make provision by order for any person to act in the meantime in the place of the parish council or of the chairman (*g*).

Legal proceedings.

487. In legal proceedings the council appears by the clerk or an authorised officer or member, who may institute and carry on any proceeding which the council may (*h*).

Chairman.

488. The chairman is elected at the annual meeting (*i*). He may resign by giving notice in writing to the council (*j*). A retiring chairman is eligible for re-election (*k*). The disqualifications for being elected or being a chairman are the same as in the case of district councillors (*l*).

A casual vacancy in the office of chairman is filled by the parish council (*m*).

A vice-chairman may be appointed, who, in the absence or inability of the chairman, has the latter's powers and authority (*n*).

Parish councillors.

Qualification.

489. The parish councillors are elected from among the parochial electors (*o*) of the parish or persons who have during the whole of the twelve months preceding the election resided in the parish, or within three miles thereof (*p*), or who have entered into residence on or before the 25th March in any year if otherwise qualified for election (*q*). Sex and marriage do not disqualify (*r*).

Disqualification.

The disqualifications for being elected or being a parish councillor are the same as in the case of district councillors (*s*), except that when a person is a parish councillor, or is a candidate for such office, and is concerned in any such bargain or contract, or participates in such profit as would be a disqualification, the county council has power to remove such disqualification if it thinks that its removal would be beneficial to the parish (*t*).

(*e*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 3 (9). The parish council has no corporate seal.
(*f*) *Ibid.*, s. 3 (9).
(*g*) *Ibid.*, s. 47 (5).
(*h*) *Ibid.*, s. 3 (10), Sched. I., Part 2 (16).
(*i*) See title ELECTIONS, Vol. XII., p. 389.
(*j*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 47 (3).
(*k*) *Ibid.*, s. 47 (2).
(*l*) *Ibid.*, s. 46; as to which, see p. 264, *post*.
(*m*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 47 (4).
(*n*) *Ibid.*, s. 3 (10), Sched. I., Part 2 (11).
(*o*) As to parochial electors, see title ELECTIONS, Vol. XII., p. 191.
(*p*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 3 (1).
(*q*) Local Government Act, 1897 (60 Vict. c. 1), s. 1.
(*r*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 3 (2).
(*s*) *Ibid.*, s. 46; see p. 264, *post*.
(*t*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 46 (3). As to disqualifications generally, see p. 264, *post*.

SECT. 1. The Parish.

Proceedings of the council are not invalidated by any defect in the qualification of any of its members (*u*).

A retiring parish councillor is eligible for re-election (*a*).

Election.

490. The election is made by the parochial electors (*b*). Candidates may use school-houses and the like buildings for their meetings (*c*).

Acceptance of office.

Acceptance of office is signified by signing a declaration in the presence of a member of the council. Failing this the office is void (*d*), but there is no penalty for non-acceptance.

Term of office.

491. Parish councillors hold office for three years and go out of office on the 15th April in every third year computed from 1901 (*e*).

Resignation.

A parish councillor may resign office by giving notice in writing to the chairman (*f*), and vacates office by becoming disqualified, or absenting himself from meetings for six months without proper excuse (*g*).

If at the ordinary election any vacancies are not filled by election, such retiring councillors as are not re-elected and are necessary to fill the vacancies are, if willing, to hold office (*h*). The councillors so to continue are to be those who were highest on the poll at the previous election, or if their numbers were equal or there was no poll, then those who are nominated by the parish meeting, or failing that, by the chairman of the parish council (*i*).

Casual vacancies.

492. Casual vacancies are filled by the parish council (*k*), and for this purpose a meeting of the council must be forthwith convened (*l*); but proceedings are not invalidated by any vacancy (*m*). The person so elected retires from office when the person whose place he takes would have retired (*n*).

(ii.) *Finance.*

Expenses.

493. The expenses of a parish council and of a parish meeting (*o*), including the expenses of a poll, are, speaking generally, to be paid

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(*u*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 3 (10), Sched. I Part 2 (12).

(*a*) *Ibid.*, s. 47 (2).

(*b*) See title ELECTIONS, Vol. XII., pp. 191, 382. There must be a separate election for each ward (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 18 (4).

(*c*) *Ibid.*, s. 4.

(*d*) *Ibid.*, s. 3 (10), Sched. I., Part 2 (1). It should be at the first meeting, but the council may at that meeting postpone it (*ibid.*).

(*e*) Parish Councillors (Tenure of Office) Act, 1899 (62 & 63 Vict. c. 10), s. 1 (1), (2), (3), repealing Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 3 (3), (4), as from 1st January, 1900.

(*f*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 47 (3).

(*g*) *Ibid.*, s. 46 (6), (7). These provisions are the same as in the case of urban district councillors, as to which see p. 265, *post.*

(*h*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 47, as amended by the Parish Councillors (Tenure of Office) Act, 1899 (62 & 63 Vict. c. 10), s. 1 (4).

(*i*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 47 (1).

(*k*) *Ibid.*, s. 47 (4).

(*l*) *Ibid.*, s. 3 (10), Sched. I., Part 2 (2).

(*m*) *Ibid.*, Sched. I., Part 2 (12).

(*n*) *Ibid.*, s. 47 (4).

(*o*) In this case the parish council, when it exists, pays the expenses (Local

out of the poor rate (*p*), and for the purpose of obtaining payment the parish council (*q*) issues a precept to the overseers, and may enforce compliance before justices (*r*).

A parish council can spend money only on purposes which are expressly or impliedly authorised by statute, and improper expenditure may be controlled by the audit or the courts (*s*). Like any other local authority, it may expend money out of its funds to protect its property, rights and privileges, including for this purpose, and in proper cases, the opposing of private Bills in Parliament (*t*).

Expenses and liabilities (*a*) which involve a rate exceeding threepence in the pound for any local financial year, namely, the twelve months ending on the 31st March (*b*), cannot be incurred without the consent of the parish meeting (*c*), and any expense or liability involving a loan requires the consent of the parish meeting and the approval of the county council (*d*).

The sum raised in any financial year for expenses, including annual charges, whether of principal or interest in respect of loans, but excluding expenses under adoptive Acts (*e*), must not exceed a sum equal to a rate of sixpence in the pound on the rateable value (*f*) of the parish at the commencement of the year (*g*).

Government Act, 1894 (56 & 57 Vict. c. 73), s. 11 (4)). As to the expenses under adoptive Acts, see p. 260, *post*.

(*p*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 11 (4).

(*q*) Where there is no parish council the parish meeting has the like power; see p. 259, *post*.

(*r*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 11 (4). The demand note must state, in the form prescribed by the Local Government Board, the proportion of rate levied for the expenses (*ibid.*, s. 11 (5)). The contributions are required under the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 28. For form of precept, see Order of Local Government Board, 11th February, 1895, No. 448. See also titles POOR LAW; RATES AND RATING. As to the enforcement of orders of justices, see title MAGISTRATES, pp. 589 *et seq.*, *post*.

(*s*) As to audit, see pp. 244, 260, *post*.

(*t*) The Borough Funds Act, 1872 (35 & 36 Vict. c. 91), as to which see pp. 290, 380, *post*, does not appear to apply to parish councils. For private Bill procedure, see title PARLIAMENT.

(*a*) As to the meaning of "expenses" and "liabilities," see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 100, which definitions are made applicable by the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 75 (1). As to the former liability of parish councils to repair highways and as to their power to repair footpaths, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 25, note (*b*), 29, 183.

(*b*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 75 (1); Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 73.

(*c*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 11 (1).

(*d*) *Ibid.*, s. 11 (1), (2).

(*e*) See *ibid.*, s. 7 (1). The adoptive Acts which authorise the borrowing of money are the Baths and Washhouses Acts, 1846—1882 (see p. 257, *post*, and title PUBLIC HEALTH AND LOCAL ADMINISTRATION); the Burial Acts, 1852—1885 (see p. 257, *post*, and title BURIAL AND CREMATION, Vol. III., pp. 492 *et seq.*); the Public Libraries Act, 1892 (55 & 56 Vict. c. 53) (see title PUBLIC HEALTH AND LOCAL ADMINISTRATION); but not the Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90) (see title GAS, Vol. XV., p. 308). Under the first three of these sets of Acts the Public Works Loan Commissioners may advance loans. As to these adoptive Acts generally, see p. 257, *post*.

(*f*) That is, the rateable value stated in the valuation list in force, or, if none, in the last poor rate (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 75 (2)).

(*g*) *Ibid.*, s. 11 (3).

SECT. 1.
The Parish.

Borrowing powers.

494. A parish council may, with the consent of the Local Government Board, borrow money required for purchasing any land or building, or for erecting any buildings, which it is authorised to purchase or build for authorised purposes under adoptive Acts (*h*); for any permanent work or other thing which it is authorised to execute or do, and the cost of which ought, in the opinion of the county council and the Local Government Board, to be spread over a term of years (*i*); and for paying a capital sum on the adjustment of property, debts and finance (*j*).

The money is borrowed in the same way and subject to the like conditions as a local authority may borrow for defraying expenses incurred in the execution of the Public Health Acts (*k*), with the exception that the security is to be the poor rate (*l*) and the whole or part of the revenues of the parish council, and that the power of borrowing is limited to half of the assessable value of the parish (*m*). The required money may be lent by the county council, and the latter in turn may raise a loan for the purpose (*n*).

Accounts.

495. The accounts of receipts and expenditure of the parish council, their committees and officers, must be made up yearly to the 31st March, in the form prescribed by the Local Government Board (*o*). They are open to the inspection of parochial electors (*p*) at all reasonable times without payment, and copies and extracts may be taken (*q*).

Audit.

496. The accounts are audited by a district auditor in the same way as the accounts of urban sanitary authorities and their officers are audited (*r*), subject to such modifications as the Local Government Board may make concerning the publication of notice of the audit, and of the abstract of accounts, and the report of the auditor (*s*).

(iii.) *Meetings.*

Place of meetings.

497. The meetings are usually held in some public room vested in the council. Failing this, the council may use free of charge, but subject to the payment of expenses and damages, and subject to

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(*h*) See note (*e*), p. 243, *ante*.
(*i*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 12 (1).
(*j*) *Ibid.*, s. 68 (4).
(*k*) The Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 233, 234, 236—239, are applied subject to the exceptions stated. See, further, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.
(*l*) In the case of money borrowed for the purposes of the adoptive Acts, the charge will be upon the rate applicable to such Acts (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 12 (3)).
(*m*) *Ibid.*, s. 12 (1).
(*n*) *Ibid.*, s. 12 (2).
(*o*) *Ibid.*, s. 58 (1).
(*p*) As to parochial electors, see title ELECTIONS, Vol. XII., p. 191.
(*q*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 58 (4).
(*r*) *Ibid.*, s. 58 (2); see pp. 260, 284, *post*.
(*s*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 58 (3). The orders in force are dated 20th May, 26th July, 1895; 22nd March, 1898; 20th, 26th, 27th April, 1900.

the convenience of other persons interested, the buildings of schools supported by parliamentary grants, and other premises supported out of local rates (*t*).

Licensed premises.

The council may not meet on licensed premises, unless there is no other place to be had (*u*).

Annual meeting

498. On or within seven days following the 15th April in each year the council must hold the annual meeting (*a*), the first business thereat being the election of a chairman and the appointment of overseers (*b*).

Convening of meetings.

Meetings are convened by the chairman, either on his own initiative or on a requisition signed by two members of the council. If in the latter case the chairman refuses or for seven days neglects to call a meeting, any two members may do so forthwith (*c*).

One third of the members, being three at least, form a quorum (*d*).

Three clear days' notice of every meeting must be given (*e*). It must be signed by or on behalf of the chairman or persons convening the meeting, and given to every member (*f*), and it must state the time, place and business of the intended meeting (*g*). In the case of an annual meeting a similar notice must be given to every member immediately after his election (*h*).

Open to public.

499. All meetings of the council are to be open to the public unless the council otherwise directs (*i*). The admission of representatives of the Press to the meetings of the council and committees is governed by statute (*k*).

Proceedings.

500. A record must be kept of members present at the meetings, and of the votes given (*l*). A majority of votes of those present and voting decides all questions (*m*). When the votes are equal the chairman has a second or casting vote (*n*).

(*t*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 4.

(*u*) *Ibid.*, s. 61.

(*a*) Parish Councillors (Tenure of Office) Act, 1899 (62 & 63 Vict. c. 10), s. 1 (5). As to the convening of the first meeting, see Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 78 (1). There must be at least three other meetings each year (*ibid.*, Sched. I., Part 2 (13)).

(*b*) *Ibid.*, s. 3 (10), Sched. I., Part 2 (3). As to chairman, see p. 241, *ante;* and as to overseers, see p. 249, *post.*

(*c*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 3 (10), Sched. I., Part 2 (4).

(*d*) *Ibid.*, s. 3 (10), Sched. I., Part 2 (7).

(*e*) As to publication of notices, see *ibid.*, ss. 3 (10), 51, Sched. I., Part 2 (6), (15).

(*f*) As to service, see *ibid.*, Sched. I., Part 2 (6).

(*g*) *Ibid.*, s. 3 (10), Sched. I., Part 2 (5).

(*h*) *Ibid.*

(*i*) *Ibid.*, s. 3 (10), Sched. I., Part 2 (13).

(*k*) Local Authorities (Admission of the Press to Meetings) Act, 1908 (8 Edw. 7, c. 43), ss. 1, 5. *Ibid.*, s. 2, defines representatives of the Press; *ibid.*, ss. 3 and 4, relate to committees; and see title PRESS AND PRINTING.

(*l*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 3 (10), Sched. I., Part 2 (8).

(*m*) *Ibid.*, Sched. I., Part 2 (9).

(*n*) *Ibid.*, Sched. I., Part 2 (10).

SECT. I. The Parish.

Cheques and orders for payment must be signed by two members (*o*).

(iv.) *Committees.*

Committees.

501. Committees may be appointed which may consist wholly or partly of members of the council. A committee holds office until, but not beyond, the next annual meeting, and the acts of the committee must be submitted to the council for approval (*p*).

The parish council may regulate the quorum, proceedings, place of meeting, and area of jurisdiction of the committees, but subject thereto the committees may arrange matters of business themselves. The chairman of committees has a second or casting vote (*q*).

The parish council may concur with other parishes or district councils in appointing from their respective bodies a joint committee for any purpose in respect of which they are jointly interested (*r*). Such committee cannot hold office beyond the expiration of fourteen days after the next annual meeting of any of the councils appointing it (*s*).

(v.) *Powers and Duties.*

Transferred powers of parish councils.

502. Numerous powers and duties formerly possessed by other bodies have been transferred to the parish councils (*a*), namely: (1) the appointment of overseers and of an assistant overseer and revocation of such appointments (*b*); (2) the powers, duties, and liabilities (*c*) of the parish vestry (*d*), except such as relate to the affairs of the Church (*e*) or to ecclesiastical charities (*f*)

(*o*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 3 (10), Sched. I., Part 2 (14).

(*p*) *Ibid.*, s. 56 (1). Where a parish council has powers and duties to be exercised in part only of the parish, or in relation to property held by it for the benefit of part of a parish, and the part has a defined boundary, the parish council must, on the request of a parish meeting held for that part, appoint annually a committee consisting partly of members of the council, and partly of other persons representing that part of the parish, to exercise such powers and duties (*ibid.*, s. 56 (2)). This applies also under similar circumstances to joint committees appointed under *ibid.*, s. 57 (*ibid.*, s. 57 (5)); see the text, *infra*.

(*q*) *Ibid.*, s. 56 (3), Sched. I., Part 4.

(*r*) *Ibid.*, s. 57 (1), (2). The power of borrowing money or making a rate cannot be delegated.

(*s*) *Ibid.*, s. 57 (3). As to the costs of the joint committee, see *ibid.*, s. 57 (4).

(*a*) *Ibid.*, ss. 5, 6, 7 (7).

(*b*) *Ibid.*, s. 5 (1).

(*c*) These words have the same meaning as in the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 100 (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 75 (1).

(*d*) The vestry means the inhabitants of the parish whether in vestry assembled or not, and includes any select vestry either by statute or at common law (*ibid.*, s. 75 (2)). As to select vestries, see title ECCLESIASTICAL LAW, Vol. XI., pp. 458 *et seq.*

(*e*) See Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 75 (2).

(*f*) See *ibid.*

or such as are expressly transferred to other authorities (*g*); (3) the civil powers and duties of the churchwardens, other than as overseers (*h*), which include certain functions relating to charities (*i*), closed churchyards (*k*), and the convening of vestry meetings (*l*); (4) the powers and duties of overseers, or of churchwardens and overseers (*m*), to object to valuation lists for poor rate purposes, to appeal against such lists, and in respect of appeals by other persons against poor rates (*n*), to object to and appeal against the basis of the county rate or the rate itself (*o*), to provide and maintain parish books and chests (*p*), vestry rooms (*q*), fire engines and apparatus (*r*), to hold and manage parish property (*s*), village greens or allotments, whether for recreation grounds or otherwise (*t*); (5) the powers exercisable, with the approval of the Local Government Board, by the board of guardians of the union in which the parish lies in respect of the sale, exchange, or letting of parish property (*a*); (6) the power of executing such adoptive Acts as have been or may be adopted by the parish meeting (*b*); and, where the area of any existing authority executing such Acts is co-extensive with the parish, the parish council, when it comes into existence, takes over all the powers, duties and liabilities of that authority (*c*).

(*g*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6 (1). The powers of the vestry so transferred include their powers of arranging with owners for the rating of small tenements (Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), ss. 3, 4; see title RATES AND RATING); their powers as a "local authority" under the Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), s. 2, Sched. A (see titles GAS, Vol. XV., p. 313; WATER SUPPLY), and the Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 3, Sched. A, Part 1 (see title TRAMWAYS AND LIGHT RAILWAYS); their powers to secure the appointment of parish constables (Parish Constables Act, 1872 (35 & 36 Vict. c. 92); see title POLICE); to authorise overseers to charge on the poor rates certain expenses under the Union Assessment Acts (Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), s. 7; see title RATES AND RATING); to appoint inspectors under the Knackers Act, 1786 (26 Geo. 3, c. 71) (see title PUBLIC HEALTH AND LOCAL ADMINISTRATION); and to consent to the payment of extra remuneration to collectors of separate rates for sanitary purposes (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 230).

(*h*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6 (1) (b).

(*i*) See title CHARITIES, Vol. IV., p. 257.

(*k*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6 (1) (b); see title BURIAL AND CREMATION, Vol. III., p. 529.

(*l*) See p. 261, *post*.

(*m*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6 (1) (c). In an appeal against a poor rate in a rural parish the parish council is respondent (*R.* v. *De Grey*, [1900] 1 Q. B. 521).

(*n*) See title RATES AND RATING.

(*o*) Under the County Rates Act, 1852 (15 & 16 Vict. c. 81), ss. 14, 17; see title RATES AND RATING; and p. 360, *post*.

(*p*) See p. 253, *post*.

(*q*) See p. 253, *post*.

(*r*) See p. 253, *post*, and title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*s*) See pp. 240, *ante*, 252, *post*.

(*t*) See titles ALLOTMENTS, Vol. I., p. 336; OPEN SPACES AND RECREATION GROUNDS.

(*a*) See p. 252, *post*.

(*b*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7 (7); and see p. 244, *ante*. As to adoptive Acts, see also p. 257, *post*.

(*c*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7 (5).

SECT. 1.

The Parish.

Miscellaneous powers.

(vi.) *Additional Powers and Duties* (*d*).

503. Besides the power of appointing officers (*e*) and the powers in respect of property and documents (*f*), parish councils have powers to acquire, by purchase or hiring by agreement (*g*), or by gift (*h*), or, under certain conditions, compulsorily (*i*), land or buildings for parochial purposes (*j*), or for recreation grounds and public walks (*k*); to regulate recreation grounds, village greens, open spaces and public walks, and to exercise in respect of them certain powers exercisable by urban authorities over similar places (*l*); to secure the regulation and inclosure of commons (*m*); to acquire land for common pasture (*n*); in respect of public footpaths (*o*); in respect of natural water supplies, but not so as to interfere with private rights (*p*); to execute, or contribute to the expense of, works for the exercise of their conferred powers or in relation to parish property, other than the property of the Church or ecclesiastical charities (*q*); to deal with offensive ditches and the like (*r*); to execute adoptive Acts when adopted by the parish meeting (*s*); to

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(*d*) As to parochial charities and property held in trust for the parish, see title CHARITIES, Vol. IV., p. 264.

(*e*) See p. 249, *post*.

(*f*) See pp. 250, 253, *post*.

(*g*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 9 (1). The Lands Clauses Consolidation Acts (see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 12 *et seq.*, 167), except the provisions relating to the purchase of land otherwise than by agreement, apply, and also the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 178, relating to lands belonging to the Duchy of Lancaster (see title CONSTITUTIONAL LAW, Vol. VII., p. 221). Persons authorised to sell land may lease it to the council for a term not exceeding thirty-five years (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 9 (13), applying, with adaptations, the Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 3 (7)).

(*h*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8 (1).

(*i*) *Ibid.*, s. 9 (2)—(19); see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 167 *et seq.*

(*j*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8 (1) (a).

(*k*) *Ibid.*, s. 8 (1) (b).

(*l*) *Ibid.*, s. 8 (1) (d). The powers exercisable are those of an urban authority under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 164, and the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 44. See title OPEN SPACES AND RECREATION GROUNDS. For further powers in respect of the same places, see as to the powers transferred from the churchwardens and overseers, pp. 246, 247, *ante*.

(*m*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8 (1) (c), (4). See title COMMONS AND RIGHTS OF COMMON.

(*n*) Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 34.

(*o*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 8 (1) (g), 9 (15), 13 (1), (2); see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 29, 183.

(*p*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8 (1) (e). This does not relieve the district council of any obligation as to the supply of water (*ibid.*, s. 8 (3)). Land for the supply of water cannot be acquired except by agreement (*ibid.*, s. 9 (15); and see title WATER SUPPLY). A parish council has no right of action in its own name and without the Attorney-General to enforce the claim of the inhabitants to the use of natural water in the parish (*Stoke Parish Council* v. *Price*, [1899] 2 Ch. 277).

(*q*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8 (1) (i), (k).

(*r*) *Ibid.*, s. 8 (1) (f); and see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*s*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7 (7); and see p. 257, *post*.

complain or make representations as to unhealthy dwelling-houses or obstructive buildings (*t*); and to complain to the county council of the neglect of the rural district council in matters of public health, maintenance of highways, or protection of rights of way (*a*).

Powers with regard to rural district council.

The parish council is entitled to receive notice from the rural district council before the latter enters into any contract for the sewering or water supply of a contributory place in the parish (*b*), and may also apply to the Local Government Board to confer urban powers on the rural district council with respect to any parish or part of a parish (*c*).

Other conferred powers

Other conferred powers relate to small holdings (*d*), allotments (*e*), isolation hospitals (*f*), and postal facilities (*g*).

Delegation of powers.

Powers which may be delegated by a rural district council to a parochial committee under the Public Health Acts may be delegated to a parish council (*h*).

(vii.) *Officers.*

Parochial officers.

504. The overseers of the poor are essential officers of a parish, but beyond these the parish council may appoint one or more assistant overseers (*i*), a poor-rate collector, a treasurer, and a clerk (*j*).

In all cases where powers and duties of an authority (other than justices) are transferred to a parish council, the existing officers of that authority become the officers of the council, and for this purpose the body appointing a surveyor of highways is deemed a highway authority, and any paid surveyor an officer of that body (*k*).

All such officers hold office by the same tenure and upon the same terms and conditions as formerly, and whilst performing the

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(*t*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6 (2); see p. 376, *post*, and title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*a*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 16 (1), (2), 26 (4); see titles PUBLIC HEALTH AND LOCAL ADMINISTRATION; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 150 *et seq.*, 162.

(*b*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 16 (3); and see title SEWERS AND DRAINS.

(*c*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 25 (7).

(*d*) Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 3 (2), (4); and see title SMALL HOLDINGS AND SMALL DWELLINGS.

(*e*) Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), ss. 23 (1), 50 (2); and see title ALLOTMENTS, Vol. I., pp. 336 *et seq.*

(*f*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*g*) See title POST OFFICE.

(*h*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 15, 17. As to delegation by a rural district council, see p. 331, *post*. If a parochial committee be formed consisting partly of members of the district council and partly of other persons, these other persons must be, or be selected from, the members of the parish council (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 15).

(*i*) *Ibid.*, s. 5 (1); and see, generally, titles POOR LAW; RATES AND RATING.

(*j*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 17 (3), (6).

(*k*) *Ibid.*, s. 81; and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 124. As to the meaning of the word "existing," see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 100, applied by Local Government Act, 1894 56 & 57 Vict. c. 73), s. 75 (1).

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same duties they are to receive not less salary or remuneration than before (*l*).

Where a parish is divided, any officer of the parish continues to hold office for each parish or district thereby formed, his salary being borne by those parishes or districts in proportion to their rateable value (*m*) at the commencement of the next financial year (*n*).

Overseers.

505. The parish council must appoint overseers at its annual meeting, and, as soon as possible, must fill any casual vacancy occurring in the office, giving notice of such appointments to the board of guardians (*o*).

The parish council may also appoint or revoke the appointment of an assistant overseer for its parish (*p*).

Clerk.

506. If at the time of the constitution of the parish council there is an existing vestry clerk (*q*) in the rural parish, he is to become the clerk of the parish council, even though there be an assistant overseer for the parish (*r*). In all other cases the parish council may appoint a clerk, but not a vestry clerk (*s*); and the clerk may be one of the council acting without remuneration. Failing such appointment the assistant overseer, or one of the assistant overseers, chosen by the council, is to be the clerk, and these duties are to be taken into account in determining his salary; and in the event of there being no assistant overseer, the council may appoint as its clerk a collector of poor rates or some other fit person with such remuneration as is thought proper (*t*).

Treasurer.

507. The parish council may also appoint one of its own number or some other person to be treasurer, but without remuneration. He must give such security as may be required under the regulations of the county council (*a*).

(viii.) *Parish Property and Rights.*

(a) *In General* (*b*).

Vesting of parish property.

508. The legal interest in all property formerly vested in the overseers or in the churchwardens and overseers of a rural parish,

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(*l*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 81 (4). "Officer" means the holder of any place, situation, or employment (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 100, applied by the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 75 (1).

(*m*) "Rateable value" means the rateable value stated in the valuation list in force, or, if there be no such list, in the last poor rate (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 75 (2)).

(*n*) *Ibid.*, s. 81 (5).

(*o*) *Ibid.*, s. 5 (1). As to overseers, see, further, titles POOR LAW; RATES AND RATING.

(*p*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 5 (1).

(*q*) Appointed under the Vestries Act, 1850 (13 & 14 Vict. c. 57).

(*r*) Local Government Act, 1894 (56 & 57 Vict. 73), s. 81 (2).

(*s*) *Ibid.*, s. 17 (4).

(*t*) *Ibid.*, s. 17 (1)—(3).

(*a*) *Ibid.*, s. 17 (6).

(*b*) The subject of parochial charities and of property held by trustees for public parochial purposes is dealt with in title CHARITIES, Vol. IV., p. 263.

except property connected with the affairs of the Church (*c*), or held for an ecclesiastical charity (*d*), is vested in the parish council, subject to all trusts and liabilities affecting the property (*e*).

The property referred to consisted of all buildings, lands, and hereditaments belonging to the parish which, for security, had been vested in the churchwardens and overseers and their successors (*f*) for and on behalf of the parish (*g*), or in the overseers where there were no churchwardens (*h*). It included freehold and leasehold (*i*), but not copyhold (*j*), property, even though held before the Poor Relief Act, 1819 (*k*), came into operation (*l*), provided that it belonged to the parish, that is property held for the general benefit of the parish, the profits of which were applied to the relief of the poor, or were applicable for any of the purposes for which church rates were levied, even though the property had been originally vested in trustees (*m*). But it did not include property

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(*c*) For the definition of "affairs of the Church," see Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 75 (2).

(*d*) For the definition of "ecclesiastical charity," see *ibid.*; titles CHARITIES, Vol. IV., p. 257, note (*e*); ECCLESIASTICAL LAW, Vol. XI., pp. 355, note (*c*), 713.

(*e*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 5 (2) (c). As to the summary determination of questions relating to vesting, see *ibid.*, s. 70 (1). As to the general rules relating to transfer, see *ibid.*, ss. 67, 68. The Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 48, requiring the consent of a corporation to an order under the Charitable Trusts Acts, 1853—1891, vesting the legal estate of charity lands in the Official Trustee, does not apply to property vested in the churchwardens and overseers by virtue of the Poor Relief Act, 1819 (59 Geo. 3, c. 12), and the consent of the parish council is not necessary, but its active powers of management are not affected (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 52 (4); and see title CHARITIES, Vol. IV., p. 280).

(*f*) They were not thereby constituted a proper body corporate with all the legal incidents and restrictions belonging to a corporation by the common law. Thus, their assent and entry under a demise to them sufficed to vest the property in them on behalf of the parish without any acceptance by an instrument under the seal of the supposed corporation (*Smith* v. *Adkins* (1841), 8 M. & W. 362); and any of the churchwardens or overseers might authorise a distress (see title ECCLESIASTICAL LAW, Vol. XI., pp. 131, 466).

(*g*) Poor Relief Act, 1819 (59 Geo. 3, c. 12), s. 17; and see title CHARITIES, Vol. IV., pp. 257, 258.

(*h*) Poor Relief Act, 1819 (59 Geo. 3, c. 12), s. 35.

(*i*) *Doe* d. *Hobbs* v. *Cockell* (1836), 4 Ad. & El. 478; S. C., *sub nom. Doe* d. *Higgs* v. *Cockell* (1836), 6 Nev. & M. (K. B.) 179; *Smith* v. *Adkins, supra; Gouldsworth* v. *Knights* (1843), 11 M. & W. 337.

(*j*) *A.-G.* v. *Lewin* (1837), 8 Sim. 366; *Re Paddington Charities* (1837), 8 Sim. 629; *Doe* d. *Bailey* v. *Foster* (1846), 3 C. B. 215.

(*k*) 59 Geo. 3, c. 12.

(*l*) *Deptford* (*Churchwardens*) v. *Sketchley* (1847), 8 Q. B. 394; *Doe* d. *Jackson* v. *Hiley* (1830), 10 B. & C. 885; *Doe* d. *Hobbs* v. *Cockell, supra; Doe* d. *Higgs* v. *Cockell, supra; Doe* d. *Higgs* v. *Terry* (1835), 4 Ad. & El. 274.

(*m*) *Doe* d. *Jackson* v. *Hiley, supra; Doe* d. *Higgs* v. *Terry, supra; Doe* d. *Hobbs* v. *Cockell, supra; Doe* d. *Higgs* v. *Cockell, supra; Deptford* (*Churchwardens*) v. *Sketchley, supra; Alderman* v. *Neate* (1839), 4 M. & W. 704; *Re Hackney Charities, Ex parte Nicholls* (1865), 34 L. J. (CH.) 169, not affected on the point on appeal, 34 L. J. (CH.) 176, C. A.; see *Haigh* v. *West*, [1893] 2 Q. B. 19, C. A. A lease executed by churchwardens describing the demised tenement as parcel of the lands of the parish church and reserving payment of rent to them is *primâ facie* evidence that the land is parish property, even though the lease is expressed to be made with the consent and approbation of the vicar and the majority of the aldermen and burgesses, and of the inhabitants and parishioners, and though the lease is indorsed with a memorandum expressing the consent of certain

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of which the trustees were known (*n*), or where the objects of the trusts or the modes of relief were not general but special (*o*).

Powers of holding and management.

509. The parish council has the powers, duties and liabilities formerly possessed by the overseers or by the churchwardens and overseers of holding and managing parish property generally, not being property relating to the affairs of the Church or held for an ecclesiastical charity (*p*); and it may also exercise the powers formerly exercised by the board of guardians over parish property (*q*), but the consent of the parish meeting is necessary (*r*), except in the case of a single parish having a separate board of guardians (*s*).

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subscribing parishioners (*Doe* d. *Higgs* v. *Cockell* (1836), 6 Nev. & M. (K. B.) 179; S. C., *sub nom. Doe* d. *Hobbs* v. *Cockell* (1836), 4 Ad. & El. 478.

(*n*) *Deptford* (*Churchwardens*) v. *Sketchley* (1847), 8 Q. B. 394, overruling on this point *Rumball* v. *Munt* (1846), 8 Q. B. 382, and apparently, by implication, overruling *Ex parte Annesley* (1836), 2 Y. & C. (EX.) 350; see also *Doe* d. *Edney* v. *Billett* (1845), 7 Q. B. 976, 983.

(*o*) *Deptford* (*Churchwardens*) v. *Sketchley*, *supra*; *e.g.*, a trust for the binding of apprentices as well as for the relief of the poor and the repair of the church (*A.-G.* v. *Lewin* (1837), 8 Sim. 366; *Allason* v. *Stark* (1838), 9 Ad. & El. 255); for purchasing bread for the poor of the parish (*Re Paddington Charities* (1837), 8 Sim. 629); for the relief of the most poor and needy people of good life and conversation (*Allason* v. *Stark*, *supra*).

(*p*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6 (1) (c) (iii.); *A.-G. and Spalding Rural Council* v. *Garner*, [1907] 2 K. B. 480 (right of property in grass and herbage on an awarded road); *Haigh* v. *West*, [1893] 2 Q. B. 19, C. A. As to its power to discharge tithe rentcharge by giving land in lieu thereof, see the Tithe Act, 1839 (2 & 3 Vict. c. 62), s. 21; Tithe Act, 1840 (3 & 4 Vict. c. 15), s. 17; and, as to tithe generally, see title ECCLESIASTICAL LAW, Vol. XI., pp. 742 *et seq.* As to affairs of the Church and ecclesiastical charity, see notes (*c*), (*d*), p. 251, *ante*; and title CHARITIES, Vol. IV., pp. 263, 264. As to powers of sale, leasing, and exchange, see *ibid.*, pp. 222, 223, 230, 233; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8 (2). As to powers with regard to allotment lands, see title ALLOTMENTS, Vol. I., pp. 336 *et seq.*; and as to exhausted parish lands used for the supply of materials, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 108, 109.

(*q*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6 (1) (d). The powers are those under the Union and Parish Property Act, 1835 (5 & 6 Will. 4, c. 69), extended to copyhold lands by the Union and Parish Property Act, 1837 (7 Will. 4 & 1 Vict. c. 50), s. 2, and the Parish Property and Debts Act, 1842 (5 & 6 Vict. c. 18), s. 4. It must be property for the general benefit of the ratepayers, parishioners, or inhabitants (*ibid.*, s. 2). The produce of sales is applied as directed by the Local Government Board, and land taken in exchange is subject to the same trusts as the land exchanged (Union and Parish Property Act, 1835 (5 & 6 Will. 4, c. 69), s. 3). As to mode of conveyance, see *ibid.*, s. 6, and the Union and Parish Property Act, 1837 (7 Will. 4 & 1 Vict. c. 50), s. 4. The concurrence of the trustees in whom the legal estate is outstanding is not necessary (Parish Property and Parish Debts Act, 1842 (5 & 6 Vict. c. 18), s. 3). Copyhold lands are included, and provision is made for enfranchisement (Union and Parish Property Act, 1837 (7 Will. 4 & 1 Vict. c. 50), ss. 2, 3). As to where several parishes are jointly interested in the property, see the Parish Property and Parish Debts Act, 1842 (5 & 6 Vict. c. 18), s. 3; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 52 (1).

(*r*) Union and Parish Property Act, 1835 (5 & 6 Will. 4, c. 69), s. 3; Parish Property and Parish Debts Act, 1842 (5 & 6 Vict. c. 18), s. 2; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 52 (1).

(*s*) Poor Law Act, 1889 (52 & 53 Vict. c. 56), s. 8. There are other powers of sale of the guardians which do not appear to be transferred, namely, under the Baths and Washhouses Acts, 1846—1882 (see p. 257, *post*, and title PUBLIC HEALTH AND LOCAL ADMINISTRATION); the Public Libraries Act, 1892

510. Buildings, or land for buildings, to be used for the purpose of parish business may be provided or acquired by the parish council (*t*).

Power of acquiring.

511. Land no longer required or not suitable for parish purposes, may, with the consent of the Local Government Board, be sold, let, or exchanged (*u*).

Power to sell surplus land.

512. Fire engines and fire apparatus for the parish, and a proper place for keeping them, may be provided (*v*). The parish council may also agree with the council of a neighbouring borough or district for the use of its fire engines, apparatus, and men (*a*).

Fire apparatus.

(b) *Parish Documents and Books.*

513. Minute books must be provided by the parish council (*b*) for its use, and it may provide proper depositories for all parochial books and papers, which are not otherwise provided for by law (*c*). Parochial electors may inspect them free of charge and take extracts (*d*).

Custody of documents.

All documents required by Acts or Standing Orders of Parliament to be deposited with the parish clerk of a rural parish must be deposited with the clerk of the parish council, or, if there be none, with the chairman, and the same rights of inspecting and

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(55 & 56 Vict. c. 53) (see title PUBLIC HEALTH AND LOCAL ADMINISTRATION); the School Sites Acts (see title EDUCATION, Vol. XII., p. 118); the Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112) (see title LITERARY AND SCIENTIFIC INSTITUTIONS, pp. 195, *et seq.*, *ante*). As to the Burial Acts, 1852—1885, see p. 257, *post*, and title BURIAL AND CREMATION, Vol. III., p. 497.

(*t*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8 (a); and see Parochial Offices Act, 1861 (24 & 25 Vict. c. 125), s. 1; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6 (1) (c) (ii.), as to parishes with a population exceeding 4,000. As to power to provide a parish room in parishes with over 2,000 inhabitants, see *ibid.*

(*u*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 9 (13); Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 32 (1)—(3), the latter taking the place of the Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 11, which it repeals; see title ALLOTMENTS, Vol. I., p. 353. As to the application of the proceeds of sale or exchange, and as to the incorporation of the provisions of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 128—132, relating to the right of pre-emption of superfluous lands, see title SMALL HOLDINGS AND SMALL DWELLINGS.

(*v*) Poor Law Amendment Act, 1867 (30 & 31 Vict. c. 106), s. 29. This power is transferred by the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6 (1) (c) (ii.). Similar provision may be made under the Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), s. 44, if and when adopted by a parish meeting (see title GAS, Vol. XV., p. 308), for a parish or part of a parish (see Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), ss. 4, 73).

(*a*) Parish Fire-engines Act, 1898 (61 & 62 Vict. c. 138), s. (1); see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*b*) Vestries Act, 1818 (58 Geo. 3, c. 69), s. 2. This is one of the duties transferred by the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6 (1) (c) (ii.).

(*c*) Parochial Offices Act, 1861 (24 & 25 Vict. c. 125), s. 1. This is also a transferred power (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6 (1) (c) (ii.)).

(*d*) *Ibid.*, s. 58 (4).

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of taking copies of, or extracts from, such documents remain as prior to 1894 (*e*).

Documents directed by law to be kept with the public books, writings and papers of the parish (*f*), and all other public books, writings and papers of the parish, except registers of baptism, marriages, and burials, or relating to the affairs of the Church or to ecclesiastical charities (*g*), remain in the same custody as before 1894, or may be deposited in such custody as the parish council may determine (*h*). But the incumbents and churchwardens on the one side and the parish council on the other have mutual rights of reasonable access to the documents in the hands of the others, and any difference as to custody or access is to be settled by the county council (*i*).

The county council has power to inquire into the manner in which documents under the control of the parish council are kept, and to make orders relating thereto (*k*), and an order grouping parishes must provide for the custody of documents in each parish (*l*).

SUB-SECT. 5.—*The Parish Meeting.*

(i.) *Constitution.*

(a) *In General.*

Parish meeting.

514. The parish meeting consists of the parochial electors (*m*) of the parish or ward and no others (*n*).

(b) *Where there is no Parish Council.*

The body corporate.

515. Where there is no parish council the chairman of the parish meeting and the overseers are a body corporate by the name of the chairman and overseers of the parish. They have perpetual succession, and may hold land for the purposes of the parish without licence in mortmain. They act under the directions of the parish

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(*e*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 17 (7). Documents are required to be so deposited under the Standing Orders of Parliament relating to private Bills (see title PARLIAMENT); the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 8, 9; Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 6. By the Parliamentary Documents Deposit Act, 1837 (7 Will. 4 & 1 Vict. c. 83), provision is made for the deposit of documents under Standing Orders, and for inspecting and copying them, or taking extracts therefrom.

(*f*) See the Vestries Act, 1818 (58 Geo. 3, c. 69), s. 6; Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 6 (1) (a), 75 (2).

(*g*) See notes (*c*), (*d*), p. 251, *ante*.

(*h*) As to "proper custody" for the purpose of evidence, see title EVIDENCE, Vol. XIII., pp. 512 *et seq.*

(*i*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 17 (8); see *Lewis* v. *Poole*, [1898] 1 Q. B. 164.

(*k*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 17 (9), 40.

(*l*) *Ibid.*, s. 38 (3).

(*m*) See title ELECTIONS, Vol. XII., pp. 191, 192, 246; and see *ibid.*, p. 202, note (*s*).

(*n*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 2 (1), 49 (a). All provisions with respect to a parish meeting for the whole of a parish apply as if the ward or part were the whole parish (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 49 (b)).

meeting, and these acts are executed under the hands and seals, when necessary, of the chairman and overseers (*o*).

Chairman.

516. The chairman must be elected for each year at the annual assembly (*p*), or at a poll consequent thereon, which poll may be demanded at the meeting by a single parochial elector (*q*).

Qualifications for the chairmanship are not expressly defined by statute, but it is implied that he must be a parochial elector (*r*). Further, the statutory provisions defining the disqualification of the chairman of other bodies (*s*) are not extended to the chairmanship of the parish meeting, and whilst it is expressly provided that neither sex nor marriage disqualifies for certain offices, the chairmanship of the parish meeting is not one of them (*t*).

The retiring chairman is eligible for re-election (*a*). The chairman may resign office by giving notice in writing to the parish meeting (*b*). A casual vacancy in the office is to be filled by the parish meeting, and the person elected retires from the office at the next annual meeting (*c*).

Place of meeting.

517. The meeting is usually held in some suitable public room, vested in the parish council or in the chairman of the parish meeting and the overseers, which can be used free of charge, but failing this the parochial electors have the right to use a school-house or other suitable room maintained out of any local rate (*d*).

The meeting cannot be held on premises licensed for the sale of intoxicating liquors, unless there is no other suitable room available either free or at a reasonable cost (*e*).

Proceedings of meeting.

518. The proceedings must not commence before 6 o'clock in the evening (*f*); and public notice of the meeting must be given (*g*).

Questions are decided by a majority of those present and voting, and the announcement by the chairman of his decision as to the result is final, unless a poll is demanded before the conclusion of the meeting (*h*).

(*o*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 19 (6); and see p. 256, *post*, and title CHARITIES, Vol. IV., pp. 137, 258.

(*p*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 19 (1). As to the annual assembly, see p. 256, *post*.

(*q*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 2 (7), Sched. I., Part 1 (7); and as to polls, see p. 260, *post*.

(*r*) Thus, the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 19 (11), refers to the acts of the parish meeting being signified by the "chairman presiding at the meeting and two other parochial electors."

(*s*) *Ibid.*, s. 46.

(*t*) The Qualification of Women (County and Borough Councils) Act, 1907 (7 Edw. 7, c. 33), does not apply to this office.

(*a*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 47 (2).

(*b*) *Ibid.*, s. 47 (3).

(*c*) *Ibid.*, s. 47 (4).

(*d*) *Ibid.*, s. 4.

(*e*) *Ibid.*, s. 61.

(*f*) *Ibid.*, s. 2 (3).

(*g*) As to time, form, contents, and publication of the notice, see *ibid.*, s. 2 (7), Sched. I., Part 1 (2), (3), and *ibid.*, s. 51.

(*h*) *Ibid.*, s. 2 (7), Sched. I., Part 1 (5), (6). As to polls, see p. 260, *post*.

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Votes.

Every parochial elector has one vote on any one question, and in case of an election he has one vote for each of any number of persons not exceeding the number to be elected (*i*).

The chairman has a second or casting vote when the voting is equal (*k*).

Minutes of meeting.

519. Minutes must be kept, and should be signed at the same or the next meeting by the chairman thereof. When so signed they are receivable in evidence without proof, and the regularity of the meetings referred to and the qualification of the members thereat are presumed until the contrary is proved (*l*).

Number of meetings.

Annual assembly.

520. In parishes where there is no parish council there must be at least two meetings in the year (*m*). The first of these must be held between the 1st March and the 1st April inclusive, and is called the annual assembly (*n*). Other meetings may be convened at any time by the chairman or any six parochial electors (*o*). The days, times, and places of the meetings are fixed by the chairman (*p*), subject to any statutory provisions (*q*). The parish meeting may regulate their own proceedings and business (*r*).

Committees.

521. Committees may be appointed by the parish meeting from among their own number. All acts of the committees must be submitted to the parish meeting for approval (*s*).

Authentication of acts of parish meeting.

522. Any act of the parish meeting may be signified by an instrument executed at the meeting under the hands and seals (if necessary) of the chairman presiding at the meeting and two other parochial electors there present (*t*), and any such instrument purporting to be so executed is deemed to have been duly executed until the contrary is proved (*a*).

(c) *Where there is a Parish Council.*

Annual assembly.

523. There must be at least one parish meeting in the year to be held between the 1st March and the 1st April inclusive (*b*), and as

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(*i*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 2 (2).

(*k*) *Ibid.*, s. 2 (7), Sched. I., Part 1 (8). In the absence etc. of the elected chairman, the meeting may appoint its own chairman (*ibid.*, Sched. I., Part 1 (10)).

(*l*) *Ibid.*, s. 2 (7), Sched. I., Part 3 (1—3).

(*m*) *Ibid.*, s. 19 (2).

(*n*) Local Government Act, 1897 (60 & 61 Vict. c. 1).

(*o*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 45 (3).

(*p*) *Ibid.*, s. 45 (1).

(*q*) As to these, see p. 255, *ante*.

(*r*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 2 (7), Sched. I. Part 3 (6). As to voting etc., see p. 255, *ante*, and the text, *supra*.

(*s*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 19 (3). As to the right to demand a poll on the appointment of a committee and on a resolution to approve its acts, see note (*h*), p. 260, *post*.

(*t*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 19 (11).

(*a*) *Ibid.*, s. 2 (7), Sched. I., Part 3 (4).

(*b*) *Ibid.*, s. 2 (3), and Local Government Act, 1897 (60 & 61 Vict. c. 1), ss. 2, 3, repealing the Local Government Act, 1894 (56 & 57 Vict. c. 73), Sched. I., Part 1 (1). For the general rules governing such

the parish council is elected in every third year, dating from 1901 (*c*), the principal business of the annual assembly in such year is the election of the parish council, and the meeting must be held in such year on the date fixed by the Local Government Board for the election, which is generally the first Monday after the 10th March (*d*). At such meeting opportunity must be given for putting questions to, and receiving explanations from any candidates who may be present. Candidates may attend such meeting and speak, but they cannot vote unless they are parochial electors of the parish (*e*).

The parish meeting may, if necessary, determine which of the retiring councillors shall fill vacancies not supplied by the election (*f*).

Other meetings.

524. Other meetings may be convened at any time by the chairman of the parish council or any two parish councillors (*g*), and meetings must be held on such days, and at such times and places, as the parish council may fix, but subject to any statutory provisions (*h*).

Chairman.

525. If the chairman of the parish council be present at the meeting, and is not then a candidate for election, he presides (*i*).

Regulation of proceedings.

526. Standing orders for the regulation of the proceedings of meetings may be made, varied, and revoked by the parish council (*j*).

(ii.) *Powers, Duties and Rights.*

(a) *Exclusive Powers of the Parish Meeting.*

Adoptive Acts.

527. In every rural parish the parish meeting has the exclusive power of adopting certain Acts (*k*), namely, the Lighting and Watching Act, 1833 (*l*); Baths and Washhouses Acts, 1846—1882 (*m*); Burial Acts, 1852—1885 (*n*); Public Improvements Act, 1860 (*o*); Public Libraries Act, 1892 (*p*).

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meetings, see Local Government Act, 1894 (56 & 57 Vict. c. 73), Sched. I., Parts 1, 3.

(*c*) See p. 242, *ante*.

(*d*) See Order of Local Government Board, 14th January, 1901, art. 1, and Sched. I.

(*e*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 2 (7), Sched. I., Part 1 (9).

(*f*) *Ibid.*, s. 47 (1); and see p. 242, *ante*.

(*g*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 45 (3).

(*h*) *Ibid.*, s. 45 (1). As to the holding of meetings, see, generally, pp. 244 *seq.*, 254 *et seq.*, *ante*.

(*i*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 45 (2).

(*j*) *Ibid.*, s. 2 (7), Sched. I., Part 3 (5).

(*k*) *Ibid.*, s. 7. Those Acts are referred to as the adoptive Acts (*ibid.*).

(*l*) 3 & 4 Will. 4, c. 90; see title GAS, Vol. XV., p. 307.

(*m*) (1846) 9 & 10 Vict. c. 74; (1847) 10 & 11 Vict. c. 61; (1878) 41 & 42 Vict. c. 14; (1882) 45 & 46 Vict. c. 30; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*n*) (1852) 15 & 16 Vict. c. 85; (1853) 16 & 17 Vict. c. 134; (1854) 17 & 18 Vict. c. 87; (1855) 18 & 19 Vict. c. 128; (1857) 20 & 21 Vict. c. 35; (1857) 20 & 21 Vict. c. 81; (1859) 22 Vict. c. 1; (1860) 23 & 24 Vict. c. 64; (1862) 25 & 26 Vict. c. 100; (1871) 34 & 35 Vict. c. 33; (1880) 43 & 44 Vict. c. 41; (1881) 44 & 45 Vict. c. 2; (1885) 48 & 49 Vict. c. 21. See title BURIAL AND CREMATION, Vol. III., pp. 450, 492.

(*o*) 23 & 24 Vict. c. 30; see title OPEN SPACES AND RECREATION GROUNDS.

(*p*) 55 & 56 Vict c. 53; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

SECT. 1.
The Parish.
Consent, where necessary.

Where a parish council is in existence, the consent of the parish meeting is required for the sale or exchange of land or buildings in the parish vested in the parish council (*q*); the incurring of expenses or liabilities by the parish council involving a rate exceeding threepence in the pound for any local financial year, or a loan (*r*); the supporting or opposing of draft schemes for the administration of parochial charities (*s*).

The parish meeting exercises the powers or gives the consents (*a*) which were formerly exercised or given by the owners and ratepayers of a parish or a majority of them under any of the Acts relating to the relief of the poor (*b*), or under the School Sites Acts (*c*), or the Literary and Scientific Institutions Act, 1854 (*d*), so far as respects the dealing with parish property, the spending of money, or the raising of a rate (*e*).

(b) *Powers, Rights and Duties where there is no Parish Council*

Transferred powers.

528. Subject to the provisions of any grouping order (*f*) that may have been made, the parish meeting of a parish in which no parish council exists has such powers, rights, and duties as are transferred to or are conferred or imposed upon it by statute (*g*), and such powers of a parish council as the county council may on the application of the parish meeting confer upon it (*h*).

The powers and duties transferred or conferred by statute are: the powers, duties, and liabilities of the vestry, except such as relate to the affairs of the Church or to ecclesiastical charities (*i*), and such as are expressly transferred to any other authority (*k*); the power and duty of appointing overseers and notifying their appointment, and also the power of appointing and revoking the appointment of an assistant overseer (*l*); the same power of appointing trustees

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(*q*) See pp. 250 *et seq.*, *ante*.

(*r*) See p. 243, *ante*.

(*s*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 14 (5). As to rendering annual accounts of parochial charities to the parish meeting, see *ibid.*, s. 14 (6); and title CHARITIES, Vol. IV., p. 273.

(*a*) As to the county council requiring, by order, the consent of the parish meeting of part of a parish to acts of the parish council in respect of that part, see Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 37, set out in title BURIAL AND CREMATION, Vol. III., pp. 495, 496. The order does not require submission to or confirmation by the Local Government Board (Local Government Act, 1894 (56 & 56 Vict. c. 73), s. 40). As to the appointment of a committee to deal with a defined part of a parish, see note (*p*), p. 246, *ante*.

(*b*) So far as these deal with parish property, see pp. 243, 252, *ante;* and, generally, see title POOR LAW.

(*c*) See, generally, title EDUCATION, Vol. XII., p. 117.

(*d*) 17 & 18 Vict. c. 112; see note (*s*), p. 252, *ante*, and, generally, see title LITERARY AND SCIENTIFIC INSTITUTIONS, pp. 195 *et seq.*, *ante*.

(*e*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 52 (1).

(*f*) As to grouping orders, see p. 240, *ante*.

(*g*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 19 (4), (5), (7), (8). The trusteeship, management, or control of an elementary school is not affected by any of the provisions of the Act (*ibid.*, s. 66).

(*h*) *Ibid.*, s. 19 (10). Note that the county council can only grant powers which are conferred on a parish council by the Act.

(*i*) See notes (*c*), (*d*), p. 251, *ante*.

(*k*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 19 (4).

(*l*) *Ibid.*, s. 19 (5); and see pp. 249, 250, *ante*.

of a charity in the place of overseers or churchwardens as is possessed by a parish council (*m*); the same powers as are conferred on a parish council in respect of the stopping or diversion of a public right of way, or the declaring of a highway to be unnecessary and not repairable at the public expense, and of complaint to a county council of a default of a rural district council (*n*); the right to receive through their chairman notice of draft schemes relating to parochial charities (*o*).

Regulations as to transfer.

529. All powers and duties transferred from an authority to the parish meeting, and the adjustment of property and liabilities, are subject to the general provisions relating to such transfers (*p*), and the provisions relating to the determination of questions in dispute are also applicable (*q*).

Vesting of property.

530. The legal interest in all property which would be vested in a parish council, if that existed (*r*), is vested in the body corporate of the chairman and overseers of the parish, subject to all trusts and liabilities affecting the same (*s*), and all persons concerned are required to make or concur in making such transfers as may be necessary (*t*).

(c) *Powers where there is a Parish Council.*

Province of parish meeting.

531. Where a parish council exists in a parish the province of the parish meeting is limited to discussing and passing resolutions on the affairs of the parish, and the exercise of such powers as are conferred exclusively upon all parish meetings (*u*).

(iii.) *Finance.*

Expenses.

532. The expenses of a parish meeting, including the taking of a poll, are payable out of the poor rate; and the demand note must state in the form prescribed by the Local Government Board the proportion of the rate levied for such expenses (*v*). They are paid by the parish council where such exists, and in other cases, for the purpose of obtaining payment of such expenses, the chairman has the same powers as a board of guardians have for the purpose of obtaining contributions to their common fund (*w*).

(*m*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 19 (5); see p. 252, *ante;* title CHARITIES, Vol. IV., p. 264; as to accounts of charities, see also p. 261, *post.*

(*n*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 19 (8). As to these matters, see, respectively, p. 249, *ante,* and p. 375, *post.*

(*o*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 14 (5); see also title CHARITIES, Vol. IV., p. 187.

(*p*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 67.

(*q*) *Ibid.*, s. 70.

(*r*) See p. 250, *ante.*

(*s*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 19 (7). Questions relating to such vesting may be determined in the same way as in the case of a parish council (*ibid.*, s. 70 (1); and see note (*e*), p. 251, *ante*).

(*t*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 19 (7).

(*u*) As to which see p. 257, *ante.*

(*v*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 11 (4), (5).

(*w*) *Ibid.*, s. 11 (4); see p. 242, *ante.* The form of precept is prescribed by Order of Local Government Board, 11th February, 1895, No. 449. The

SECT. 1. The Parish.

A rate levied for defraying the expenses of the parish meeting, including expenses under adoptive Acts (*a*), is limited to a maximum of sixpence in the pound in any local financial year (*b*).

Accounts and audit.

533. The accounts of receipts and payments of the parish meeting, their committees, and officers are to be made up yearly to the 31st March in the form prescribed by the Local Government Board (*c*), and are audited by a district auditor in the same way as the accounts of a parish council (*d*).

Parochial electors may at all reasonable times, without payment, inspect and take copies of, and extracts from, the accounts (*e*).

(iv.) *Polls.*

Demand and conduct of poll.

534. Resolutions before a parish meeting may be subsequently submitted to a poll by ballot (*f*) of the whole electorate. In certain cases a poll may be demanded by any one parochial elector (*g*), but, except in these cases, a poll cannot be taken unless either the chairman assents, or, the poll is demanded at the meeting by at least five of the parochial electors (*g*) present or by a third of their number, whichever number is less (*h*).

Each parochial elector has one vote on any question at any poll and no more, or in case of an election, one vote for each of any number of persons not exceeding the number to be elected (*i*).

The conduct of the poll is regulated by rules framed by the Local Government Board (*j*).

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demand note for any rate levied for the purpose must state in the form prescribed by the Local Government Board the proportion of the rate levied for such expenses (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 11 (5)). As to rating, generally, see title RATES AND RATING.

(*a*) As to adoptive Acts, see p. 257, *ante*.

(*b*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 19 (9). Where a parish continues in pursuance of an order of the county council to maintain its own highways, the highway expenses are not to be deemed to be expenses of the parish meeting for this purpose of limitation (*ibid.*, s. 82 (2)).

(*c*) *Ibid.*, s. 58 (1); see p. 244, *ante*. For the prescribed form, see Order of Local Government Board, 22nd March, 1898.

(*d*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 58 (2); and see p. 244, *ante*.

(*e*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 58 (4).

(*f*) *Ibid.*, ss. 2 (5), 48 (3).

(*g*) As to parochial electors, see title ELECTIONS, Vol. XII., p. 191.

(*h*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 2 (7), Sched. I., Part 1 (7). The matters upon which a single elector can demand a poll are: an application, representation, or complaint to a county or district council; the appointment of a chairman for the year or of a committee, or the delegation of any powers or duties to a committee, or the approval of the acts of a committee; the appointment of an overseer; the appointment or revocation of the appointment or dismissal of an assistant overseer or a parish officer; the appointment of trustees or beneficiaries of a charity; the adoption of adoptive Acts; the consent or refusal of consent to anything which cannot be done without consent; the incurring of any expense or liability; the place and time for the assembly of the parish meeting; any other prescribed matter (*ibid.*).

(*i*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 2 (2). As to the right to use ballot-boxes etc. for a poll, see *ibid.*, s. 48 (6), (8). As to expenses, see *ibid.*, s. 48 (7), (8).

(*j*) *Ibid.*, s. 48 (2), (8). The rules applicable are contained in the Parish

Returning officer.

For the purpose of the polling the chairman of the parish meeting at which the poll is demanded is the returning officer, unless he is unwilling or unable to act, in which case he may appoint some other person to act (*k*).

SECT. 2.—*The Vestry.*

General position.

535. The vestry is now almost entirely an ecclesiastical institution (*l*), the civil powers of the vestry in rural parishes having been transferred to the rural district councils, and, in nearly all urban parishes, to the borough or urban district council, by order of the Local Government Board (*m*). Where there has not been such a transfer, the urban vestry has power to nominate and in many instances appoint and control the actions of the overseers and assistant overseers (*n*); to adopt and exercise powers under the Burial Acts, 1852—1906 (*o*); to direct the custody of parish documents (*p*); to consider the basis of the county rate (*q*); to appoint a vestry clerk (*r*); to inspect accounts of charities (*s*); and to consent to the provision of parochial offices (*a*), or to provide them (*b*).

Meetings (Polls) Order, 1894, which apply where there is no parish council, and the Parish Meetings (Polls) Order, 1895, Stat. R. & O. Rev., Vol. IX., Parish Council and Parish Meeting, England, pp. 1, 23, which apply where a parish council exists. For the purpose of these Orders a parish which is situate in more than one administrative county is to be deemed to be wholly situate in the county containing the larger part of its population (Order, 1894, r. 17; Order, 1895, r. 18). If the poll be for part of a parish, the rules apply as if the part were a parish (Order, 1895, r. 21)

(*k*) Parish Meetings (Polls) Orders, 1894 and 1895, r. 1 (1), (2); compare note (*n*), p. 306.

(*l*) See title ECCLESIASTICAL LAW, Vol. XI., pp. 452 *et seq.*, where the various kinds of vestries are described.

(*m*) Under Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 33, 34.

(*n*) See the Poor Relief Act, 1819 (59 Geo. 3, c. 12), s. 7; Poor Law Audit Act, 1848 (11 & 12 Vict. c. 91), s. 1; Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), s. 32; Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), s. 7; Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), ss. 3, 4; Poor Law Act, 1879 (42 & 43 Vict. c. 54), s. 17; General Order of Local Government Board, 8th September, 1903, art. 3 (4); and see title RATES AND RATING.

(*o*) See p. 257, *ante*, and title BURIAL AND CREMATION, Vol. III., pp. 445, note (*n*), 446, 450.

(*p*) Vestries Act, 1818 (58 Geo. 3, c. 69), s. 6.

(*q*) County Rates Act, 1852 (15 & 16 Vict. c. 81), s. 13; and see title RATES AND RATING, and p. 359, *post*.

(*r*) If and when the Vestries Act, 1850 (13 & 14 Vict. c. 57), is applied. As to the vestry clerk, see title ECCLESIASTICAL LAW, Vol. XI., p. 460. For a recent case dealing with the duties and payment of salary of the vestry clerk, see *R.* v. *Davies, Ex parte Peake* (1911), 104 L. T. 778.

(*s*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 44; see title CHARITIES, Vol. IV., p. 273.

(*a*) In parishes with a population exceeding 4,000 (Parochial Offices Act, 1861 (24 & 25 Vict. c. 124), s. 1).

(*b*) When the Vestries Act, 1850 (13 & 14 Vict. c. 57), ss. 4, 5, is applied. As to the annual list of parish property to be kept at the clerk's office, see title CHARITIES, Vol. IV., p. 245; Vestries Act, 1831 (1 & 2 Will. 4, c. 60), s. 39. The details to be entered in the list are prescribed. This provision is not affected by the Local Government Act, 1894 (56 & 57 Vict. c. 73).

SECT. 3.
The Urban District.

SECT. 3.—*The Urban District.*

SUB-SECT. 1.—*The Urban District Council.*

(i.) *Constitution.*

Effect of the Local Government Act, 1894.

536. In 1894 all urban sanitary authorities (*c*) were renamed "urban district councils," and their districts "urban districts," except in the case of boroughs of which the styles and titles of the corporation and council remained unaffected (*d*).

The term "urban district council" is a generic term, including the council of every kind of urban district, whether a borough or county borough or not (*e*).

Chairman.

537. The chairman of an urban district council, other than a borough council (*f*), must be appointed at the annual meeting (*g*) to hold office for one year, and to be chairman at all meetings at which he is present (*h*). The disqualifications of persons seeking office as urban district councillors apply equally to the office of chairman (*i*).

A woman, married or unmarried, is eligible for the office provided that she is a councillor (*k*). The chairman, unless a woman, or unless personally disqualified by statute, is *ex officio* a justice of the peace for the county in which the district is situate (*l*), but before acting he must take the necessary oaths, though these need not be repeated on his re-election on the expiration or other determination of a previous term (*m*).

Vice-chairman.

A council may appoint a vice-chairman (*n*).

(*c*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*d*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 21 (1), 84 (1), 85 (5); and see the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 6. As to the effect of the Act on improvement commissioners having harbour powers, see the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 65. Urban district councils may sue and be sued in their corporate names (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 7). They may change their names with the sanction of the county council (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 55 (3), which practically superseded the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 311). As to transfers of stock on change of name, see the Local Government (Stock Transfer) Act, 1895 (58 & 59 Vict. c. 32).

(*e*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 21 (3); see *Kirkdale Burial Board* v. *Liverpool Corporation*, [1904] 1 Ch. 829. In this section of the present title the word "council" is for the sake of brevity frequently used to denote "urban district council."

(*f*) As to boroughs, see pp. 293 *et seq.*, *post.*

(*g*) See title ELECTIONS, Vol. XII., p. 375. As to the appointment of a substitute, see *ibid.*; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 59 (1).

(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 199, Sched. I. (3), applied by Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 59 (1).

(*i*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 46; see p. 263, *post.*

(*k*) This is not expressly enacted, but it is recognised by the statute; see Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 22.

(*l*) As to justices of the peace, see title MAGISTRATES, pp. 531 *et seq.*, *post.*

(*m*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 22; Chairmen of District Councils Act, 1896 (59 & 60 Vict. c. 22), s. 1.

(*n*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 59 (2); see title ELECTIONS, Vol. XII., p. 376.

Councillors.

538. The councillors are such persons, being duly qualified (*o*), as are elected (*p*) as councillors by the parochial electors (*q*) of the parishes or wards in the urban district (*r*).

A person who ceases to hold the office of councillor is re-eligible for the office, unless disqualified (*s*).

A councillor may, by writing, resign his office, on payment of the fine provided for non-acceptance of office, and the council must forthwith declare the office vacant (*t*). Non-acceptance of office creates a casual vacancy (*u*).

A casual vacancy in the office of councillor is filled by election held in accordance with the Order of the Local Government Board (*a*): The person elected holds office for the residue of the term of office of the person whose place he takes.

(ii.) *Qualifications and Disqualifications.*

Qualification of councillors.

539. In urban districts which are not boroughs there are no *ex-officio* or nominated members of the council (*b*). A councillor must be a parochial elector (*c*) of a parish within the urban district, or must have resided during the whole of the preceding twelve months in the district (*d*). Sex and marriage are not disqualifications (*e*).

(*o*) See the text, *infra*, and p. 264, *post*.

(*p*) See title ELECTIONS, Vol. XII., pp. 361 *et seq.* As to their term of office, see *ibid.*; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 23 (6); District Councillors and Guardians (Term of Office) Act, 1900 (63 & 64 Vict. c. 16), s. 1 (1), (2)).

(*q*) As to parochial electors, see title ELECTIONS, Vol. XII., p. 191.

(*r*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 23 (3). Their number and the manner in which they were allotted amongst the wards of the urban sanitary district remained unaltered in 1894, but their numbers and their apportionment amongst the wards (which wards may also be altered) may be regulated and determined by the county council (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 57 (1) (e); and see p. 377, *post*).

(*s*) Urban District Councillors Election Order, 1898, r. 26 (1), and Sched. V., Stat. R. & O. Rev., Vol. IV., District Council, England, p. 8, adapting the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 37, made applicable by the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 48 (4). As to disqualifications, see the text, pp. 264 *et seq.*, *post*.

(*t*) Urban District Councillors Election Order, 1898, r. 26 (1), and Sched. V., adapting the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 36, made applicable by the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 48 (4). As to the fine on non-acceptance of office, see p. 264, *post*.

(*u*) Urban District Councillors Election Order, 1898, r. 26 (1) and Sched. V., adapting the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 40, made applicable by the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 48 (4). As to the course adopted when more than one casual vacancy is filled at the same election, and the time within which the election should be held, see *ibid.*, and title ELECTIONS, Vol. XII., p. 374. An election is not necessary to fill a casual vacancy occurring within six months before the ordinary day of retirement from the office in which the vacancy occurs, but it must be filled at the next ordinary election (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 48 (4)).

(*a*) See title ELECTIONS, Vol. XII., p. 374.

(*b*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 23 (1).

(*c*) As to which see title ELECTIONS, Vol. XII., p. 191, and compare p. 241, *ante*.

(*d*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 23 (2). All other statutory enactments, whether in general, local, or personal Acts, are repealed (*ibid.*). As to what constitutes residence, see title ELECTIONS, Vol. XII., p. 177, note (*f*).

(*e*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 23 (2).

SECT. 3.
The Urban District.

Acceptance of office by qualified person.

540. Every qualified person who has been elected, or been deemed to be re-elected, to the office of urban district councillor must, unless exempt as hereinafter stated, either accept the office by making and subscribing the statutory declaration within one month after notice of being so elected, or of being deemed to be re-elected, or pay the prescribed fine (*f*).

Elected person cannot act before making declaration.

A person elected or deemed to be elected as councillor must not act in the office, except in administering the declaration, until he has made and subscribed the prescribed declaration before two members of the council or the clerk to the council, or, in case of his absence from the United Kingdom, before a British consul, and such persons are authorised to receive the declaration.

Penalty.

The penalty for acting without having made the declaration is a fine not exceeding £20 for each offence, recoverable by action (*g*).

Disqualifications under Local Government Act, 1894.

541. The following persons are disqualified from being elected or being members of, or chairmen of, parish or district councils (*h*): infants; aliens; those who within twelve months before their election or since election, including both the nomination and the poll (*i*), have received union or parochial relief (*k*); those who within five years before election or since election, including both the nomination and the poll (*l*), have been convicted either on indictment or summarily of any crime and been sentenced to imprisonment with hard labour without the option of a fine, or to any greater punishment, and have not received a free pardon; persons who within the said periods have been adjudged bankrupt, unless and until the adjudication is annulled or a discharge has been granted, with a certificate (*m*) that the bankruptcy was caused by misfortune without any misconduct on their part (*n*), or have made a composition or arrangement with their creditors, unless

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(*f*) Urban District Councillors Election Order, 1898, r. 26 (1), and Sched. V., adapting the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 34, made applicable by the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 48 (4). Penalties are imposed for non-acceptance; see *ibid.*

(*g*) Urban District Councillors Election Order, 1898, r. 26 (1), and Sched. V., adapting the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 35, 41, 239, made applicable by the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 48 (4). If made before a British consul it must forthwith be sent to the clerk of the council (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50). For persons who are exempt from serving in the office, see Urban District Councillors Election Order, 1898, r. 26 (1), and Sched. V., and the list on pp. 297, 298, *post*, the notes thereto indicating how far they apply to the office of councillors.

(*h*) Also applicable to boards of guardians (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 46 (1)).

(*i*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 75.

(*k*) As to this, see title ELECTIONS, Vol. XII., pp. 142—144. As to what constitutes union or parochial relief, see also Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), ss. 56—58, 71; and see title POOR LAW.

(*l*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 75 (2).

(*m*) As to this, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 90 *et seq.* Compare the cases under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50); and see p. 307, *post.*

(*n*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 46 (1) (c), (4).

and until their debts have been paid in full (*o*), this latter provision including an administration order providing for the payment of less than the full amount of their debts under the statutory provisions (*p*) relating to small bankruptcies (*q*), and also deeds of arrangement (*r*); persons holding any paid office under the council (*s*); persons concerned in any bargain or contract entered into with the council, or participating in the profit of any such bargain or contract or of any work done under the authority of the council (*t*), subject, however, to certain limitations (*a*).

Offence.

542. Acting or voting in the office during disqualification is an offence punishable by fine on summary conviction (*b*). Speaking at a meeting of the council, but without voting, renders the offender liable to the penalty (*c*), and the liability does not cease although the period in which his election may be challenged has expired (*d*).

Avoidance of office by disqualification and absence.

543. A vacancy is created by a councillor becoming disqualified during his term of office, or by his absence from council meetings for more than six months consecutively, except in case of illness or for some reason approved by the council. Upon such event the council must declare the office vacant, and signify the same by notice signed by three members and countersigned by the clerk, and notified as the council may direct (*e*).

(*o*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 46 (1) (c), (4); but see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 269.

(*p*) See title BANKRUPTCY AND INSOLVENCY,, Vol. II., pp. 294—301.

(*q*) *Bradfield* v. *Cheltenham Guardians*, [1906] 2 Ch. 371.

(*r*) Under the Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57); see *Corrigan* v. *Allison* (1900), 64 J. P. 678.

(*s*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 46 (1) (d). But payment made to a medical practitioner under the Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), does not disqualify him (*ibid.*, s. 11); and see title PUBLIC HEALTH AND LOCAL ADMINISTRATION. As to disqualification through being the paid clerk of a joint hospital committee, see *Greville-Smith* v. *Tomlin* (1911), 104 L. T. 816.

(*t*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 46 (1) (e).

(*a*) The disqualification by reason of being interested in bargains or contracts does not attach where the interest is only in the sale or lease of lands, or in loans of money to the council, or in any contract for the supply from land, of which the person is owner or occupier, of stone, gravel, or other materials for making or repairing highways or bridges, or in the transport of materials for the repair of roads or bridges in his immediate neighbourhood; or in any newspaper in which any advertisement relating to the affairs of the council is inserted; or in any contract with the council as a shareholder in any joint stock company, but in this last exception he may not vote at any meeting of the council on any question in which the company is interested, except that in the case of a water company or other company established for the carrying on of works of a like public nature this prohibition may be dispensed with by the county council (*ibid.*, s. 46 (2)).

(*b*) *Ibid.*, s. 46 (8). As to proceedings to be taken against persons filling and exercising municipal offices unlawfully, see Municipal Offices Act, 1710 (9 Ann. c. 25), and title CROWN PRACTICE, Vol. X., pp. 135 *et seq.*

(*c*) *Charlesworth* v. *Rudgard* (1835), 4 L. J. (EX.) 89.

(*d*) *De Souza* v. *Cobden*, [1891] 1 Q. B. 687, C. A.

(*e*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 46 (6), (7). This does not apply to boroughs (*ibid.*). The council ought not to vacate the office without giving the holder an opportunity of explaining his absence; see *Richardson* v. *Methley School Board*, [1893] 3 Ch. 510; see also *R.* v. *Hunton, Ex parte Hodgson* (1911), 75 J. P. 335.

SECT. 3. The Urban District.

Disqualification on certain convictions.

544. Disqualification for holding public office, which includes the office of district councillor, is imposed by, or may be imposed under, certain statutes in the case of persons found guilty of corrupt practices and other offences against election law (*f*).

(iii.) *Powers and Duties.*

General description of powers and duties.

545. The urban district council within its district has the powers and duties of sanitary authority (*g*) and highway authority (*h*), and exercises such as were formerly in the hands of other persons under local Acts (*i*). The county council may also delegate certain powers to the urban district council (*k*), or appoint the latter as its agent in the transaction of administrative business in matters affecting the urban district (*l*), and may alter the area over which a council has jurisdiction (*m*).

Powers transferred from justices.

546. The urban district council has the powers, duties and liabilities of justices out of sessions in relation to the following matters when arising within a county district, namely: the licensing of gang masters (*n*) and of dealers in game (*o*); the grant of pawnbrokers' certificates (*p*), and of licences for passage brokers and emigrant runners (*q*); the abolition of, and the alteration of days for holding, fairs (*r*); the execution as the local authority of the Acts relating to petroleum (*s*).

Powers transferred from quarter sessions.

547. The urban district council has also the powers, duties, and liabilities formerly exercised by and imposed upon quarter sessions

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(*f*) Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), ss. 4, 6 (3), 38 (5), 43 (4); Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70), ss. 2, 3, 8 (2), 23, 28 (4), 35, 36; Public Bodies Corrupt Practices Act, 1889 (52 & 53 Vict. c. 69), s. 2. See, further, title ELECTIONS, Vol. XII., p. 524, and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 481 *et seq.*

(*g*) Including the power to make bye-laws; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION. The powers under the Public Health Acts are cumulative; see the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 341.

(*h*) See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 27.

(*i*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 10; except under Acts for the conservancy of rivers (*ibid.*); see title WATERS AND WATERCOURSES.

(*k*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 28 (2).

(*l*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 64.

(*m*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 57; and see p. 377, *post.*

(*n*) See title AGRICULTURE, Vol. I., p. 277. For the provisions relating to the effect of a transfer of powers and duties by the Local Government Act, 1894 (56 & 57 Vict. c. 73), see *ibid.*, s. 67. As to settling questions of transfer, see *ibid.*, s. 70.

(*o*) See title GAME, Vol. XV., p. 255.

(*p*) See title PAWNS AND PLEDGES.

(*q*) See title SHIPPING AND NAVIGATION.

(*r*) See title MARKETS AND FAIRS.

(*s*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 27 (1). See title PUBLIC HEALTH AND LOCAL ADMINISTRATION. The powers in respect of infant life protection were taken out of this list and vested in the board of guardians by the Infant Life Protection Act, 1897 (60 & 61 Vict. c. 57), s. 15, and Schedule, repealed and re-enacted by the Children Act, 1908 (8 Edw. 7, c. 67), s. 10; see title INFANTS AND CHILDREN, Vol. XVII., p. 158.

in relation to the licensing of knackers' yards within the county district (*t*).

Various statutory powers.

548. The council also has, or may acquire, powers under statutes relating to a variety of matters dealing with the interests of its district and the inhabitants. These are discussed elsewhere (*a*).

Power of Local Government Board to confer powers.

549. The Local Government Board has powers upon the application of the council, or any representative body within the district, to make an order conferring on the council or on such other representative body all or any of the following matters: the appointment of overseers and assistant overseers, the revocation of the appointment of the latter, any powers, duties, or liabilities of overseers, and any powers, duties, or liabilities of a parish council; and may apply the provisions of the Local Government Act, 1894 (*b*), relating to these matters. The order may extend to the whole or to specified parts of the area of the district, and may make the necessary provisions for giving effect to it: it must make necessary provisions for preserving the existing interests of paid officers. It cannot alter the incidence of any rate (*c*).

If the order confers any of the powers relating to overseers, it or a subsequent order may confer on the council or representative body the powers of the vestry under the Poor Rate Assessment and Collection Act, 1869 (*d*), relating to the rating of small tenements (*e*).

Process under adoptive Acts.

550. Where in the urban district (*f*), or part of it, an authority is constituted under any of the adoptive Acts (*g*), the council may resolve that the powers, duties, property, debts and liabilities of that authority shall be transferred to the council as from the date specified in the resolution. Thereupon the transfer is effected and the council becomes the successor of that authority (*h*).

An adoptive Act cannot be adopted for any part of the district without the approval of the council (*i*).

(*t*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 27 (2); see title PUBLIC HEALTH AND LOCAL ADMINISTRATION. Fees payable in respect of the matters transferred from the justices and quarter sessions are payable to the council (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 27 (3)).

(*a*) See for example list of cross references given on pp 233—236, *ante*. For many of these purposes the council is authorised to purchase or hire land, as to which see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 163 *et seq.*

(*b*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 33 (1), (5). As to overseers, see p. 249, *ante;* and title POOR LAW. As to powers of a parish council, see pp. 246, 248, *ante*.

(*c*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 33 (3), (4). The order may also make provisions for securing proper representation on the body of trustees of charities (*ibid.*, s. 33 (2), (7)), as to which see title CHARITIES, Vol. IV., pp. 255 *et seq.*

(*d*) 32 & 33 Vict. c. 41, ss. 3, 4.

(*e*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 34; see title RATES AND RATING.

(*f*) The area of a county borough is an urban district within the meaning of this provision (*Kirkdale Burial Board* v. *Liverpool Corporation*, [1904] 1 Ch. 829).

(*g*) For these, see p. 257, *ante*.

(*h*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 62 (1).

(*i*) *Ibid.*, s. 62 (2).

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Exercise of powers outside district.

551. The council may, with the consent of the council of the adjoining district, execute and do in the adjoining district any works and things that it may do in its own district, on such terms as to payment and otherwise as the two councils may agree. Contributions so agreed to be paid are deemed to be expenses incurred by the council in the execution of works in its district (*k*).

Failure to act.

552. In the event of an urban district council, other than a borough council, being unable to act, either from failure to elect or otherwise, the county council may order elections to be held and may appoint persons to form the urban district council until an effective council is elected (*l*).

(iv.) *Contracts.*

In general.

553. The contracts of an urban district council are, in general, governed by the law relating to the contracts of corporate bodies (*m*), but special statutory requirements must be observed when the council is entering into contracts, as it is empowered to do (*n*), necessary for the purpose of exercising its powers and performing its duties as an urban sanitary authority under the Public Health Acts (*o*).

Contracts under Public Health Acts, over £50:

(i.) To be under seal.

554. The statutory requirements under the Public Health Act, 1875 (*p*), are the following:—

If the value or amount of the contract exceeds £50, the contract must be in writing and sealed with the common seal of the council (*q*). This is an imperative provision (*r*), and relief cannot be obtained in equity on the ground of part performance or otherwise (*s*); but the other contracting party need not also contract under seal (*t*).

The contract to which the statutory requirements are applicable is such as is necessary for the execution of the powers and duties of the statutes (*u*), so that an agreement not under seal to compromise a dispute arising out of a contract under seal is enforceable (*a*), as also is a like agreement compromising an action (*b*).

(*k*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 285. The right to exercise the above power does not dispense with any conditions or requirements made by the statutory provision under which the works are being executed (*Jones* v. *Conway and Colwyn Bay Joint Water Supply Board*, [1893] 2 Ch. 603, C. A., *per* NORTH, J., at p. 609.

(*l*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 59 (5); Local Government (Elections) Act, 1896 (59 & 60 Vict. c. 1), which is still in operation.

(*m*) See title CORPORATIONS, Vol. VIII., pp. 379—386.

(*n*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 173.

(*o*) *Ibid.*, s. 174. These requirements apply only to contracts made by an urban authority (*ibid.*), which includes borough councils. As to the Public Health Acts generally, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*p*) 38 & 39 Vict. c. 55.

(*q*) *Ibid.*, s. 174 (1).

(*r*) *Young & Co.* v. *Royal Leamington Spa Corporation* (1883), 8 App. Cas. 517; *Hunt* v. *Wimbledon Local Board* (1878), 4 C. P. D. 48, C. A.; see also *Frend* v. *Dennett* (1861), 5 L. T. 73.

(*s*) *Frend* v. *Dennett*, *supra*.

(*t*) *Brooks, Jenkins & Co.* v. *Torquay Corporation*, [1902] 1 K. B. 601.

(*u*) That is, the Public Health Acts. See title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*a*) *Williams* v. *Barmouth Urban District Council* (1897), 77 L. T. 383, C. A.

(*b*) *A.-G.* v. *Gaskill* (1882), 22 Ch. D. 537. As to compromise of a highway prosecution or indictment, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 145.

Further, the contract must be such that in the contemplation of the parties its value or amount exceeds, or will exceed, the limit of £50 (*c*).

Effect of contract not under seal.

Although it is essential that the contract itself should be sealed (*d*), a contract which should be, but is not, under seal is not altogether void and becomes enforceable if ratified under seal (*e*).

The council is not obliged to set up non-compliance with the statutory provisions as a defence in an action brought upon it, but such defence if intended must be specially pleaded (*f*). For this reason the court may refuse to grant a *certiorari* to bring up and quash a resolution to pay for work which has been done under an unsealed contract (*g*), and an action which is brought by a council to recover the expenses of paving private streets cannot be successfully defended on the ground that the expenses were paid under a contract which ought to have been, but was not, under seal (*h*).

(ii.) Matters to be specified.

555. The contract must specify the work, materials, matters, or things to be furnished, had, or done; the price to be paid; a time limit; and a penalty for not duly performing the contract (*i*). The provision as to the insertion of a penalty clause is directory and not obligatory, even if the whole of this provision is not merely directory (*k*).

A contract under which the contractors are to be paid for their work of paving etc. streets when the authority has collected the contributions from the frontagers assumes that the authority will take all necessary steps for collecting such contributions, and it cannot escape payment on the ground that it is unable to collect the contributions owing to the statutory notices given by it being invalid (*l*).

(iii.) Estimate and report.

556. If the contract is for the execution of works, the council must obtain from its surveyor an estimate in writing of the probable expense of executing the work in a substantial manner, and of the annual expense of maintaining it; and a report as to the

(*c*) *Eaton* v. *Basker* (1881), 7 Q. B. D. 529, C. A.; *Wood* v. *East Ham Urban District Council* (1907), 71 J. P. 129, C. A.; *Spencer Whatley and Underhill* v. *Southall-Norwood Urban District Council* (1905), 69 J. P. 308.

(*d*) See *Bozson* v. *Altrincham Urban District Council* (1903), 67 J. P. 397, C. A; *Tunbridge Wells Improvement Commissioners* v. *Southborough Local Board* (1888), 60 L. T. 172.

(*e*) *Brooks, Jenkins & Co.* v. *Torquay Corporation*, [1902] 1 K. B. 601; *Melliss* v. *Shirley Local Board* (1885), 14 Q. B. D. 911, reversed on other grounds (1885), 16 Q. B. D. 446, C. A. See, further, as to liability on contracts not under seal, title BUILDING CONTRACTS, ENGINEERS AND ARCHITECTS, Vol. III., p. 288.

(*f*) R. S. C., Ord. 19, rr. 15, 20.

(*g*) *R.* v. *Norwich Corporation* (1882), 46 J. P. 308.

(*h*) *Bournemouth Commissioners* v. *Watts* (1884), 14 Q. B. D. 87; see also *R.* v. *Prest* (1850), 16 Q. B. 32.

(*i*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174 (2).

(*k*) See *Soothill Upper Urban Council* v. *Wakefield Rural Council*, [1905] 2 Ch. 516, C. A. It had previously been held by a Divisional Court that the absence of a penalty clause rendered the contract unenforceable by action *British Insulated Wire Co.* v. *Prescott Urban District Council*, [1895] 2 Q. B. 463). On appeal no judgments were delivered, the Local Government Board having intimated that they would sanction the payment (*ibid.*, p. 538). The decision must now be taken as overruled.

(*l*) *Worthington* v. *Sudlow* (1862), 2 B. and S. 508. As to the paving of streets, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 215 *et seq.*

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most advantageous way of contracting, whether by contracting for the execution of the work, or for executing and also maintaining the same in repair during a term of years or otherwise (*m*). The provision is directory only, and the authority is liable under the contract, although there has been no estimate nor report (*n*); and where, on the completion of the work, it would not be maintained out of the rates or under the statute, no estimate nor report is necessary (*o*). Where, then, the work may be both executed and repaired under the statutory provisions, there should be an estimate and report on both execution and repair; but where under such provisions the work may be only executed or only repaired, the estimate and report will extend only to the work which is within the statute (*p*).

(iv.) Tender. Contracts of £100 and over.

557. Tenders must be invited by public notice for the execution of any contract of the value or amount of £100 or upwards. The notice must be at least a ten days' notice, expressing the nature and purpose of the contract, and the authority must require and take sufficient security for its due performance (*q*). This provision is also only directory, and has nothing to do with the contractor or the validity of his contract (*r*).

The security generally takes the form of a guarantee by sureties, and in this case the common law principles governing the rights of the surety apply (*s*).

(v.) Effect of contract.

558. The contract, if duly and properly executed, is binding on the authority and its successors, and on all parties thereto and their executors, administrators, successors, and assigns; but the authority may compound with any person for any sum it thinks proper in respect of any penalty arising from non-performance of the contract, whether the penalty is in the contract itself or in a bond (*t*).

(*m*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174 (3).

(*n*) *Nowell* v. *Worcester Corporation* (1854), 9 Exch. 457; *Cunningham* v. *Wolverhampton Local Board of Health* (1857), 7 E. & B. 107, 114.

(*o*) *Cunningham* v. *Wolverhampton Local Board of Health, supra.*

(*p*) *Ibid.*, at p. 114.

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174 (4). By submitting plans and estimates, the authority does not guarantee that the work can be executed according to such plans and estimates (*Thorn* v. *London Corporation* (1876), 1 App. Cas. 120); and see title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 302. As to the position of the contractor and the architect of the local authority under a contract, see *ibid.*, pp. 207, 211, 215, 246, 256.

(*r*) See *Young & Co.* v. *Royal Leamington Spa Corporation* (1883), 8 App. Cas. 517, 528.

(*s*) See titles BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., pp. 279 *et seq.*; GUARANTEE, Vol. XV., pp. 478 *et seq.* The courts will not always enforce the term of the contract of an authority which requires disputes to be submitted to one of their own officers; see *Nuttall* v. *Manchester Corporation* (1892), 8 T. L. R. 513; *Pickthall* v. *Merthyr Tydvil Local Board* (1886), 2 T. L. R. 805; and see *Freeman (G.) & Sons* v. *Chester Rural Council*, [1911] W. N. 54, C. A. (stay refused where contract provided that disputes should be referred to the engineer of the local authority); and titles ARBITRATION, Vol. I., p. 453; BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 287.

(*t*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174 (5). As to when sums can be claimed as liquidated damages instead of penalties, see *Law* v. *Redditch Local Board*, [1892] 1 Q. B. 127, C. A.; and see title DAMAGES, Vol. X., pp. 328 *et seq.*

(v.) *Compensation.*

559. Under the Public Health Acts (*u*) the necessity for arbitration may arise for the purpose of assessing compensation payable to a person (*a*) who has sustained damage in the execution by the council of its statutory powers (*b*); or for the purpose of determining all such matters as by the statutes are specially authorised or directed to be so determined (*c*).

As a rule an action will not lie in respect of matters for which compensation is awardable (*d*).

Nature of damage.

The damage (*e*) in respect of which compensation is payable must be such as would have been actionable but for the authority of the statute (*f*). It must arise from the execution of the works (*g*), and

(*u*) See, generally, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*a*) He must have been entitled to the property affected at the time of the execution of the works (*Helmore* v. *East Ham Local Board* (1893), *Times*, 13th December, subsequently affirmed on appeal); or have the right to claim compensation duly assigned to him (*Dawson* v. *Great Northern Rail. Co.*, [1905] 1 K. B. 260, C. A.).

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 181, 308; and see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 163. Where under similar provisions in a local Act costs were not mentioned, it was held that full compensation included the costs of the application to the justices (*Huddersfield Corporation* v. *Shaw* (1890), 54 J. P. 724).

(*c*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 179. For the referred matters, see *ibid.*, ss. 22, 52, 61, 150, 155, 228, 328; and as to the procedure on arbitration, see *ibid.*, ss. 179, 180; Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 24, and the following cases: *Re Gifford and Bury Town Council* (1888), 20 Q. B. D. 368; *Holdsworth* v. *Barsham* (1862), 2 B. & S. 480; *sub nom. Holdsworth* v. *Wilson* (1863), 4 B. & S. 1, Ex. Ch.; *Re Surbiton Urban District Council and Upjohn* (1899), *Times*, 19th January; *Davis* v. *Witney Urban District Council* (1899), 63 J. P. 279, C. A.; *Peake* v. *Finchley Local Board* (1887), 57 L. T. 882; *Re Barnett and Eccles Corporation* (1901), 65 J. P. 757; *Re Cowdell* (1883), 52 L. J. (CH.) 246; *Re Clark and Bath Corporation*, [1884] W. N. 127; *Chesterfield Corporation and Brampton Local Board* (1886), 50 J. P. 824; *Re Walker and Beckenham District Local Board* (1884), 50 L. T. 207; *Tunbridge Wells Local Board* v. *Akroyd* (1880), 5 Ex. D. 199, C. A. The arbitrators have no power to determine the question of liability; that should be determined in an action on the award (*Brierley Hill Local Board* v. *Pearsall* (1884), 9 App. Cas. 595); but they may determine the facts which show damage, *e.g.*, the fact that meat which has been seized as unsound was sound, in a case where the proceedings before the justices were dismissed for want of form (*Walshaw* v. *Brighouse Corporation*, [1899] 2 Q. B. 286, C. A.); and see title FOOD AND DRUGS, Vol. XV., p. 41. See also, generally, title ARBITRATION, Vol. I., pp. 437 *et seq.*, 492. As to stamps, see *ibid.*, pp. 447, 470.

(*d*) See cases cited in titles ACTION, Vol. I., p. 8; COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 31 *et seq.* As to when an action is the proper remedy, see *ibid.*, pp. 32, 44; and, as to when an injunction may be obtained instead of taking proceedings for compensation, see titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 44; INJUNCTION, Vol. XVII., p. 224.

(*e*) As to damages generally, see title DAMAGES, Vol. X., pp. 301 *et seq.*

(*f*) *Hall* v. *Bristol Corporation* (1867), L. R. 2 C. P. 322; *Rhodes* v. *Airedale Drainage Commissioners* (1876), 1 C. P. D. 402, C. A.; *Herring* v. *Metropolitan Board of Works* (1865), 34 L. J. (M. C.) 224; *Cessford* v. *Dover Harbour Board* (1898), *Times*, 2nd April; *Burgess* v. *Northwich Local Board* (1880), 6 Q. B. D. 264. As to the same principle under the Lands Clauses Consolidation Acts, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 44 *et seq.*, and the cases there cited.

(*g*) See *Cessford* v. *Dover Harbour Board* (1898), *Times*, 2nd April, *per* WILLS, J. Merely giving a notice of intention to execute work, *e.g.*, to lay a sewer through private lands, acted upon by the claimant, does not entitle him

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not merely from their use after construction (*h*); and it must arise from the execution of the powers under the Public Health Acts (*i*), and not under other statutory or common law powers (*j*). It must, further, be the result of a lawful exercise of the statutory powers (*j*), and when it arises from something done by the council which it is not authorised to do, the remedy is by action and not by a claim for compensation (*l*).

Character of damage.

The damage sustained need not be damage to land or an interest in land (*m*), but it includes any species of damage suffered by the execution of powers (*n*). Prospective or future, as well as present, damage may generally be included (*o*).

SUB-SECT. 2.—*Officers.*

(i.) *In General.*

Compulsory officers.

560. Urban district councils must appoint a medical officer of health (*p*), a surveyor, an inspector of nuisances (*q*), a clerk, and a treasurer, unless such an officer has been appointed under the powers of a local Act, in which case he may receive additional remuneration, and no second appointment need or can be made under the Public Health Acts (*r*).

Beyond these officers the councils must appoint or employ such assistants, collectors, and other officers and servants as may be necessary for the proper execution of the Public Health Acts (*s*).

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to compensation for expenses so incurred (*Davis* v. *Witney Urban District Council* (1899), 63 J. P. 279, C. A.).

(*h*) But see *Durrant* v. *Branksome Urban Council*, [1897] 2 Ch. 291, 305, C. A., where it was assumed that compensation would be payable for the damage caused by the silting up of a stream by the discharge of sewers; and see title SEWERS AND DRAINS. In *Horton* v. *Colwyn Bay and Colwyn Urban Council*, [1908] 1 K. B. 327, C. A., the compensation claimed was for depreciation of land by reason of the contemplated user of a sewage pumping station and reservoir on land other than, but in proximity to, the claimant's land, and it was held that the compensation was not awardable; see, further, title ACTION, Vol. I., p. 14, and the cases there referred to.

(*i*) See generally title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*j*) *Burgess* v. *Northwich Local Board* (1880), 6 Q. B. D. 264; *Roberts* v. *Falmouth Sanitary Authority* (1888), 52 J. P. 741.

(*k*) See *Cessford* v. *Dover Harbour Board* (1898), *Times*, 2nd April, *per* WILLS, J.

(*l*) *R.* v. *Darlington Local Board of Health* (1865), 6 B. & S. 562.

(*m*) As is the case under the Lands Clauses Consolidation Acts; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 1 *et seq.*

(*n*) As to costs incurred in successfully resisting proceedings before justices, see title FOOD AND DRUGS, Vol. XV., p. 41. As to damage sustained by altering the level of a street when executing paving works, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 62.

(*o*) *Uttley* v. *Todmorden District Local Board of Health* (1874), 44 L. J. (C. P.) 19; and see *Colac Municipality* v. *Summerfield*, [1893] A. C. 187, P. C.; *Re Brewer and Hankins's Contract* (1899), 80 L. T. 127, C. A.

(*p*) Districts may be united for the appointment of such officer; see p. 275, *post.*

(*q*) See p. 277, *post.*

(*r*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 189. The treasurer must be a distinct person from the clerk (*ibid.*, s. 192). A banking association cannot be treasurer (*Re West of England and South Wales District Bank, Ex parte Swansea Friendly Society* (1879), 11 Ch. D. 768).

(*s*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 189. As to the freedom of officers from personal liability, see *ibid.*, s. 265. As to the protection of public officers acting as such, see titles LIMITATION OF ACTIONS, p. 176, *ante;* PUBLIC AUTHORITIES and PUBLIC OFFICERS.

Method of appointment.

561. Subject to the general principles of law regulating contracts (*t*), and to the special provisions affecting contracts above a certain value entered into by an urban authority under the Public Health Acts (*u*), no particular form of appointment is necessary (*a*), but it should be recorded in the minutes.

If the appointment be under seal, a 10*s.* impressed stamp is necessary (*b*), but no stamp is otherwise required (*c*).

Duties.

562. The duties and conduct of the medical officer of health and of those inspectors of nuisances whose salaries are partly paid by the county council (*d*), are regulated by orders of the Local Government Board (*e*). In the case of other officers and servants, the urban district council may make regulations, which do not require confirmation, to control their duties and conduct (*f*).

Remuneration.

563. The salaries, wages, or allowances to be paid to officers and servants are in the discretion of the council (*g*), except where any portion of the salary is payable out of moneys voted by Parliament (*h*). The council cannot grant gratuities out of rates (*i*).

An action will lie by the officer against the council for arrears of remuneration, but the judgment, in the absence of goods on which to levy execution, is enforceable by mandamus to levy a rate, and not against the individual members of the council (*k*).

(*t*) See titles CONTRACT, Vol. VII., pp. 327 *et seq.*; CORPORATIONS, Vol. VIII., pp. 382 *et seq.* See also *Dyte* v. *St. Pancras Board of Guardians* (1872), 27 L. T. 342; *Austin* v. *Bethnal Green Guardians* (1874), L. R. 9 C. P. 91.

(*u*) See p. 268, *ante*.

(*a*) See *Smith* v. *Hirst* (1870), 23 L. T. 665; *Scott* v. *Clifton School Board* (1884), 14 Q. B. D. 500; *R.* v. *Powell, Ex parte Williams*, [1899] 1 Q. B. 396; *R.* v. *Greene* (1852), 17 Q. B. 793; *Roberts* v. *Drewitt* (1864), 18 C. B. (N. S.) 48; *Smart* v. *West Ham Union Guardians* (1855), 10 Exch. 867. See further, as to medical officers of health, p. 275, *post*; and as to inspectors of nuisances, p. 277, *post*.

(*b*) Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 1, 2; and Sched. I., "Deed."

(*c*) The stamp duties formerly charged by the Stamp Act, 1870 (33 & 34 Vict. c. 97), were abolished by the Customs and Inland Revenue Act, 1875 (38 & 39 Vict. c. 23), s. 14.

(*d*) See pp. 275, 277, *post*.

(*e*) Order of Local Government Board, 23rd March, 1891. See further, as to medical officers of health, note (*l*), p. 275, *post*; and as to inspectors of nuisances, p. 277, *post*.

(*f*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 189.

(*g*) *Ibid.* Salaries accrue from day to day and are apportionable (Apportionment Act, 1870 (33 & 34 Vict. c. 35), ss. 2, 5).

(*h*) *I.e.*, in the case of medical officers of health and, sometimes, inspectors of nuisances, as to which see pp. 275, 277, *post*. As to extra remuneration, see p. 274, *post*.

(*i*) See *Ex parte Mellish* (1863), 8 L. T. 47; but a payment for extra work beyond the contractual duties was held to be legal (*R.* v. *Gloucester Corporation* (1859), 23 J. P. 709). For compensation for loss of office, see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*k*) There is no direct authority that such an action lies, but it is the inference to be drawn from *Kendall* v. *King* (1856), 17 C. B. 483; *Hall* v. *Taylor* (1858), E. B. & E. 107; see also *Bush* v. *Beavan* (1862), 1 H. & C. 500; *Bush* v. *Martin* (1863), 33 L. J. (EX.) 17. Previous decisions had held that under similar conditions the appointment of an officer did not constitute a contract upon which an action for debt would lie for salary, the proper remedy being mandamus or an action on the case (*Bogg* v. *Pearse* (1851), 10 C. B. 534; *Addison* v. *Preston Corporation* (1852), 12 C. B. 108; *Smart* v. *West Ham Union Guardians* (1855), 10 Exch. 867).

SECT. 3. **The Urban District.**

Removal.

564. Officers and servants appointed under the Public Health Acts (*l*) are removable by the council at pleasure, except where the officer is paid in part out of moneys voted by Parliament (*m*). A resolution to dismiss an officer is not a resolution to rescind that by which he was appointed, so as to require the formalities of a bye-law relating to rescinding (*n*). In exercising the power of dismissal the council need not give any notice nor assign any reason (*o*).

Disabilities.

565. Such officers and servants cannot in any way be concerned or interested in any bargain or contract made with the authority appointing them for any of the purposes of the Public Health Acts (*p*). Such a prohibited contract is void (*q*), and payments under it are illegal (*r*).

Prohibited contract.

Contracts excepted from prohibition.

Certain contracts, subject to statutory conditions being complied with, are excepted, namely, contracts made with the council for the sale, purchase, lease, or hire of any lands, rooms, or offices, and contracts made with the council by a joint stock company in which the officer is a shareholder (*s*).

Extra services.

The above provisions do not exclude an officer from receiving remuneration for services beyond those which he was originally engaged to perform (*t*), provided the remuneration is of proper amount and character (*a*).

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 189. As to the effect of such a power, see *R.* v. *Darlington School* (*Governors*) (1844), 6 Q. B. 682, Ex. Ch.; *Re Teather and Poor Law Commissioners* (1850), 19 L. J. (M. C.) 70; *Hayman* v. *Rugby School* (*Governors*) (1874), L. R. 18 Eq. 28; *Ex parte Richards* (1878), 3 Q. B. D. 368.

(*m*) See note (*h*), p. 273, *ante*.

(*n*) *Ex parte Richards, supra*; S. C., *sub nom. R.* v. *Jones*, 42 J. P. 614, dissenting from *R.* v. *Wrexham and Denbigh Roads* (*Trustees*) (1836), 5 Ad. & El. 581.

(*o*) *Wood* v. *East Ham Urban District Council* (1907), 71 J. P. 129, C. A.

(*p*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 193. For the penalties for breach, see *ibid.* This provision applies to the officers of rural district councils. See, further, Public Bodies Corrupt Practices Act, 1889 (52 & 53 Vict. c. 69), s. 1 (1), and title CRIMINAL LAW and PROCEDURE, Vol. IX., pp. 483, note (*g*), 484. The consent of the Attorney-General is necessary to proceedings for penalties (Public Health (Officers) Act, 1884 (47 & 48 Vict. c. 74), s. 2, which Act is to be construed (*ibid.*, s. 1) as one with the principal Act of 1875. It had formerly been held that such consent was not necessary, and that the penalty could be recovered by any person even though he was not a party aggrieved (*Fletcher* v. *Hudson* (1880), 5 Ex. D. 287, C. A.).

(*q*) *Melliss* v. *Shirley Local Board* (1885), 16 Q. B. D. 446, C. A. (where the opinion was expressed that an interest in a contract which was acquired by the officer after the contract had been made would not avoid the contract); see also *City of London Electric Lighting Co.* v. *London Corporation*, [1903] A. C. 434.

(*r*) *Barton* v. *Piggott* (1874), L. R. 10 Q. B. 86.

(*s*) Public Health (Members and Officers) Act, 1885 (48 & 49 Vict. c. 53), s. 2, which Act is to be construed (*ibid.*, s. 1) as one with the principal Act of 1875. For cases previous to this statute, see *Todd* v. *Robinson* (1884), 14 Q. B. D. 739, C. A.; *Burgess* v. *Clark* (1884), 14 Q. B. D. 735, C. A.; *Wednesbury Local Board of Health* v. *Stevenson* (1863), 27 J. P. 741.

(*t*) *R.* v. *Prest* (1850), 16 Q. B. 32; *R.* v. *Gloucester Corporation* (1859), 23 J. P. 709; *Edwards* v. *Salmon* (1889), 23 Q. B. D. 531, C. A.

(*a*) See *Whiteley* v. *Barley* (1888), 21 Q. B. D. 154, C. A.; *R.* v. *Ramsgate Corporation* (1889), 23 Q. B. D. 66.

Security.

566. Officers and servants who will have the custody or control of money must give sufficient security for the faithful execution of their office or employment, and for duly accounting for such money (*b*). This is usually in the form of a bond, with two sureties (*c*), which should be so drawn as to cover the tenure of office, including reappointments and changes (*d*), and any alterations in salary (*e*), or in the character of the duties to be performed (*f*) by subsequent legislation (*g*) or otherwise, so as to prevent the discharge of the sureties on the happening of such events (*h*).

Accountability of officers etc.

567. Officers and servants must give written account of all moneys received, and duly pay moneys in their hands to the treasurer. Rates must be paid over to the treasurer within seven days of receipt, and, if required, a list of defaulting ratepayers, with details, must be furnished (*i*).

(ii.) *Medical Officer of Health.*

In general.

568. The appointment and terms of appointment of a medical officer of health depend upon whether he is to be paid entirely by the local authority or whether it is intended that one half of his salary should be paid by a contribution made by the county council under the Local Government Act, 1888 (*k*). In the latter case it is necessary that the conditions contained in the orders of the Local Government Board should be complied with (*l*).

Appointment for two or more districts.

569. The same person may, with the sanction of the Local Government Board, be appointed medical officer of health for two or more districts, by the respective authorities of those districts, and the mode of appointment, and the proportions in which the

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(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 194.

(*c*) For a form of bond, see Encyclopædia of Forms and Precedents, Vol. VI., p. 226; and as to the stamp required, see title BONDS, Vol. III, pp. 103, 105; Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched., "Bond." The exemption given by the Public Health Act, 1848 (11 & 12 Vict. c. 63), s 151, was repealed by the Public Health Act, 1872 (35 & 36 Vict. c. 79) s. 42.

(*d*) See *Birmingham Corporation* v. *Wright* (1851), 16 Q. B. 623; *Worth* v. *Newton* (1854), 10 Exch. 247; *Oswald* v. *Berwick-upon-Tweed Corporation* (1856), 5 H. L. Cas. 856; and see title GUARANTEE, Vol. XV., pp. 495 *et seq.*

(*e*) See *Bamford* v. *Iles* (1849), 3 Exch. 380; *Holland* v. *Lea* (1854), 9 Exch. 430; *Franks* v. *Edwards* (1852), 8 Exch. 214.

(*f*) *Malling Union* v. *Graham* (1870), L. R. 5 C. P. 201; see *Portsea Island Union Guardians* v. *Whillier* (1860), 2 E. & E. 755; *Skillett* v. *Fletcher* (1867), L. R. 2 C. P. 469, C. A.

(*g*) *Pybus* v. *Gibb* (1856), 6 E. & B. 902; *Dartmouth Corporation* v. *Silly* (1857), 7 E. & B. 97.

(*h*) See title GUARANTEE, Vol. XV., p. 497.

(*i*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 195. As to the proceedings for penalties against a defaulting officer, see *ibid.*, s. 196. The sureties are not discharged by such proceedings (*ibid.*). As to falsification of accounts, see the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 196. As to the audit of officers' accounts, see pp. 284 *et seq.*, *post.*

(*k*) 51 & 52 Vict. c. 41, s. 24 (2) (c), (3); as to which see pp. 276, 277, 352, *post.*

(*l*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 24 (2) (c), (3). There are several orders made by the Local Government Board dealing with the subject of medical officers of health, namely, Orders of 11th November, 1872; 8th March, 1880; 9th March, 1880; 23rd March, 1891; and see note (*a*) p. 276, *post.*

SECT. 3. The Urban District.

expenses of appointment and the salary and charges of the officer are to be borne, are determined by order of the Board (*m*).

Deputy-medical officer.

During the illness or incapacity of the medical officer a deputy may be appointed and paid by the council, subject to the approval of the Board (*n*).

Qualification.

570. In all cases a medical officer of health must be a legally qualified medical practitioner (*o*), and, except in cases where for special reasons the Local Government Board otherwise allows, he and his deputy (if any) must be legally qualified for the practice of medicine, surgery, and midwifery (*p*). A further qualification is requisite where the appointment is to be made for a district, or combination of districts, containing, according to the last census returns, 50,000 or more inhabitants, in which case the appointee must also be registered in the Medical Register as the holder of a diploma in sanitary science, public health, or State medicine (*q*), or must have been, during three consecutive years preceding the year 1892, a medical officer of a district or combination of districts, with a population of not less than 20,000, or had been before 1888, for not less than three years, a medical officer or inspector of the Local Government Board (*r*).

A district medical officer of a union may be appointed a medical officer of health, subject to the sanction of the Local Government Board and to such conditions as the Board may prescribe (*s*).

Appointment.

571. Where it is not intended that half of the officer's salary should be paid out of the county grant, the appointment is made by the local authority, who may fix the remuneration (*t*), but the Local Government Board defines his duties by order (*u*). Where it is so intended the appointment must be in accordance with the orders of the Board (*a*).

Vacancy in office.

A vacancy must be filled up forthwith, unless the council obtains the consent of the Board to make a temporary appointment (*b*); and during the incapacity of the officer appointed, a substitute may be appointed temporarily, subject to the approval of

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(*m*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 191.

(*n*) *Ibid.*

(*o*) *Ibid.* That is, he must be duly registered under the Medical Acts, as to which see title MEDICINE AND PHARMACY.

(*p*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 18 (1). This applies also to the appointment of a medical officer of health for a combination of districts, urban or rural, or both (*ibid.*).

(*q*) Under the Medical Act, 1886 (49 & 50 Vict. c. 48), s. 21.

(*r*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 18 (2).

(*s*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 191. As to the appointment of such officers for united districts, see p. 291, *post.*

(*t*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 189.

(*u*) See p. 277, *post.*

(*a*) The latest General Order is dated 23rd March, 1891 (Stat. R. & O. Rev., Vol. IV., District Council, England, pp. 86 *et seq.*), relating to urban appointments after the 25th March, 1891, and to reappointments which were originally made under earlier orders, and which are still in operation (see note (*l*), p. 275, *ante*). The General Order of 23rd March, 1891, contains minute provisions regulating the course of procedure in the appointment (see *ibid.*, arts. 1—5).

(*b*) *Ibid.*, art. 6.

the Board (*c*). Provision is made for appointment or reappointment before the term has expired, either by resignation or notice for a future day, or by effluxion of time (*d*).

Tenure of office and salary.

572. Where the salary is partly provided by county grant the tenure of office is fixed by the council, subject to the approval of the Local Government Board; but it is determined by death, resignation, removal by the council with the authority of the Board, or by the Board itself, or on proof of insanity to the satisfaction of the Board (*e*).

The council may suspend the officer, reporting the cause thereof to the Board, and the Board may remove the suspension (*f*); and if the officer refuses to accept suggested alterations in his duties or salary, the council may, with the consent of the Board, but not otherwise, determine the office by six months' notice in writing (*g*).

The officer must agree to give a month's notice before resignation, or to forfeit an agreed sum by way of liquidated damages (*h*).

Where the salary is to be paid in part out of the county grant, such payment must be approved by the Board. Further payment for extraordinary services may be made with the like approval (*i*).

Powers and duties.

573. Besides the powers of his office, the medical officer of health may exercise those conferred on an inspector of nuisances by the Public Health Acts (*k*).

The Local Government Board defines the duties of all the medical officers of health appointed by the urban district council; and they are the same whether the officer is to be paid entirely by the council or not, except that in the latter case the officer must in addition report his appointment to the Board within seven days (*l*).

Besides the defined duties the medical officer in any urban or rural district must send to the county council a copy of every periodical report which he sends to the Board (*m*), and give all necessary information to the county medical officer of health (*n*).

(iii.) *Inspector of Nuisances.*

Compulsory appointment.

574. The inspector of nuisances is another officer whose appointment is compulsory (*o*), and towards whose salary contributions

(*c*) General Order, 23rd March, 1891, art. 9.
(*d*) *Ibid.*, arts. 7, 8.
(*e*) *Ibid.*, art. 10.
(*f*) *Ibid.*, art. 11.
(*g*) *Ibid.*, art. 12.
(*h*) *Ibid.*, art. 13.
(*i*) *Ibid.*, art. 14; see *ibid.*, arts. 15—17, as to payments of salaries.
(*k*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 191; and see, further, the text, *infra*, and title PUBLIC HEALTH AND LOCAL ADMINISTRATION.
(*l*) General Order, 23rd March, 1891, art. 20. The duties are minutely defined by *ibid.*, arts. 18, 20.
(*m*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 19 (1). The penalty for failure is the possible forfeiture of the contribution to his salary by the county council (*ibid.*).
(*n*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 69 (2). The penalty for not doing so is £1 up to £10, recoverable by the county council on summary conviction (*ibid.*, s. 69 (4)).
(*o*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 189. He is one of the

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Appointment, powers and duties.

may be made by county grant, provided that the conditions of the Local Government Board have been complied with (*p*). Where it is intended that his salary shall be in part so paid, the provisions relating to the appointment, duties, salary, and tenure of office of a medical officer of health apply (*q*). Where it is not so intended the council may arrange these matters as it thinks fit (*r*).

The same person may be both surveyor and inspector of nuisances (*s*); and an inspector of nuisances may be appointed for more than one district, subject to the same conditions and provisions as in the case of a like appointment of a medical officer of health (*a*).

Control as to duties.

The duties of an inspector of nuisances, part of whose salary is repaid to the urban council by the county council, are defined by the Order of the Local Government Board (*b*).

SUB-SECT. 3.—*Proceedings.*

(i.) *Of the Council.*

Holding meetings.

575. An urban district council which is not a borough council must hold an annual meeting as soon after the 15th April as possible, and other meetings at least once a month and at such other times as may be necessary (*c*). Meetings cannot be held in premises licensed for the sale of intoxicating liquor (*d*), so long as some other suitable room is available either free of charge or at a reasonable cost (*e*).

Summoning meetings.

If, as is usual, notice of a meeting is required, the absence of proper notice invalidates the proceedings (*f*), but, apart from regulations made by the council, notice of an adjourned meeting is not necessary (*g*).

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persons authorised by statute to authenticate documents by his signature (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 266).

(*p*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 24 (2) (c), (3).

(*q*) Public Heath Act, 1875 (38 & 39 Vict. c. 55), s. 191; and see p. 276, *ante.*

(*r*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 189; see p. 276, *ante.*

(*s*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 192.

(*a*) *Ibid.*, s. 191; see p. 275, *ante.*

(*b*) General Order, 23rd March, 1891, art. 19.

(*c*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 59 (1), applying the Public Health Act, 1875 (38 & 39 Vict. c. 55) s. 199, Sched. I. (11). In the case of the first meeting of a newly constituted council the returning officer fixes the day and place (*ibid.*, Sched. I. (12)), and the members then elect a chairman for that meeting and a chairman to serve for a year at all meetings at which he is present (*ibid.*). As to making regulations for meetings, see *ibid.*, s. 199, Sched. I. (1); title ELECTIONS, Vol. XII., p. 376. A regulation that a resolution of the council cannot be altered or rescinded unless a certain specified notice is given to the members, setting forth the proposed alteration or rescission, is a usual and proper regulation (*Mayer* v. *Burslem Local Board* (1875), 39 J. P. 437). As to whether a resolution to dismiss an officer comes within such a regulation, see p. 274, *ante.*

(*d*) As to such premises, see title INTOXICATING LIQUORS, Vol. XVIII., pp. 1 *et seq.*

(*e*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 61. Urban district councils must provide all offices necessary for their business, and that of their officers and servants under the Public Health Acts (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 197).

(*f*) See *Dobson* v. *Fussy* (1831), 7 Bing. 305.

(*g*) See *Kerr* v. *Wilkie* (1860), 6 Jur. (N. S.) 383, H. L.; *Wills* v. *Murray* (1850), 4 Exch. 843.

Quorum.

576. Seven members, or any less number provided it be a third of the total number of councillors, form a quorum, and without the necessary number business cannot be transacted (*h*); but proceedings are not invalidated by any vacancy or vacancies among the members or by any defect in the election of the council, or in the election, or selection, or qualification of the members (*i*).

Chairman.

577. The chairman of the council presides at the meetings, but in his absence at the time appointed for holding the same the members present appoint one of their number to preside (*k*). The chairman is not liable to an action for ruling a motion out of order unless he is guilty of malice (*l*); but in the event of his refusing to put a resolution to the meeting an action will lie for an injunction against such refusal and for a mandamus to hold a meeting for the purpose of submitting the resolution (*m*).

Proceedings.

578. Questions are decided by a majority of votes of those present and voting (*n*). The chairman has a second or casting vote in the event of the voting being equal (*o*).

Minutes.

A record must be kept of members present at meetings, and of the manner of their voting on any question (*p*). Minutes must also be kept (*q*).

Admission.

Neither the public nor ratepayers have the right of attending the meetings of the council without its consent, express or implied (*r*). The admission of the Press is regulated by statute (*s*).

Meetings may be attended by inspectors of the Local Government Board when so directed by the Board (*t*), but they cannot take active part in the proceedings.

(ii.) *Of the Committees.*

Power to appoint.

579. An urban district council (*u*) may appoint committees, consisting either wholly or partly of its members. The committees

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(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), Sched. I. (2).

(*i*) *Ibid.*, Sched. I. (9); see *Newhaven Local Board* v. *Newhaven School Board* (1885), 30 Ch. D. 350, C. A. The fact that one of the members of the council is interested in the matter under discussion and speaks and uses his influence to induce the council to adopt his view does not invalidate the proceedings (*Murray* v. *Epsom Local Board*, [1897] 1 Ch. 35).

(*k*) Public Health Act, 1875 (38 & 39 Vict. c. 55), Sched. I. (3), (5).

(*l*) *Breay* v. *Browne* (1896), 41 Sol. Jo. 159.

(*m*) See *Pender* v. *Lushington* (1877), 6 Ch. D. 70.

(*n*) Public Health Act, 1875 (38 & 39 Vict. c. 55), Sched. I. (7).

(*o*) *Ibid.*, Sched. I. (8). As to the chairman, see p. 262, *ante.*

(*p*) Public Health Act, 1875 (38 & 39 Vict. c. 55), Sched. I. (6).

(*q*) *Ibid.*, Sched. I. (10). As to the admissibility of minutes and orders etc. as evidence, see *ibid.*

(*r*) *Tenby Corporation* v. *Mason*, [1908] 1 Ch. 457, C. A.

(*s*) Local Authorities (Admission of the Press to Meetings) Act, 1908 (8 Edw. 7, c. 43); see title PRESS AND PRINTING.

(*t*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 205. An exception was made in the case of Oxford (*ibid.*), but this is now unnecessary as Oxford is now a county borough. See note (*o*), p. 300 and p. 302, *post.* This provision was limited to urban authorities which were local boards.

(*u*) This provision does not apply to borough councils (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 56 (4)), as to which see p. 302, *post.*

SECT. 3. The Urban District.

cannot hold office beyond the next annual meeting of the council, and their acts must be submitted to the council for approval.

Delegation of powers.

If the committee be appointed for the purposes of the Public Health Acts (*v*) or Highway Acts (*a*), the council may authorise the committee to institute any proceeding or do any act which the council might have instituted or done for that purpose other than the raising of a loan or the making of a rate or contract (*b*).

Proceedings.

The council may regulate the quorum, proceedings, place of meeting and area of jurisdiction of the committees, but subject thereto these matters may be arranged by the committees themselves. The chairman at any committee meeting has a second or casting vote (*c*).

Joint committees.

Joint committees may be formed in conjunction with other councils for any purpose in respect of which the several councils are interested (*d*).

SUB-SECT. 4.—*Finance.*

(i.) *Expenses.*

Under the Public Health Acts.

580. The expenses are generally payable out of the district fund and general district rate (*e*).

(*v*) See, generally, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*a*) See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 24.

(*b*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 56 (1). The corresponding provision in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 200, is repealed as to urban authorities except borough councils (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 89, Sched. II.). As to committees under the Housing of the Working Classes Acts, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*c*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 56 (3), Sched. I., Part 4. As to the right of such committee to use schoolrooms and other rooms, the expense of maintaining which is payable out of local rates, see *ibid.*, s. 4; and see p. 244, *ante*.

(*d*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 57 (1), (4). As to the delegation of powers and the costs and the term of office of the joint committee, see *ibid.* For the purposes for which a joint committee may be appointed, see *ibid.*, ss. 8, 26, 53; Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 28, 61; and see p. 246, *ante*. See also Local Government (Joint Committees) Act, 1897 (60 & 61 Vict. c. 40), and title BURIAL AND CREMATION, Vol. III., p. 499.

(*e*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 207; Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 4. Exceptions are made where in a borough in 1875 sanitary expenses were payable out of the borough fund or rate (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 207; see *Walsall Overseers* v. *London and North Western Rail. Co.* (1879), 4 App. Cas. 467); where like expenses in improvement districts were payable out of a general district rate leviable over the whole district (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 207); where in a borough some sanitary expenses were payable out of the borough fund or rate, and others were payable out of a rate or rates leviable throughout the whole district (*ibid.*); in all of which cases the expenses under the Public Health Acts are to be borne by the same fund or rate as formerly. As to the power of the Local Government Board to direct sanitary expenses to be payable as under the Public Health Act, 1875 (38 & 39 Vict. c. 55), which were not in 1875 payable as such expenses under the previously existing Local Government Acts, see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 208, Sched. V., Part 1. As to highway expenses, see *ibid.*, s. 216, and title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 126;

District fund.

The district fund is formed or supplied by the various sources of income of the urban district council. It is kept by the treasurer under a separate account called "the district fund account," and is applied by the council in its discretion for purposes legitimately charged upon it (*f*).

District rate.

The district rate is that levied to supplement the district fund when necessary. It is made by writing under seal, and may be prospective or retrospective, in the latter case being for the payment of charges (*g*), and expenses legally chargeable (*h*), which have been incurred at any time within six months before the making of the rate (*i*). The amount of the rate is not limited by the provisions of any local Act in force in the district (*k*). For the purpose of the assessment and levying of the rate the council may divide its district into parts (*l*).

Private improvement rate.

Certain expenses incurred by the council are declared by statute to be, or to be deemed to be, private improvement expenses, whilst others may be declared to be such by the council under

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and as to private improvement expenses, see the text, *infra*. As to the general district rate, see title RATES AND RATING.

(*f*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 209.

(*g*) Including judgments (*R.* v. *Rotherham Local Board of Health* (1858), 8 E. & B. 906).

(*h*) See *Waddington* v. *London Union Guardians* (1858), E. B. & E. 370; *R.* v. *Tramore Drainage Board* (1892), 30 L. R. Ir. 329.

(*i*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 210. As to the calculation of the six months, see *ibid.*, and *R.* v. *Rotherham Local Board of Health, supra*. The time limit has no application where the debt recoverable is made chargeable on the rates by statute (*Ward* v. *Lowndes* (1859), 1 E. & E. 940); see, further, title RATES AND RATING. The court will not grant a mandamus to levy a rate which would be retrospective in a case where it is unnecessary (*Webb* v. *Herne Bay Commissioners* (1870), L. R. 5 Q. B. 642), or where the council has no power under the circumstances to levy such a rate (*R.* v. *Bedlington Overseers* (1884), 48 J. P. 486); nor will such mandamus be granted to enforce a judgment obtained in an action which had been brought after six months had elapsed since the cause of action (*Burland* v. *Kingston-upon-Hull Local Board of Health* (1862), 3 B. & S. 271), unless, at least, the delay can be satisfactorily explained (*Worthington* v. *Hulton* (1865), L. R. 1 Q. B. 63; *R.* v. *Leigh Rural Council*, [1898] 1 Q. B. 836, C. A.; see also *Swire* v. *Burley Local Board of Health* (1859), 33 L. T. (o. s.) 222). An application for a mandamus for the purpose of obtaining payment under an award, made within the six months, will be granted if made within six months from the date of the award (*Ringland* v. *Lowndes* (1863), 15 C. B. (N. S.) 173). If the delay of the plaintiff renders it necessary for the council to have the protection of a mandamus before levying the rate, the costs of obtaining it will not as a rule be imposed on the council (*R.* v. *Burleigh Board of Health* (1859), 1 L. T. 92).

(*k*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 227. This saving is limited to a rate for the purposes of the Public Health Acts; see *St. Helens Corporation* v. *St. Helens Colliery Co.* (1883), 48 J. P. 39; *Hill* v. *Crediton Urban District Council* (1899), 80 L. T. 861, C. A.; *Manly* v. *Young*, [1896] 2 I. R. 126, C. A. It does not affect exemptions under the local Act; see *Bingley Urban District Council* v. *Midland Rail. Co.* (1899), 80 L. T. 725; *Walton Commissioners* v. *Walford* (1875), L. R. 10 Q. B. 180.

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211 (4); see *Dorling* v. *Epsom Local Board of Health* (1855), 5 E. & B. 471; *Newport Corporation* v. *Lang* (1892), 57 J. P. 199 (as to their discretion in the matter); *Mayer* v. *Burslem Local Board* (1875), 39 J. P. 437 (as to the effect of a bye-law on a resolution to divide); *Dryden* v. *Putney Overseers* (1876), 1 Ex. D. 223 (the statute does not authorise putting private improvement expenses on the general rates).

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statutory sanction (*m*), and so payable out of a private improvement rate (*n*).

Expenses under other Acts.

581. The expenses of exercising its powers and duties under numerous statutes are made payable by the council as part of the general expenses of its execution of the Public Health Acts (*o*).

(ii.) *Borrowing Powers.*

In general.

582. The only powers of borrowing possessed by an urban district council are those conferred by statute, and they must be exercised under the conditions and requirements of the statute, otherwise the loans effected are void (*p*).

Under Public Health Acts.

The Public Health Act, 1875 (*q*), gives the council powers of borrowing or reborrowing for the purpose of defraying expenses incurred by it in the execution of the Public Health Acts (*r*), or for the purpose of discharging loans contracted under the Sanitary Acts (*s*) or the Public Health Acts (*t*). The sanction of the Local Government Board is necessary (*a*).

(*m*) See, *e.g.*, the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 23, 36, 41, 62, 150; Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 19 (2), when adopted; Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), ss. 3, 11; Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 38 (8); and see titles BURIAL AND CREMATION, Vol. III., p. 488; PUBLIC HEALTH AND LOCAL ADMINISTRATION; SEWERS AND DRAINS.

(*n*) As to which, see the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 213—215, and titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 224 *et seq.*; RATES AND RATING.

(*o*) See the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 207, and for instances, see the Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 16; Burial Act, 1860 (23 & 24 Vict. c. 64), s. 1; Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 20; Canal Boats Act, 1877 (40 & 41 Vict. c. 60), s. 8; Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), s. 7; Public Health and Local Government Conferences Act, 1885 (48 & 49 Vict. c. 22), s. 2, subject to the regulations of the Local Government Board, as to which see General Order, 13th May, 1891, Contagious Diseases (Animals) Act, 1886 (49 & 50 Vict. c. 32), s. 9 (2); Open Spaces Act, 1887 (50 & 51 Vict. c. 32), s. 8 (1); Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), s. 9; Technical Instruction Act, 1889 (52 & 53 Vict. c. 76), s. 4; Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), s. 20; Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), ss. 24 (2), 42 (1), 65; Museums and Gymnasiums Act, 1891 (54 & 55 Vict. c. 22), s. 10 (2); Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 18 (1); Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 23; Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), ss. 18, 26; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 28; Small Dwellings Acquisition Act, 1899 (62 & 63 Vict. c. 44), s. 9 (3); Advertisements Regulation Act, 1907 (7 Edw. 7, c. 27), s. 4; Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 53 (1).

(*p*) See *Re Companies Acts, Ex parte Watson* (1888), 21 Q. B. D. 301; *Wenlock* (*Baroness*) v. *River Dee Co.* (1885), 10 App. Cas. 354; *Wenlock* (*Baroness*) v. *River Dee Co.* (1888), 38 Ch. D. 534, C. A.; *A.-G.* v. *De Winton*, [1906] 2 Ch. 106 (overdraft at the bank for an unauthorised purpose).

(*q*) 38 & 39 Vict. c. 55.

(*r*) See, generally, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*s*) These Acts were repealed by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 343, and Sched. V., Part 1. For the meaning of the term, see *ibid.*, s. 4.

(*t*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 233, which does not apply to expenses which are incurred under local Acts, nor does it enable the council to borrow for the purpose of paying off loans under local Acts.

(*a*) *Ibid.* For the method of borrowing etc., see *ibid.*, ss. 233—243, 317.

Powers of borrowing are given to the council for the purpose of executing the powers and duties conferred or imposed upon it by many statutes (*b*).

Under other statutes.

(iii.) *Accounts and Audit.*

What accounts to be kept.

583. The accounts and books of account to be kept by the urban district council are prescribed by order of the Local Government Board (*c*). Separate accounts are required to be kept in respect of loans borrowed from the Public Works Loan Commissioners (*d*); of allotments (*e*); of burial boards (*f*); of the dwelling-house improvement fund and other matters under the Housing of the Working Classes Act, 1890 (*g*); of baths and washhouses (*h*); of public libraries (*h*); and of isolation hospitals (*h*).

Making up accounts.

Accounts, in the prescribed form, must be made up yearly to the 31st March, or, in the case of accounts which are required to be audited half-yearly, half-yearly to the 30th September and the 31st March in each year (*i*).

Annual reports.

584. An annual report must be made to the Local Government Board, in such manner and at such time as it directs, of all works executed, and of all sums received and disbursed under and for the purposes of the Public Health Acts (*j*) during the preceding year (*k*), and a copy must be published in a local newspaper (*l*).

(*b*) *E.g.*, Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 20; Baths and Washhouses Act, 1878 (41 & 42 Vict. c. 14), s. 9; Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), s. 8; Epidemic and Other Diseases Prevention Act, 1883 (46 & 47 Vict. c. 59), s. 2; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 62 (7); Technical Instruction Act, 1889 (52 & 53 Vict. c. 76), s. 4; Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), ss. 25 (1), 43 (1), 66, as amended by Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 75 and Sched. VI.; Museums and Gymnasiums Act, 1891 (54 & 55 Vict. c. 22), s. 10; Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 19 (1); Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 53 (4), (5).

(*c*) Accounts of Local Boards Order, 22nd March, 1880. This is the only Order relating to the subject. Its schedule contains forms showing how the several books of account are to be kept. The books consist of a minute-book, a ledger, a highway repairs expenditure account, and an order check-book.

(*d*) Public Works Loans Act, 1875 (38 & 39 Vict. c. 89), s. 8.

(*e*) See title ALLOTMENTS, Vol. I., p. 359.

(*f*) Burial Act, 1860 (23 & 24 Vict. c. 64), ss. 1, 2, 3; and see title BURIAL AND CREMATION, Vol. III., p. 488.

(*g*) 53 & 54 Vict. c. 70, ss. 24, 44; and see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*h*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*i*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 58 (1). As to accounts required to be audited half-yearly, see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 246, relating to the audit of the accounts of a borough council under that Act; and see p. 324, *post*. No forms of accounts have been published by the Local Government Board other than those of 22nd March, 1880 (see note (*c*), *supra*.

(*j*) See, generally, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*k*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 206. This applies to both urban and rural councils. As the General Order of the Local Government Board, 22nd March, 1880 (see note (*c*), *supra*), prescribes and requires a financial statement of accounts to be sent to the Local Government Board, this is a sufficient compliance with the statutory requirement.

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 206.

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Auditors.

585. The accounts of the urban district council (*m*) and its committees and officers (*n*) are audited by district auditors (*o*), appointed by the Local Government Board, with the sanction of the Treasury, and removable by the Board (*p*). Their duties and districts are assigned to them by the Board (*q*). They and the assistant district auditors, who may also be appointed by the Board (*a*), are paid out of moneys provided by Parliament and to such an amount as the Treasury may sanction (*b*), but contributions are obtained from local authorities by means of stamps affixed to or impressed upon the financial statements which are submitted to the auditor for audit (*c*).

The audit. Time.

586. The accounts are to be audited and examined once in every year as soon as possible after the 25th March (*d*), in accordance with regulations made by the Local Government Board (*e*). The Board may also make rules modifying enactments as to the publication of notice of the audit and of the abstract of accounts, and as to the report of the auditor (*f*).

Notice.

At least (*g*) fourteen days' notice of the time and place of the audit

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(*m*) As to audits in boroughs, see pp. 324 *et seq.*, *post.*

(*n*) Including any officer or assistant who is required to receive money or goods on behalf of the council (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 250). In the case of an officer dying before the audit, his personal representatives must account in his place (General Order, 22nd March, 1880, art. 21). The accounts of overseers collecting or paying away money for the purposes of the Public Health Acts are audited by the poor law auditors (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 248).

(*o*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 58 (1). No power is given to the Local Government Board to order extraordinary audits, as they may do in the case of the accounts of overseers; see title POOR LAW. The district auditors audit the accounts not only of urban district councils, other than borough councils, but those of rural district councils, parish councils, parish meetings (see pp. 244, 260, *ante*, and 337 *post*), county councils and their committees (see p. 363, *post*), port sanitary authorities (see p. 292, *post*), joint boards, and any other accounts to which their audit may be applied by statute, *e.g.*, the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), the Museums and Gymnasiums Act, 1891 (54 & 55 Vict. c. 22), and the Public Libraries Act, 1892 (55 & 56 Vict. c. 53).

(*p*) District Auditors Act, 1879 (42 & 43 Vict. c. 6), s. 4. The Act is applicable to all persons or bodies of persons who receive or expend any local rate, but not to overseers of the poor (*ibid.*, s. 8). As to "local rate," see *ibid.*

(*q*) *Ibid.*, s. 4.

(*a*) *Ibid.*

(*b*) *Ibid.*, ss. 2, 4. The district auditor is not prevented from recovering any expenses incurred in any proceedings which he is authorised or required to take or defend (*ibid.*, s. 12).

(*c*) *Ibid.*, ss. 2, 3, 6, and Sched. I. (where the scale of duty is set out).

(*d*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 247 (1); General Order, 22nd March, 1880, art. 12.

(*e*) District Auditors Act, 1879 (42 & 43 Vict. c. 6), s. 5, which defines what subjects may be dealt with by the regulations: disobedience to the regulations incurs penalties in the case of the first two offences; the third is a misdemeanour (*ibid.*; Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 98).

(*f*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 58 (3).

(*g*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 247 (3). The term "at least" excludes both the first and last days; see *R.* v. *Shropshire Justices* (1838), 8 Ad. & El. 173. The form of notice of audit, the mode of giving it, and the form of certificate of publication are prescribed as regards parish councils (see p. 244, *ante*) by Order of Local Government Board, 20th April, 1900; as regards parish meetings (see p. 260, *ante*), by Order of Local Government Board, 22nd

and of the deposit of accounts as required by statute must be given by advertisement in a local newspaper. The appointment is made by the auditor, and the notice is given by the council. The production of the newspaper containing the notice is sufficient proof of the notice in all proceedings (*h*).

In the case of the audit of accounts of a joint committee of district councils, or of a joint committee of a district council or councils and a parish council or parish meeting or parish councils or parish meetings, including the accounts of a joint committee appointed by a borough council with another council not being a borough council, the rule as to publication of notice is modified (*i*).

Deposit of accounts.

587. A copy of the accounts duly made up and balanced, and all books and documents mentioned or referred to in such accounts, must be deposited in the council's office, and be open during office hours to the inspection of all persons interested (*j*) for seven clear days (*k*) before the audit, and all such persons may take copies of or extracts from the same without fee or reward. Neglect to make up the accounts and books, or altering or allowing them to be altered when made up, or refusing to allow inspection, is punishable by a penalty up to £5 (*k*). Opportunity to inspect accounts at the time of the audit is also to be provided to such extent and in such manner as in the opinion of the auditor will not interfere with the audit (*l*).

Inspection.

Penalty for refusal.

Production of documents.

588. The auditor may by summons in writing compel the production of all necessary documents and the attendance before him of any person holding or accountable for the same, from whom he may require a signed declaration of the correctness of the documents and books. Penalties are imposed for neglect or refusal, and a false or corrupt declaration is punishable as perjury (*m*). The attendance of the clerk and officers of the council is also required (*n*).

Objections by ratepayers.

589. A ratepayer or owner (*o*) of property in the district may be present at the audit, and may raise objections to the accounts, and may appeal against allowances by the auditor just as he may appeal against disallowances (*o*). The auditor is further required to receive

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March, 1898; as regards joint committees (see pp. 246, 280, *ante*) of district councils, or of district councils and parish councils or parish meetings, by Order, 26th April, 1900.

(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 247 (3).

(*i*) See Order of Local Government Board, 26th July, 1895. The form and manner of giving notice and the form of certificate are prescribed by Order, 26th April, 1900.

(*j*) The fact that a person otherwise interested is bankrupt does not disqualify him for inspection (*Marginson* v. *Tildsley* (1903), 67 J. P. 226).

(*k*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 247 (4). In reckoning the seven days, the day of publication of the notice and the day of the audit must be excluded (*Liffin* v. *Pitcher* (1842), 1 Dowl. (N. S.) 767).

(*l*) General Order, 22nd March, 1880, art. 40.

(*m*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 247 (5). Documents cannot be refused on the ground that they are not relevant or relate to other matters as well as the audit. The auditor is entitled to judge for himself; see *Williams* v. *Manchester Corporation* (1897), 45 W. R. 412. As to perjury, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 490 *et seq.*

(*n*) General Order, 22nd March, 1880, art. 13.

(*o*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 247 (6). As to the

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any objection made by a ratepayer or any person aggrieved, to examine into its merits, and decide the same. He must state the grounds of his decision, and offer to enter his reasons in the book of account then being examined, if so required (*p*).

Disallowances and surcharge.

590. The auditor must disallow every item of account contrary to law, and surcharge the same on the person making or authorising the making of the illegal payment (*q*), but he cannot disallow expenses which have been sanctioned by the Local Government Board (*r*). He must charge against any accounting person the amount of any deficiency or loss incurred by the latter's negligence or misconduct, or of any sum which ought to have been brought into account by him, certifying in all cases the amount so due (*s*).

Any person aggrieved is entitled, on application, to a statement in writing of the reasons for the auditor's decision in respect of disallowance or surcharge or allowance (*s*); and in case of disallowance or surcharge the auditor must declare the grounds of his decision, and offer to state the grounds in writing, if required to do so by the person aggrieved, in the proper books of account forthwith, or so soon as the arrangements for the audit will permit. He must also report the disallowance or surcharge to the Local Government Board (*t*), and a similar report must be given where a surcharge is made owing to money or goods having been purloined, embezzled, wasted, or misapplied, or owing to deficiency or loss occasioned by negligence or misconduct (*u*).

Appeal: (i.) *certiorari*, (ii.) appeal of Local Government Board.

The party aggrieved may either apply to the King's Bench Division for a writ of *certiorari* (*a*) to remove the disallowances or allowances (*b*) into the High Court in the same way as in the case of disallowances or allowances by poor law auditors (*c*); or he may appeal to the Local Government Board, which has the same powers as it possesses in the case of appeals against allowances, disallowances, and surcharges by the poor law auditors (*d*), namely, of inquiring into and deciding upon the lawfulness of the reasons stated by the auditor for the allowance, disallowance, or surcharge, and to issue an order thereon, as it may deem proper (*e*), including the remission

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meaning of "owner," see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4, and title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*p*) General Order, 22nd March, 1880, art. 18. As to the duties of the auditor, see *ibid.*, arts. 14—19.

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 247 (7). He has no discretion in the matter; see *Barton* v. *Piggott* (1874), L. R. 10 Q. B. 86. The person to be surcharged must be a person who has control of the funds, not, *e.g.*, a surveyor who gives a certificate upon which an unauthorised payment is made (*R.* v. *Calvert*, [1898] 2 I. R. 266).

(*r*) Local Authorities (Expenses) Act, 1887 (50 & 51 Vict. c. 72), s. 3.

(*s*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 247 (7).

(*t*) General Order, 22nd March, 1880, art. 15.

(*u*) *Ibid.*, art. 20.

(*a*) See title CROWN PRACTICE, Vol. X., pp. 174, 192.

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 247 (6), (8).

(*c*) *Ibid.*, s. 247 (8). The court has the same power in such cases. As to such cases, see Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), ss. 35, 36.

(*d*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 247 (6), (8).

(*e*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 36.

of a disallowance or surcharge upon payment of costs (*f*), and this latter power cannot be controlled by the courts (*g*).

Certificate of auditor.

591. The auditor is required, after auditing the accounts in the ledger, to sign a certificate at the foot of the balance sheet (*h*), and to indorse a certificate in the other books that they have been audited (*h*).

Report by auditor.

The auditor must report on the audited and examined accounts within fourteen days after completion of the audit. The report must be delivered to the clerk of the council, who must deposit it in the council's office, and publish an abstract of the accounts in the local newspapers (*i*). Reports of the audit of joint committees must be sent to the Local Government Board (*k*).

At the close of the audit the auditor must send to the Local Government Board a report in a prescribed form (*l*) showing what required books and accounts are not kept, or are imperfectly kept, or kept in a form not prescribed by the Board (*m*).

Recovery of surcharges.

592. Any person certified as liable to pay any sums of money must pay the amount to the treasurer of the council, within fourteen days after the case has been certified, unless there is an appeal. Any costs and expenses, including a reasonable compensation for loss of time, if and so far as are not recovered from the party liable, may be recovered by the auditor from the council (*n*).

Distress and sale.

Payment of the certified sums is enforced by obtaining from the justices a warrant of distress and sale of the goods and chattels of the person liable so to pay (*o*).

Proof required on application to justices.

The only proofs required in such proceedings from the auditor are proof of his appointment by production of his certificate of appointment under the seal of the Local Government Board; that the audit was held; that the certificate of liability to pay was made in the proper book of account; and that the sum has not been paid

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(*f*) Poor Law Audit Act, 1848 (11 & 12 Vict. c. 91), s. 4.

(*g*) *A.-G.* v. *Merthyr Tydfil Union*, [1900] 1 Ch. 516, C. A.

(*h*) General Order, 22nd March, 1880, art. 22. The exact form of certificate is there given. The certificate at the foot of the balance sheet is to the effect that he has examined the accounts and compared the treasurer's payments with the vouchers; and that the balance shown in the treasurer's account agrees with the balance appearing in the treasurer's hands, or, in the event of there being a discrepancy, accounting for the same.

(*i*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 247 (10). A modification of this provision is made in the case of rural district councils, parish councils, parish meetings, and joint committees of the two latter (General Order, 20th May, 1895); and in the case of joint committees appointed wholly or partly by district councils (Order of Local Govern[illegible], 26th July, 1895).

(*k*) *Ibid.*

(*l*) General Order, 22nd March, 1880, Sched., Form R.

(*m*) *Ibid.*, art. 23.

(*n*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 247 (9).

(*o*) *Ibid.*; Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 32; and similarly under the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 11. As to courts of summary jurisdiction generally, see title MAGISTRATES, pp. 531 *et seq.*, *post*. As to distress under the Summary Jurisdiction Acts, see title DISTRESS, Vol. XI., pp. 221 *et seq.*

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within the time limited (*p*). The certificate of liability is final and cannot be reviewed by the justices, and they have no discretion as to issuing the warrant (*q*).

Proceedings to enforce payment must be commenced within nine calendar months from the disallowance or surcharge by the auditor, or, in the event of appeal either to the court or to the Local Government Board, from the final determination of such appeal (*r*).

Financial statement: (i.) by council;

593. The council must prepare and submit to the district auditor at every audit a financial statement in duplicate, in the prescribed form (*s*), containing the particulars prescribed by the Local Government Board. One of the duplicates must have the proper stamp affixed or impressed, the amount of duty being regulated by the statutory scale (*t*). At the conclusion of the audit the auditor cancels the stamp and certifies on each duplicate, in the form prescribed by the Local Government Board, the amount, in words at length, of the expenditure audited and allowed, the compliance with the regulations with respect to such statement, and that he has ascertained by the audit the correctness of the statement.

The auditor sends the duplicate so stamped and certified to the Local Government Board; and in this case a return of the receipts or expenditure contained in the statement need not (*u*), unless the Board requires, be sent to the Board under the Local Taxation Returns Acts, 1860 and 1877 (*a*).

(ii.) by joint committee

Every joint committee is required to submit to the authorities appointing them, at the next meeting of those authorities, a copy of the financial statement of the accounts of the joint committee as certified by the district auditor (*b*).

Solicitor's bills.

594. Solicitors' bills chargeable to the council may be submitted for taxation to the clerk of the peace for the county (*c*). The

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(*p*) Poor Law Audit Act, 1848 (11 & 12 Vict. c. 91), s. 9.

(*q*) See *R.* v. *Finnis* (1859), 1 E. & E. 935; *R.* v. *Linford* (1857), 7 E. & B. 950.

(*r*) Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), s. 9. As to final determination, see *Brooks* v. *Dolby*, *Savage* v. *Dolby*, *Tomlinson* v. *Dolby* (1902), 66 J. P. 532.

(*s*) The form prescribed for urban district councils, other than borough councils, is that contained in the General Order of Local Government Board, 18th April, 1903. Forms for rural district councils have not been issued, but they use those of rural sanitary authorities under an Order, 26th April, 1879.

The form of statement required from all joint committees appointed for purposes other than those of the Burial Acts (as to which see Order, 29th April, 1902) by any combination of district councils, including borough councils appointing with [illegible] councils not being borough councils, parish councils or parish meetin[illegible], [illegible] whose accounts are subject to audit under the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 58 (see pp. 244, 284, *ante*), is prescribed by an Order, 27th April, 1900.

(*t*) For the scale, see District Auditors Act, 1879 (42 & 43 Vict., c. 6), Sched. I.

(*u*) District Auditors Act, 1879 (42 & 43 Vict. c. 6), s. 3.

(*a*) 23 & 24 Vict. c. 51; 40 & 41 Vict. c. 66.

(*b*) Order of Local Government Board, 26th July, 1895, art. 2.

(*c*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 249. This does not prevent an ordinary order for taxation being made (*Re Blake and Croydon Rural*

amount found due after taxation is *primâ facie* evidence of the reasonableness, but not of the legality, of the charge. Failing submission for taxation, the decision of the auditor upon the reasonableness and the legality of the charge is final (*d*).

Taxation.

(iv.) *Adjustment of Property, Debts and Liabilities.*

595. Differences as to any powers, rights, duties, capacities, liabilities, obligations, or property transferred, or alleged or claimed to be transferred, in pursuance of the Public Health Acts (*e*), or any provisional order made thereunder, may be settled by an order of the Local Government Board on the application of any authority from or to whom the transfer is effected, or is alleged or claimed to be effected, or on the application of any person affected by the transfer (*f*). The Board may also by order adjust any accounts arising out of or incidental to such powers, rights, duties etc., or to the transfer thereof, and may direct by whom and to whom any moneys found due are to be paid, and the mode of raising such moneys (*f*).

Under Public Health Acts.

If, however, the order directs any rate to be made, or any other act or thing to be done, which the party required to make or do would not, apart from the provisions of the Acts, have been enabled to make or do by law, the order is provisional until confirmed by Parliament. The settlement or adjustment may be included in any provisional order which gives rise to it (*g*).

Provisional order.

596. Any adjustment required for the purpose of the Local Government Act, 1894 (*h*), may be effected by agreement or, failing that, by arbitration.

Under Local Government Act, 1894.

SUB-SECT. 5.—*Legal Proceedings.*

597. In common with other bodies, urban district councils may take proceedings to protect their corporate existence, property, and rights (*i*). Express powers of taking legal proceedings, other than summary proceedings, are given them in respect of nuisances (*k*), and

Actions by urban councils.

Sanitary Authority (1886), 2 T. L. R. 336; *Southampton Guardians* v. *Bell and Tayler* (1888), 21 Q. B. D. 297).

(*d*) The High Court cannot open the matter or revise the decision; see *R.* v. *Hunt* (1856), 6 E. & B. 408. The clerk of the peace is remunerated for such taxation at a rate fixed by the Master of the Crown Office and declared by Order of Local Government Board, 20th April, 1877. The rate allowed is 4*d.* per sheet or folio of seventy-two words for the taxation of every bill due to any solicitor in respect of legal business performed on behalf of any local authority whose accounts are required to be audited by the Public Health Act, 1875 (38 & 39 Vict. c 55).

(*e*) See, generally, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*f*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 304.

(*g*) *Ibid.* This provision does not prevent the parties having their differences settled by other methods; compare *Bexley Local Board* v. *West Kent Sewerage Board* (1882), 9 Q. B. D. 518 (proceedings under a local Act the terms of which made the Local Government Board the sole tribunal for the determination of differences).

(*h*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 68.

(*i*) See *A.-G.* v. *Brecon Corporation* (1878), 10 Ch. D 204; and see title CORPORATIONS, Vol. VIII., pp. 366, 392 *et seq.*

(*k*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 107; and see titles NUISANCE; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

SECT. 3. The Urban District.

public rights of way (*l*), and to prevent the pollution of streams (*m*), and, in the case of urban councils only, to promote or protect the interests of the inhabitants of their district (*n*). In all such proceedings the general law relating to the presence or absence of the Attorney-General is applicable (*o*). The powers of councils to take necessary proceedings for the enforcement of their duties as sanitary authorities are dealt with elsewhere (*p*).

Except in the above-mentioned cases, urban district councils are not empowered to charge the rates with the costs and expenses of legal proceedings, even though such proceedings may be deemed to be advisable in the interests of the inhabitants and ratepayers (*q*).

Actions against district councils.

598. Urban and rural councils may render themselves liable to all proceedings, civil and criminal, to which private individuals and companies may render themselves liable for breaches of contract and wrongs committed in the exercise or purported exercise of their duties and powers; subject to the common law limitation that, for example, as highway authorities, the councils are not liable for nonfeasance, such as neglect to repair (*r*).

Appearance in legal proceedings.

599. The council may appear before any court, or in any legal proceeding by its clerk (*s*), or by any officer or member authorised generally or in respect of any special proceeding by resolution of the council (*t*).

The clerk or such authorised person may institute (*a*) and carry

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(*l*) Local Government Act, 1894 (57 & 58 Vict. c. 73), s. 26; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 162.

(*m*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 69; see titles NUISANCE; WATERS AND WATERCOURSES.

(*n*) Borough Funds Act, 1872 (35 & 36 Vict. c. 91), ss. 1, 2; and see p. 380, *post*. As to proceedings under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), see titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 210; METROPOLIS.

(*o*) See titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 158, 247; NUISANCE; PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*p*) See titles FOOD AND DRUGS, Vol. XV., p. 39; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 142, note (*i*), 223, 225, 239; PUBLIC HEALTH AND LOCAL ADMINISTRATION; and generally, as to summary procedure, title MAGISTRATES, p. 531, *post*. As to proceedings in the county court, see title COUNTY COURTS, Vol. VIII., pp. 677, 678.

(*q*) See *A.-G.* v. *Rickmansworth Urban District Council* (1902), 66 J. P. 410.

(*r*) See titles CORPORATIONS, Vol. VIII., pp. 364, 365; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 133 *et seq.*; INJUNCTION, Vol. XVII., p. 227; NUISANCE; PUBLIC AUTHORITIES AND PUBLIC OFFICERS. As to the limitation of actions against local authorities, see titles LIMITATION OF ACTIONS, p. 176, *ante*; PUBLIC AUTHORITIES AND PUBLIC OFFICERS; and as to enforcing judgments against them, see titles CORPORATIONS, Vol. VIII., pp. 396, 397; EXECUTION, Vol. XIV., pp. 12, 81, 126.

(*s*) In a case where justices refused to determine a complaint without the attendance of the clerk of the local authority, the Court of Queen's Bench refused to compel them to do so (*Ex parte Leamington Local Board* (1862), 5 L. T. 637).

(*t*) The defendant is entitled to call for proof of authorisation, and unless this be forthcoming the proceedings are invalid; see *Thorpe* v. *Priestnall*, [1897] 1 Q. B. 159.

(*a*) Proceedings are instituted by the laying of an information (*Thorpe* v. *Priestnall*, *supra*; and see *R.* v. *Willace* (1797), 1 East, P. C. 186; *Beardsley* v. *Giddings*, [1904] 1 K. B. 847; *Brooks* v. *Bagshaw*, [1904] 2 K. B. 798); and see title FOOD AND DRUGS, Vol. XV. pp. 30, 31.

on any proceeding which the council may institute and carry on under the Public Health Act, 1875 (*b*). This does not give the representative a right of audience where by the rules of the court before which he is appearing only counsel can be heard (*c*); nor does it empower the council to delegate prosecutions to the police, who are not its officers nor under its control (*d*).

SUB-SECT. 6.—*Miscellaneous.*

(i.) *Union of Districts.*

By Local Government Board.

600. Districts may be united, on the application of rural and urban district councils, for certain purposes affecting public health (*e*), and the Local Government Board may, under certain conditions, by order, unite districts for the purpose of appointing a medical officer of health (*f*).

Construction for mutual benefit.

Two or more local authorities may, without any sanction of the Local Government Board, combine for the purpose of executing and maintaining any works that may be for the benefit of their districts or any part thereof (*g*); and two or more councils may combine in providing a common hospital (*h*).

(ii.) *Enforcement of Duties.*

Under Public Health Acts.

601. The proper discharge by a local authority of its duties under the Public Health Acts (*i*) may be enforced by the Local Government Board (*j*).

Under other statutes.

The duty imposed upon an urban district council to enforce the provisions or exercise the powers imposed or conferred upon it by statutes is generally enforced under the special provisions of those statutes (*k*).

(*b*) 38 & 39 Vict. c. 55, s. 259.

(*c*) *R.* v. *London Justices*, [1896] 1 Q. B. 659, C. A.

(*d*) *Kyle* v. *Barber* (1888), 58 L. T. 229.

(*e*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 279.

(*f*) *Ibid.*, s. 286. See *ibid.* for the powers of, and regulations to be made by, the Board on the matter, the notices preliminary to making the order, and the arrangements which can be made for constituent and united districts; and see p. 275, *ante*.

(*g*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 285, which also gives power to a local authority to execute works in an adjoining district with the consent of the council of that district.

(*h*) *Ibid.*, s. 131; and see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*i*) See, generally, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*j*) When this remedy is applicable, no other legal proceeding is available (*Robinson* v. *Workington Corporation*, [1897] 1 Q. B. 619, C. A.; *Pasmore* v. *Oswaldtwistle Urban Council*, [1898] A. C. 387; *Dent* v. *Bournemouth Corporation* (1897), 66 L. J. (Q. B.) 395). For the procedure etc. to procure enforcement, see the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 43, 106, 295, 299—302.

(*k*) See, for instance, the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 8; Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44) and title PUBLIC HEALTH AND LOCAL ADMINISTRATION; Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 24, and titles ALLOTMENTS, Vol. I., p. 355; SMALL HOLDINGS AND SMALL DWELLINGS; Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 5, and title FACTORIES AND SHOPS, Vol. XIV., p. 455; and as to highways and rights of way, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 138 *et seq.*

SECT. 3.

The Urban District.

Incorporations with Public Health Act, 1875.

(iii.) *Towns Improvement Clauses Act*, 1847.

602. Certain provisions of the Towns Improvement Clauses Act, 1847 (*l*), are incorporated with the Public Health Act, 1875 (*m*), for the purpose of regulating certain matters in urban districts, such as those relating to the naming of streets and the numbering of houses, the improvement of the line of streets and the removal of obstructions, ruinous and dangerous buildings, and precautions during the construction and repair of sewers, streets, and houses (*n*).

SECT. 4.—*The Port Sanitary Authority.*

Definition.

603. The port sanitary authority is the body constituted by the Local Government Board to act permanently or temporarily as the sanitary authority of any port (*o*) established for the purposes of the laws relating to the Customs of the United Kingdom (*p*).

Constitution by order.

The authority may be constituted permanently by provisional order (*q*), or by a simple order (*r*). When proceeding by provisional order the Board may, until the order has been made and confirmed by Parliament, temporarily constitute the authority by order, and may from time to time renew such order, and may make, by it or by its renewal, such provisions as the Board may make by provisional order (*s*).

Effect of order.

The order gives the port sanitary authority jurisdiction over all waters within the limits of the port, and also over the whole or such portions of the district within the jurisdiction of any riparian authority as may be specified in the order (*t*), and no other authority may there exercise powers which have been conferred on the port sanitary authority (*u*). It may assign (*a*) to the port sanitary authority any powers, rights, duties, capacities, liabilities (*b*) and obligations under the Public Health Acts (*c*), or the Infectious Disease (Prevention) Act, 1890 (*d*).

In the case of joint boards it may contain regulations for such

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(*l*) 10 & 11 Vict. c. 34; for which see p. 328, *post.*

(*m*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 160.

(*n*) Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), ss. 64—83; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 236—257.

(*o*) As to such ports, see titles REVENUE; WATERS AND WATERCOURSES.

(*p*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 287; and see *ibid.* for who may be constituted a port sanitary authority. Such authorities existing in 1875 were continued unaffected (*ibid.*, s. 326). See the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), ss. 11—16; and title METROPOLIS.

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 287.

(*r*) As to which see Public Health (Ships, etc.) Act, 1885 (48 & 49 Vict. c. 35), s. 3.

(*s*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 287.

(*t*) *Ibid.*, s. 288.

(*u*) *Ibid.*, s. 289.

(*a*) *Ibid.*, s. 287; Public Health (Ports) Act, 1896 (59 & 60 Vict. c. 20), s. 1.

(*b*) The authority and its officers are protected against personal liability (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 265).

(*c*) See, generally, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*d*) 53 & 54 Vict. c. 34. By the Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), s. 16, the term "port sanitary district" means the port sanitary district of London, and any port or part of a port for which a port sanitary authority has been constituted, and the district then ceases to form part of any urban or rural district for the purposes of the Act; see titles METROPOLIS; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

matters as may be regulated by the provisions of a provisional order forming a united district (*e*).

SECT. 4. The Port Sanitary Authority.

The port sanitary authority may, with the sanction of the Local Government Board, delegate the exercise of any of its powers to any riparian authority within or bordering on its district (*f*).

Delegation of powers.

604. The method of paying the expenses of a port sanitary authority permanently constituted is provided for in the order of constitution (*g*).

Expenses: (i.) permanent authority; (ii.) temporary authority.

In the case of a temporary authority, the expenses are defrayed out of a common fund, to be contributed by the riparian authorities in such proportions as the Local Government Board determines, and the Board may by order exempt one or more of the authorities from such payment (*h*).

Such port sanitary authority, being an urban or rural district council, raises its proportion of expenses in the same way as any other expenses, for the purposes of the Public Health Acts (*i*), are raised (*k*).

SECT. 5.—*The Borough.*

SUB-SECT. 1.—*In General.*

Meaning of "borough."

605. The borough (*l*) is a city or town to which the Municipal Corporations Act, 1882 (*m*), applies. Its area is defined by its charter, or by the provisional order or local Act altering the boundaries (*n*).

SUB-SECT. 2.—*The Municipal Corporation.*

(i.) *Description.*

Meaning of municipal corporation.

606. The municipal corporation (*o*) is the body corporate constituted by the incorporation of the inhabitants of a borough or city (*p*)

(*e*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 287. As to the formation of united districts, see p. 339, *post.*

(*f*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 289.

(*g*) *Ibid.*, s. 287. See Public Health (Ports) Act, 1896 (59 & 60 Vict. c. 20), s. 1.

(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 290.

(*i*) See, generally, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*k*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 290. For the recovery of expenses, see *ibid.*, ss. 290, 292; and for borrowing powers, *ibid.*, s. 244.

(*l*) For original meanings of the word "borough," see Jacob's Law Dictionary; Littleton's Tenures, s. 164; Co. Litt. 109 a, 115 b; Com. Dig., tit. "Burrough"; 1 Bl. Com. 114. For the definition of "parliamentary borough," see Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 7 (1); Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 15 (3); and see title ELECTIONS, Vol. XII., p. 178. As to borough and local courts of record, see title COURTS, Vol. IX., pp. 127 *et seq.*

(*m*) 45 & 46 Vict. c. 50, s. 7 (1), but now repealed by the Statute Law Revision Act, 1898 (61 & 62 Vict. c. 22). See the definition in the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 15 (1); and as to the application of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), see title ELECTIONS, Vol. XII., p. 190, note (*q*).

(*n*) As to alterations, see p. 322, *post.*

(*o*) For the law governing corporations generally, see title CORPORATIONS, Vol. VIII., pp. 279 *et seq.*

(*p*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 7 (1).

SECT. 5. The Borough.

in England or Wales (*q*). Incorporation is now obtained by the grant of a charter (*r*).

How composed.

The municipal corporation is composed of the mayor (*s*), aldermen (*t*), and burgesses or citizens (*a*). The burgesses or citizens (*b*) are those persons whose names appear for the time being on the burgess roll (*c*).

Rights of burgesses.

607. In municipal affairs a burgess has the right of voting at the election of councillors (*d*) and of the two elective borough auditors (*e*); of being elected a councillor, provided he possesses the other necessary qualifications (*f*); of inspecting and taking copies of or extracts from the minutes of proceedings of the council (*g*), or an order of the council for the payment of money (*h*), or the rate-books (*i*). He alone may take proceedings against corporate officers for acting in the corporate office without having made the necessary declaration or without qualification (*k*).

(*q*) The Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s 3, does not extend to Scotland or Ireland.

(*r*) Under *ibid.*, ss. 210—218. The City of London is an unreformed corporation, and is not subject to the Act of 1882; see title METROPOLIS. Metropolitan boroughs (see *ibid.*) are not municipal boroughs within the meaning of the word as used in this article for the kinds of boroughs, see pp. 299, 301, *post.* The mention of a body corporate in connection with a town named in one of the Schedules to the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), is *primâ facie* evidence that it is a municipal corporation, but it is not conclusive, and may be rebutted by evidence to the contrary (*R.* v. *Greene* (1837), 6 Ad. & El. 548); in this case (relating to Gateshead) the *primâ facie* evidence was successfully rebutted). Judicial cognisance has been taken of the existence of a corporation without requiring the production of the charter, where the existence of the corporation was notorious, *e.g.*, in the case of Manchester, although this city was not mentioned in the Schedules to the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76) (*R.* v. *Turner* (1872), 12 Cox, C. C. 313).

(*s*) See p. 309, *post.*

(*t*) See p. 308, *post.*

(*a*) "Burgess" includes "citizen" (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 7 (1)). By the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 15 (1), a reference to the mayor, aldermen, and burgesses in any Act passed thereafter includes a reference to the mayor, aldermen, and citizens. The freemen no longer constitute or form an integral part of the corporation; see *Lincoln Corporation* v. *Holmes Common* (1867), L. R. 2 Q. B. 482; and, generally, p. 321, *post.*

(*b*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 7 (1).

(*c*) *Ibid.*, s. 9 (1); see title ELECTIONS, Vol. XII., p. 246.

(*d*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 11 (1). His right does not depend on his being entitled to be on the burgess roll; it is sufficient if his name appears there (*ibid.*, s. 51).

(*e*) *Ibid.*, s. 25 (1); as to auditors, see p. 324, *post.*

(*f*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 11 (2). In this case he must not only be enrolled a burgess, but also be entitled to enrolment (*ibid.*); as to councillors, see pp. 302 *et seq.*, *post.*

(*g*) Municipal Corporations Act, 1882 (45 & 46 Vict c. 50), s. 233 (1); and see p. 316, *post.*

(*h*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 233 (2); and see p. 320, *post.*

(*i*) Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 13.

(*k*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 224 (1); and see pp. 296, 326, *post.* As to the right of voting when a parliamentary borough was

SECT. 5. The Borough.

Style of corporation.

608. The municipal corporation bears the name of "The Mayor, Aldermen, and Burgesses of the Borough of ——," or "The Mayor, Aldermen, and Citizens of the City of ——," as the case may be (*l*). The corporate seal is the common seal of the municipal corporation (*m*).

Seal.

(ii.) *Corporate Property.*

Vesting of corporate property.

609. The corporate property is vested in the municipal corporation, subject to the rights possessed by the freemen previous to 1835 (*n*). It may consist of corporate land, that is, land belonging to or held in trust for the municipal corporation (*o*), or corporate stock (*p*). The proceeds of such corporate property go into the borough fund (*q*), of which the municipal corporation is trustee (*r*).

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disfranchised under the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), see Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 245. As to liability to serve on juries in a quarter sessions borough, see title JURIES, Vol. XVIII., pp. 230, 236.

(*l*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 8. The change of name introduced by the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), did not create a new corporation, nor affect the continuity of the old corporation (*Doe* d. *Bristol Hospital* (*Governors*) v. *Norton* (1843), 11 M. & W. 913; *Ludlow Corporation* v. *Tyler* (1836), 7 C. & P. 537; *A.-G.* v. *Kerr* (1840), 2 Beav. 420; *A.-G.* v. *Newcastle Corporation* (1842), 5 Beav. 307, *per* Lord LANGDALE, M.R., at p. 314; *A.-G.* v. *Leicester Corporation* (1846), 9 Beav. 546); and, although the mayor, aldermen, and burgesses, or citizens, acting by the council, are the "urban authority" for the purposes of the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 6, they are not thereby constituted a separate body. They exercise and perform their rights and duties under the Public Health Acts in accordance with the laws in force with respect to municipal corporations, subject, however, to any provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 198; see *Andrews* v. *Ryde Corporation* (1874), L. R. 9 Exch. 302; *Hyde Corporation* v. *Bank of England* (1882), 21 Ch. D. 176. So the alteration (see p. 262, *ante*) of urban sanitary authorities into urban district councils, which include councils of boroughs and cities, does not alter the style or title of the corporation or council of the borough (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 21 (1)); nor does the conversion of a borough into a county borough (Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 31, 34 (3)); as to county boroughs, see p. 300, *post*. It is improper to use the term "citizens" in the name of a borough (*A.-G.* v. *Worcester Corporation* (1846), 2 Ph. 3; *Rochester Corporation* v. *Lee* (1846), 15 Sim. 376); but as to misnomer and its effect, see, generally, title CORPORATIONS, Vol. VIII., p. 308. A misnomer or inaccuracy in the description of any place mentioned in the Schedule to the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), cannot affect the operation of the statute relating to municipal corporations (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 241).

(*m*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 7 (1).

(*n*) *Lincoln Corporation* v. *Holmes Common* (1867), L. R. 2 Q. B. 482.

(*o*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 7 (1).

(*p*) Corporate stock consists of all the stocks, funds, or public securities standing in the books of the Bank of England or of any other public company or society in the name of the corporation, under any style or title of incorporation (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 118 (1)). As to transfers of stock, see *ibid.*, s. 118 (1)—(7), and the Forged Transfers Acts, 1891 (54 & 55 Vict. c. 43) and 1892 (55 & 56 Vict. c. 36); and see title COMPANIES, Vol. V., p. 195.

(*q*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 139; as to the borough fund, see p. 319, *post*.

(*r*) *Arnold* v. *Gravesend Corporation* (1856), 2 K. & J. 574.

SECT. 5.
The Borough.

Corporate offices.

Acceptance of office.

(iii.) *Corporate Offices.*

610. The corporate offices are those of mayor, alderman, councillor, and elective auditor (*s*).

611. Every qualified (*t*) person elected to a corporate office must, unless exempted by law (*a*), either accept the office or render himself liable to a fine (*b*). Acceptance is signified by the person elected making and signing a declaration (*c*).

The declaration must be made and subscribed before the members of the council or the town clerk, who have power to receive the same (*d*), within five days after regular (*e*) notice of election (*f*). If this is not done the person elected is liable to pay to the council such fine as may be prescribed by bye-law (*g*), or, if there is no bye-law, in the case of an alderman, councillor or elective auditor, a fine of £25, and in the case of a mayor, £50 (*h*). The fine is recoverable summarily (*i*). Until he has made and subscribed the declaration the person elected must not act in the office except in administering the declaration (*k*).

Non-acceptance of the office creates a casual vacancy (*l*).

Penalty for acting in office before acceptance or during disqualification.

612. A person who acts in a corporate office (*m*) before making the required declaration (*n*), or without being qualified at the time of making it, or after ceasing to be qualified, or after becoming disqualified (*o*), is liable to a fine (*p*) not exceeding £50; but if in fact he was enrolled as a burgess he is not liable merely because he was

(*s*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 7 (1). The mayor, aldermen, and councillors form the council, see p. 302, *post*. As to the mayor, see p. 309, *post;* aldermen, p. 308, *post;* councillors, p. 302, *post;* and elective auditor, p. 324, *post*.

(*t*) As to qualification, see p. 303, *post*.

(*a*) See p. 297, *post*.

(*b*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 34 (1); and see title CORPORATIONS, Vol. VIII., pp. 327, 328.

(*c*) For the form of declaration, see Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 35, Sched. VIII., Form A.

(*d*) *Ibid.*, s. 239 (1). The Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), applies (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 239 (2)).

(*e*) Casual information is not sufficient. He must have "regular" notice of his election either by being actually present when it is announced, or by being apprised of the fact by some official authority (*R.* v. *Preece* (1843), 5 Q. B. 94, 97).

(*f*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 34 (1).

(*g*) *Ibid.* There must be some evidence of qualification before a fine can be imposed; see *R.* v. *Richmond* (1862), 11 W. R. 65.

(*h*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 34 (2).

(*i*) *Ibid.*, s. 34 (4). As to summary proceedings generally, see title MAGISTRATES, pp. 531 *et seq.*, *post*.

(*k*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 35. A person who administers the declaration to a councillor whom he knows to be disqualified cannot act as a relator in *quo warranto* proceedings against the latter (*R.* v. *Greene* (1842), 2 Q. B. 460; and see title CROWN PRACTICE, Vol. X., p. 136).

(*l*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 40 (3).

(*m*) Except for the purpose of administering the declaration to someone else (*ibid.*, s. 35).

(*n*) See the text, *supra*.

(*o*) See pp. 303, 304, *post*.

(*p*) Recoverable by action (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 41 (1)). As to this proceeding, see *ibid.*, s. 224, and pp. 326, 327, *post*.

not entitled to be so enrolled (*q*). His liability to a penalty ceases when the disqualification ceases (*r*), but it does not cease because the period within which the elections could be called in question has expired (*s*).

What is acting in office.

A councillor acts in his office if he takes part in the discussions of the council, without voting (*t*), and the fact of his acting is sufficiently evidenced by producing an attendance book of the members signed by him and the minute book of the council showing his name as an attending member (*a*).

Validity of acts notwithstanding disqualification.

The disqualification of a corporate officer does not affect the validity of his acts whilst holding that office; and an election to a corporate office cannot be questioned on the ground of the defect or want of title of the election officer; nor can a burgess roll be questioned by reason of a defect in the title or want of title of the mayor if he was in actual possession of the office (*b*).

Exemptions.

613. The following persons are exempt by law:—(i.) any person disabled by lunacy or imbecility of mind, or by deafness, blindness, or other permanent infirmity of body (*c*); (ii.) any person who, being above the age of sixty-five years, or having within five years before the day of his election either served the office or paid the fine for non-acceptance, claims exemption within five days of his election (*d*); (iii.) any military, naval, or marine office in His Majesty's service on full pay or half pay (*e*); (iv.) any officer or other person employed and residing in any of His Majesty's dockyards, victualling establishments, arsenals, barracks, or other naval or military establishments, and army reserve men (*f*); (v.) any resident member of the Universities of Oxford and Cambridge (as respects the municipal corporations of Oxford and Cambridge) (*g*); (vi.) dissenting

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(*q*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 41 (1), (2).
(*r*) *Lewis* v. *Carr* (1876), 1 Ex. D. 484, C. A.
(*s*) *De Souza* v. *Cobden*, [1891] 1 Q. B. 687, C. A.
(*t*) *Charlesworth* v. *Rudgard* (1835), 1 Cr. M. & R. 896.
(*a*) *Hunnings* v. *Williamson* (1883), 11 Q. B. D. 533, C. A.
(*b*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 42 The fact that the acts of a disqualified person in a corporate office are valid does not prevent an inquiry on an election petition into the validity of a vote given by him in virtue of such office (*Nell* v. *Longbottom*, [1894] 1 Q. B. 767); a councillor whose election is declared void cannot before the avoidance of his election give a valid vote at the election of a mayor (*Bland* v. *Buchanan*, [1901] 2 K. B. 75); and as to municipal elections generally, see title ELECTIONS, Vol. XII., pp. 338 *et seq.*
(*c*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 34 (3) (a).
(*d*) *Ibid.*, s. 34 (3) (b).
(*e*) *Ibid.*, s. 253; and see the Army Act, 1881 (44 & 45 Vict. c. 58), s. 146; and as to such persons, see title ROYAL FORCES.
(*f*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 253. Army reserve men are exempt from any parochial, township, or borough office (Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 7). Royal naval reserves and army special reserves (see title ROYAL FORCES) are exempt from serving as peace or parish officers (Naval Volunteers Act, 1853 (16 & 17 Vict. c. 73), s. 8; Royal Naval Reserve (Volunteer) Act, 1859 (22 & 23 Vict. c. 40), s. 7; Naval Reserve Act, 1900 (63 & 64 Vict. c. 52), s. 1 (4); Militia Act, 1882 (45 & 46 Vict. c. 49), s. 41; Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9); see also Local Militia (England) Act, 1812 (52 Geo. 3, c. 38), s. 197).
(*g*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 257 (4).

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ministers (*h*); (vii.) Roman Catholic priests (*i*); (viii.) any commissioner or assistant commissioner of excise or officer of excise or person employed in the collection or management of or accounting for the revenue of excise or any part thereof during the time of his acting as such commissioner or assistant commissioner or officer, or being so employed as aforesaid (*k*); (ix.) any officer or person appointed by the Commissioners of Inland Revenue or employed by them or under their authority or direction in any way relating to any of the duties under their care and management, so long as he continues in and exercises such office or employment (*l*); (x.) any commissioner, officer, clerk, or other person acting in the management or service of the customs (*m*); (xi.) every registrar of births and deaths, and every registrar of marriages (*n*); (xii.) any Postmaster-General or officer of the Post Office (*o*); (xiii.) any inspector of factories and workshops (*p*); (xiv.) every registered medical practitioner (*q*); (xv.) every person registered as a dentist (*r*).

Resignation of corporate office.

614. A person elected to a corporate office and duly holding the same (*s*) may at any time by writing signed by him and

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(*h*) From any parochial or ward office, or other office in any hundred of any shire, city, town, parish, division, or wapentake (stat. (1689) 1 Will. & Mar. c. 18, s. 8; Places of Religious Worship Act, 1812 (52 Geo. 3, c. 155), s. 9); see title ECCLESIASTICAL LAW, Vol. XI., pp. 813 *et seq.*

(*i*) The same exemption as in note (*h*), *supra* (Roman Catholic Relief Act, 1791 (31 Geo. 3, c. 32), s. 8); see title ECCLESIASTICAL LAW, Vol. XI., p. 807.

(*k*) Excise Management Act, 1827 (7 & 8 Geo. 4, c. 53), s. 11, repealed by the Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 40, and re-enacted by *ibid.*, s. 8, which applies to exemption from any corporate, parochial, or other public office or employment. As to the persons referred to in notes (*k*), (*l*), (*m*), see title REVENUE.

(*l*) Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 8, applying to the offices of mayor, sheriff, and all corporate, parochial, or other offices or employments. Commissioners (see title INCOME TAX, Vol. XVI., p. 612) are also exempt from all parish and ward offices (Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 35).

(*m*) Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 9. This also applies to parochial and other public offices.

(*n*) Births and Deaths Registration Act, 1837 (7 Will. 4 & 1 Vict. c. 22), s. 18, applying to every parochial and corporate office whatsoever. As to such persons, see title REGISTRATION OF BIRTHS, MARRIAGES, AND DEATHS.

(*o*) Post Office (Management) Act, 1837 (7 Will. 4 & 1 Vict. c. 33), s. 12, repealed by the Post Office Act, 1908 (8 Edw. 7, c. 48), but re-enacted by *ibid.*, s. 43, which applies to the office of mayor, sheriff, and all corporate, parochial or other public offices or employments; and see title POST OFFICE.

(*p*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 118 (6), applying to all parochial and municipal offices; and, as to such persons, see title FACTORIES AND SHOPS, Vol. XIV., p. 538.

(*q*) Medical Act (21 & 22 Vict. c. 90), s. 35. This also exempts from parochial, ward, hundred, and township offices; and, as to such persons, see title MEDICINE AND PHARMACY. As to apothecaries, see stat. (1694) 6 & 7 Will. & Mar. c. 4, s. 2.

(*r*) Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 30; and see title MEDICINE AND PHARMACY. This also exempts from parochial, ward, hundred, and township offices.

(*s*) The words "and duly holding the same" do not appear in the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), but are to be implied. A person who is disqualified cannot resign (*Hardwick* v. *Brown* (1873), L. R. 8 C. P. 406).

delivered to the town clerk resign the office on payment of the fine provided for non-acceptance thereof (*t*). In any such case the council must forthwith declare the office to be vacant, and signify the same by notice in writing, signed by three members of the council, countersigned by the town clerk, and fixed on the town hall, and the office thereupon becomes vacant (*a*); and, although it will not become vacant until all these prescribed conditions have been fulfilled (*b*), whenever the writing has been delivered to the town clerk and the fine has been paid, the resignation as such is irrevocable (*c*). No person enabled by law to make an affirmation instead of taking an oath is to be liable for any fine for non-acceptance of office by reason of his refusal on conscientious grounds to take any oath or make any declaration required by the Municipal Corporations Act, 1882 (*d*), or to take on himself the duties of the office (*d*).

Re-eligibility.

615. A person ceasing to hold a corporate office will, unless disqualified to hold the office, be re-eligible (*e*). Until, however, he complies with the conditions of requalification, he is not re-eligible (*f*).

Filling casual vacancies.

616. Casual vacancies in corporate offices are filled by election as in ordinary vacancies, the person elected holding office for the unexpired term of the vacating officer. If there be more than one casual vacancy, the elected go out of office according to the number of their votes, the holder of the smallest number taking the place of the officer who would have first retired and so on. If there has been no contest the council determines the order of retirement (*g*).

SUB-SECT. 3.—*Constitution of Boroughs.*

(i.) *Varieties of Boroughs.*

City.

617. A city has been said to be "a borough incorporate which hath or hath had a bishop" (*h*); but the existence (present or past) of a bishopric is not essential to the existence of a municipal city.

As to proceedings for a *quo warranto* absolute, although the defendant has purported to resign the office and his supposed resignation has been accepted, see title CROWN PRACTICE, Vol. X., pp. 131, 132, 140.

(*t*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 36 (1).

(*a*) *Ibid.*, s. 36 (2).

(*b*) *R.* v. *Welchpool Corporation* (1876), 35 L. T. 594; and following that decision, WRIGHT and GAINSFORD BRUCE, JJ., in a later case, held that an alderman, who in the course of rotation is about to go out of office under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 14 (5), (6), cannot, by merely resigning his office before the ordinary day of election of aldermen, and in the absence of a declaration by the council that the office is vacant, get rid of his disqualification to vote at the election of aldermen under *ibid.*, s. 60 (3), repealed by the Municipal Corporations Amendment Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 19), s. 1 (2) (*Pease* v. *Lowden*, [1899] 1 Q. B. 386).

(*c*) *R.* v. *Wigan Corporation* (1885), 14 Q. B. D. 908.

(*d*) 45 & 46 Vict. c. 50, s. 36 (3).

(*e*) *Ibid.*, s. 37.

(*f*) *Hardwick* v. *Brown* (1873), L. R. 8 C. P. 406.

(*g*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 40 (1), (2); see title ELECTIONS, Vol. XII., p. 339.

(*h*) Co. Litt. 109 b. The note in Hargrave's edition shows that it was not

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The title of "city" is a rank or dignity which is almost invariably created by the exercise of the Royal prerogative by letters patent (*i*).

County boroughs.

618. Before 1888, certain cities and towns obtained by Royal charter the special privilege of being counties of themselves having their own sheriffs (*k*), and being free from the jurisdiction of the officers of the county at large. These were usually known as counties of towns or counties of cities (*l*).

In 1888, every borough which on the 1st June of that year either had a population of at least 50,000, or was a county of itself, was for the purposes of local government made an administrative county of itself and called a county borough (*m*), but for all other purposes it continues to be part of the county in which it is situate (*n*).

Further, any borough having a population of not less than 50,000 may be constituted a county borough by the same procedure as county boundaries may be altered, that is by provisional order of the Local Government Board; confirmation by Parliament is necessary (*o*).

Effect of constitution of county borough.

The effect of a borough being recognised or constituted a county borough is to give to the mayor, aldermen, and burgesses, acting by the council, all the powers, duties, and liabilities of a county council (*p*), but to leave the constitution, election, proceedings, and position of the county borough council, and the appointment of its officers and their duties, to be regulated by the Municipal Corporations Act, 1882 (*q*).

Certain statutory provisions affecting counties in general have no application to county boroughs, namely, those relating to the constitution, election, proceedings, or position of the county council or its chairman (*r*); the county treasurer, county surveyor, and

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necessary that the borough should be incorporate, and Westminster is instanced; see also Com. Dig., tit. "Burrough"; Grant, Law of Corporations, 52.

(*i*) Ripon is an exception, having been created a city by means of a section in a local Gas Act (City of Ripon Act, 1865 (28 & 29 Vict. c. cxxvi.), s. 54).

(*k*) See title SHERIFFS AND BAILIFFS; see also 1 Bl. Com., 21st ed., 120.

(*l*) A list of those existing in 1835 is found in the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), s. 61.

(*m*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 31. A list of such county boroughs is found in *ibid.*, Sched. III. For an extension of this list, see note (*o*), *infra*.

(*n*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 31. If a separate commission of assize, oyer and terminer, and gaol delivery is not directed to be executed within the borough, the borough for such purpose is to be part of the county in which it is specified in the Schedule to the Act to be deemed to be situate (*ibid.*). As to the adjustment of financial relations with the county, see *ibid.*, ss. 32—34.

(*o*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 54 (1)—(3). Under this power the following have been (1911) constituted county boroughs since 1888:—Blackpool, Bournemouth, Burton-upon-Trent, Grimsby, Merthyr Tydfil, Newport (Mon.), Oxford, Rotherham, Smethwick, Southport, Stoke-on-Trent, Tynemouth, Warrington, West Hartlepool.

(*p*) See Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 34 (1).

(*q*) *Ibid.*, s. 34 (3) (a), (b). The financial relations of county boroughs to the county in which they are situate is dealt with on pp. 353 *et seq.*, *post*.

(*r*) See pp. 340 *et seq.*, *post*.

other county officers (*s*); the standing joint committee of the justices and the council (*a*); coroners (*b*); gas meters (*c*); the transfer to the county council of powers relating to county and other rates, and the preparation or revision of the basis or standard for the county rate (*d*); and, except where expressly mentioned, those relating to finance (*e*).

Further, the council of a county borough cannot deal with the division of the county into polling districts for parliamentary elections for the county, the appointment of places of election for the county, revision courts, and registration of parliamentary county voters (*f*), nor is the council of a county borough the county authority for the purpose of allotments (*g*).

Quarter sessions borough.

619. A quarter sessions borough is one having a separate court of quarter sessions, and includes a county of a city and a county of a town, subject to the Municipal Corporations Act, 1882 (*h*).

Borough with separate commission of the peace.

620. The right of certain boroughs to have a separate commission of the peace (*i*) is unaffected by the Municipal Corporations Act, 1882 (*k*), and the Crown has power, on the petition of the council of a borough, to grant to the borough a separate commission of the peace (*l*), and this is not affected by any subsequent grant to or for any county of a similar commission (*m*).

(ii.) *Special Cities, Boroughs, and Places.*

Cinque Ports.

621. The Cinque Ports were originally Dover (*n*), Sandwich, Romney, Hastings (*o*), and Hythe; the two "ancient towns" of Winchelsea and Rye have since been added (*p*). To some of these

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(*s*) See pp. 342 *et seq.*, *post.*

(*a*) See p. 349, *post.*

(*b*) As to these, see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 34 (4), (5); and title CORONERS, Vol. VIII., pp. 218, 236.

(*c*) See title GAS, Vol. XV., p. 344.

(*d*) See pp. 359, 368, *post.*

(*e*) These are contained in the Local Government Act, 1888 (51 & 52 Vict. c. 41), Part IV.; see p. 350, *post.*

(*f*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 34 (6).

(*g*) *Ibid.*, s. 34 (7); and see title ALLOTMENTS, Vol. I., pp. 341 *et seq.* As to the union of county boroughs with each other or with counties, see Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 54, 55. As to bridges and main roads, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 26.

(*h*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 100. As to its position in the county, see p. 372, *post;* as to its financial relationship with the county, see Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 35—38; pp. 353 *et seq.*, *post;* see also titles CORONERS, Vol. VIII., pp. 218 *et seq.;* COURTS, Vol. IX., p. 747; MAGISTRATES, pp. 531 *et seq.*, *post.*

(*i*) See generally, on this subject, title MAGISTRATES, p. 540, *post.* As to their position in the county, see p. 374, *post.*

(*k*) 45 & 46 Vict. c. 50, s. 250 (5), which preserved this right in the case of boroughs named in the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), Sched. A.

(*l*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 156.

(*m*) *Ibid.*, s. 187.

(*n*) Dover is now a larger quarter sessions borough, as to which see p. 372, *post.*

(*o*) Hastings is a county borough; and see p. 302, *post.*

(*p*) Hythe, Sandwich, and Rye are smaller quarter sessions boroughs; see

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were attached subordinate ports or towns, called their corporate members. Other towns and villages, known as unincorporated members, were also subject to their jurisdiction (*q*). With the exception of Hastings, the Cinque Ports and their ancient towns and members form, for local government purposes, part of the county in which they are respectively situate (*r*).

Cambridge and Oxford.

622. Cambridge is a municipal borough; Oxford is a city and a county borough. The composition of the council in each provides for the representation of the university, and the privileges of the chancellor, masters and scholars thereof are protected (*s*).

SUB-SECT. 4.—*Government of the Municipal Borough.*

(i.) *The Council.*

Constitution.

623. The municipal corporation acts by and through the council of the borough, which consists of the mayor, aldermen and councillors (*t*), but the council is not incorporated and acts in the name of the corporation.

(ii.) *The Councillors.*

(a) *In General.*

Who are eligible.

624. The councillors are to be "fit" persons elected by the burgesses (*a*). An unmarried woman is eligible as a councillor if she possesses the necessary qualifications (*b*).

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p. 372, *post*. Winchelsea (see note (*a*), p. 329, *post*) and Romney are not municipal boroughs.

(*q*) See also title COURTS, Vol. IX., pp. 127—129, and pp. 328, 329, *post*, as to certain prescriptive boroughs under the Municipal Corporations Act, 1883 (46 & 47 Vict. c. 18).

(*r*) The Statute of Bridges (stat. (1530) 22 Hen. 8, c. 5, s. 5) exempted the Cinque Ports and their members from its provisions. As to the commission of the peace for the liberties of the Cinque Ports, see title COURTS, Vol. IX., p. 128. The Cinque Ports Act, 1811 (51 Geo. 3, c. 36); the Cinque Ports Act, 1855 (18 & 19 Vict. c. 48); the Cinque Ports Act, 1857 (20 & 21 Vict. c. 1); and the Cinque Ports Act, 1869 (32 & 33 Vict. c. 53), were preserved by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 248 (7), and should be referred to for details as to the ports; see also Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 248; Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 38, 48.

(*s*) See Local Government Board's Provisional Orders Confirmation (No. 15) Act, 1889 (52 & 53 Vict. c. cxvi.); Local Government Board's Provisional Orders Confirmation Act, 1889 (52 & 53 Vict. c. xv.); Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 249, 257. As to the position of Cambridge and Oxford in the matter of contributions to certain expenses of paving, lighting, and cleansing streets and places as existing before 1875, see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 228.

(*t*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 10; and see Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 15 (1). The term "district council" includes the council of a borough (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 21 (3)).

(*a*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 11 (1). As to burgesses, see title ELECTIONS, Vol. XII., p. 182. As to the election of councillors, see title ELECTIONS, Vol. XII., pp. 339 *et seq.*

(*b*) Qualification of Women (County and Borough Councils) Act, 1907 (7 Edw. 7, c. 33). A married woman during coverture cannot be elected; see title ELECTIONS, Vol. XII., p. 183.

(b) *Statutory Qualification.*

Qualification.

625. A person is not qualified to be elected nor to be a councillor unless (*c*)—

(1) he is seised or possessed of real or personal property, or both, to the value of £1,000 in a borough having four or more wards, or of £500 in any other borough (*d*); or is rated to the poor rate on the annual value, *i.e.*, the rateable value (*e*) of £30 in a borough having four or more wards, or of £15 in other boroughs (*f*); and

(2) unless he is (i.) enrolled and entitled to be enrolled as a burgess (*g*); or (ii.) being entitled to be so enrolled in all respects except that of residence, he resides beyond seven miles, but within fifteen miles (*h*), of the borough, and is entered on the separate non-resident list (*i*) which the overseers are required to make (*k*); or (iii.) qualified at the time of his election to elect to the office of councillor (*l*).

(c) *Disqualification.*

Statutory disqualifications.

626. A person who, for any reason, does not possess the burgess qualification is not eligible as a councillor (*m*).

A person is disqualified (*n*) for election or for service as a councillor if and while he is an elective auditor (*o*); or holds any office or place of profit (*p*), other than that of mayor or sheriff, in

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(*c*) These provisions do not apply to the councils of Cambridge and Oxford, as to which see p. 302, *ante*.

(*d*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 11 (2) (c). The division of a borough into a greater number of wards is not to affect the qualification of councillors (*ibid.*, s. 30 (9)).

(*e*) *Baker* v. *Marsh* (1854), 4 E. & B. 144.

(*f*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 11 (2) (c); and see note (*d*), *supra*.

(*g*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50)., s. 11 (2) (a). See title ELECTIONS, Vol. XII., p. 182; and as to the burgess roll, see also *ibid.*, p. 344. The appearance of a person's name on the roll is not conclusive evidence that he is entitled to be enrolled (*Middleton* v. *Simpson* (1880), 5 C. P. D. 183). It is not necessary that he should be on the roll at the time of nomination (*Budge* v. *Andrews* (1878), 3 C. P. D. 510).

(*h*) Measured in a straight line on a horizontal plane, and determined by the map of the ordnance survey (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 231).

(*i*) *Ibid.*, s. 11 (2) (b).

(*k*) *Ibid.*, s. 49; see title ELECTIONS, Vol. XII., p. 205.

(*l*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 11 (3). As to the qualifications necessary to be entitled to appear on the burgess roll, see title ELECTIONS, Vol. XII., pp. 182 *et seq.*; and see *ibid.*, pp. 184, note (*d*), 342. Although the qualification is required only at the date of election, subsequent cessation of residence within the borough for six months disqualifies, and the seat becomes vacant, unless the person elected was at the time of his election and still continues to be qualified in some other manner (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 11 (4)).

(*m*) As to the burgess qualification, see notes (*g*) and (*l*), *supra*. As to the effect of acting in a corporate office when disqualified, see, generally, p. 296, *ante*.

(*n*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 12.

(*o*) *Ibid.*, s. 12 (1) (a). For elective auditors, see pp. 324, 325, *post*. This does not refer to the mayor's auditor, who must be a member of the council (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 25 (3)); see p. 324, *post*.

(*p*) The fact that the holder of the office does not take the profit, but allows

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the gift or disposal of the council (*q*); or is in holy orders (*r*); or is the regular minister of a dissenting congregation (*s*); or has, directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of, the council (*t*), subject, however, to certain exceptions (*a*); or has been convicted of misapplying corporate funds towards parliamentary election expenses (*b*); or is adjudicated bankrupt (*c*); or has been found guilty of corrupt practices or certain other offences against election law (*d*).

Disqualification by interest in a contract.

627. A person is interested in a contract none the less because the contract is not made directly with the council, but with a person who has so contracted (*e*). Nor does the fact that the amount involved is trifling (*f*), nor the fact that the amount of remuneration has not been fixed, make any difference (*g*).

A contract between a council and a person who was trustee for a councillor (*h*), and a contract between a member of a council and the

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another to do so, makes no difference (*Delane* v. *Hillcoat* (1829) 9 B. & C. 310). As to what will be considered to amount to an office of profit, see *Delane* v. *Hillcoat*, *supra*, *per* LITTLEDALE, J., at p. 313.

(*q*) This includes a person who holds a paid office under a distress committee established by the borough council under the Unemployed Workmen Act, 1905 (5 Edw. 7, c. 18 (*Crump* v. *Lewis*, [1908] 1 K. B. 858). As to the candidature and office of the mayor, see pp. 306, 309, *post;* of an alderman, see p. 308, *post;* and of the recorder, see p. 307, *post;* and title MAGISTRATES, p. 544, *post.*

(*r*) This disqualification does not apply to the members of the councils of Oxford and Cambridge.

(*s*) By "regular minister" is meant someone "in an analogous position to a beneficed clergyman." Where a deacon of a Baptist church refused an invitation to become the minister of an Independent chapel, but subsequently agreed to preach for the latter, without salary, for a specified period of some months, it was held that he was not disqualified for election as town councillor (*R.* v. *Oldham* (1869), L. R. 4 Q. B. 290).

(*t*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 12 (1) (c); see the text, *infra.*

(*a*) See p. 306, *post.*

(*b*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 124.

(*c*) See p. 307, *post.*

(*d*) See note (*f*), p. 266, *ante.*

(*e*) *Barnacle* v. *Clark*, [1900] 1 Q. B. 279 (a case under the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 34); see also *Le Feuvre* v. *Lankester* (1854), 3 E. & B. 530. In *Nutton* v. *Wilson* (1889), 22 Q. B. D. 744, C. A., disqualification was declared on the part of a person who was employed by contractors with a local board to do portions of such contract work; see also *Tomkins* v. *Jolliffe* (1887), 51 J. P. 247. The mere letting of a horse and cart at a fixed sum to a contractor for his work under a local authority has been held to disqualify (*Towsey* v. *White* (1826), 5 B. & C. 125); see *Whiteley* v. *Barley* (1888), 21 Q. B. D. 154, C. A.

(*f*) Such is the view now generally adopted; see *R.* v. *Rowlands*, [1906] 2 K. B. 292; *Nell* v. *Longbottom*, [1894] 1 Q. B. 767; *Nicholson* v. *Fields* (1862), 7 H. & N. 810; *Lewis* v. *Carr* (1876), 1 Ex. D. 484, C. A.; *Nutton* v. *Wilson* (1889), 22 Q. B. D. 744, C. A.; *Woolley* v. *Kay* (1856), 1 H. & N. 307.

(*g*) *Fletcher* v. *Hudson* (1881), 7 Q. B. D. 611, C. A. Where the member of a board of guardians collected rent on behalf of the board without any agreement as to commission and subsequently paid over the receipts after deducting commission, he was held to be disqualified, although he had returned the sum retained before the board had declared his office vacant (*R.* v. *Rowlands*, *supra*).

(*h*) *Simpson* v. *Ready* (1844), 12 M. & W. 736.

Contracts sufficient to disqualify.

trustees of a non-provided school with whom the council arranged to pay for the fuel for warming the building when used as a school (*i*), are sufficient to disqualify. A contract made colourably under the name of another person equally disqualifies, although the interest is concealed (*k*); but, on the other hand, a contract made by the agent of a member, purporting to be made on his behalf but contrary to his express directions, will probably not disqualify the member (*l*); and if the statutory prohibition is against "knowingly and willingly" entering into a contract, a contract made with an institution in ignorance that it is such an institution as the statute contemplates does not disqualify (*m*).

It is immaterial that the contract is one that cannot be sued on by reason of its not being under seal (*n*).

A person is interested in a contract if he takes an assignment of it by way of security, even before his election (*o*).

How long disqualification lasts.

628. The disqualification continues so long as the contract exists and the interest in it remains (*p*), so that where a person having a contract with a local authority obtained a release from the committee of the authority, subject to the approval of the authority, which was not given until after his nomination as a candidate, he was held to be disqualified (*q*); but if the contract is terminated no penalty can be recovered for subsequent acts (*a*), unless the interest in the contract (*b*) has caused the defendant to cease to be a member altogether (*c*).

(*i*) *Cox* v. *Truscott* (1905), 69 J. P. 174; see *Todd* v. *Robinson* (1884), 14 Q. B. D. 739, C. A.

(*k*) *Walsh* v. *Grimsby* (1900), *Times*, 30th November.

(*l*) *Miles* v. *McIlwraith* (1883), 8 App. Cas. 120, P. C.

(*m*) *Royse* v. *Birley* (1869), L. R. 4 C. P. 296.

(*n*) *R.* v. *Francis* (1852), 18 Q. B. 526.

(*o*) *Hunnings* v. *Williamson* (1883), 11 Q. B. D. 533, C. A.

(*p*) *Lewis* v. *Carr* (1876), 1 Ex. D. 484, C. A.

(*q*) *Re Gloucester Municipal Election Petition*, 1900, *Ford* v. *Newth*, [1901] 1 K. B. 683; see also *Cox* v. *Truscott* (1905), 69 J. P. 174.

(*a*) *Lewis* v. *Carr*, *supra*; *Cox* v. *Truscott*, *supra*.

(*b*) *Fletcher* v. *Hudson* (1881), 7 Q. B. D. 611, C. A. A borough councillor who, during his term of office, takes a disqualifying interest in a contract is suspended from office, but may resume and act in it when his interest ceases (*Cox* v. *Truscott*, *supra*). The disqualification arises "if and while" he is so interested (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 12 (1)). In the case of members of urban and rural district councils and of parish councils and of boards of guardians, they are by such interest "disqualified for being elected or being councillors" (see pp. 241, 264, *ante*), and there is no provision which limits the period of their qualification to the period of their disqualifying interest (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 46 (1), which expressly excludes the councils of boroughs; see *R.* v. *Rowlands*, [1906] 2 K. B. 292).

(*c*) When the interest ceases is a question upon which there has been much divergence of opinion. It has been doubted whether the mere existence of a debt for goods supplied constitutes such an interest (*Re Gloucester Municipal Election Petition*, 1900, *Ford* v. *Newth*, *supra*); and in one modern case it was expressly held that it does not (*Cox* v. *Truscott*, *supra*; and see note (*b*), *supra*; see also *Woolley* v. *Kay* (1856), 1 H. & N. 307); but it is submitted that such decision is not sound, and that the interest in the contract remains so long as the contract is unfulfilled on either side; see *O'Carroll* v. *Hastings*, [1905] 2 I. R. 590).

SECT. 5. The Borough.

Assignment.

An assignment of the benefits of a contract before election, if a liability under the contract remains with the candidate (*d*), or an assignment of the contract between nomination and the date of the poll (*e*), or an assignment of a contract before the election without the privity of the local authority (*f*), will not remove the disqualification.

Evidence of acting as a member.

629. The production of the minute book representing a person as having attended meetings, and of the attendance book signed by him, is evidence of his having acted as a member of the authority (*g*), and the production of an invoice extending over a considerable period is sufficient evidence of the concern or interest in a contract (*h*).

Contracts which do not disqualify.

630. The disqualification does not attach to any share or interest in any lease, sale, or purchase of land, or any agreement for the same (*i*); or in any agreement for the loan of money or any security for the payment of money only (*k*); or in any newspaper in which an advertisement relating to the affairs of the borough or council is inserted; or in any company which contracts with the council for lighting or supplying with water or insuring against fire any part of the borough, or in any railway company, or any company incorporated by Act of Parliament or royal charter, or under the Companies Acts (*l*); or in any society registered under the Industrial and Provident Societies Acts, 1893 and 1895 (*m*).

Disqualification by office.

631. A mayor cannot be a candidate at an election of councillors where he is acting as returning officer (*n*).

(*d*) *Cox* v. *Ambrose* (1890), 55 J. P. 23.

(*e*) *Harford* v. *Linskey*, [1899] 1 Q. B. 852.

(*f*) *R.* v. *Franklin* (1872), 6 I. R. C. L. 239.

(*g*) *Hunnings* v. *Williamson* (1883), 11 Q. B. D. 533, C. A.

(*h*) *Nicholson* v. *Fields* (1862), 7 H. & N. 810.

(*i*) This includes the lease of a sewage farm granted by a local authority to one of its members with onerous covenants on both sides (*R.* v. *Gaskarth* (1888), 5 Q. B. D. 321). A letting for a single day is within the exception (see *Nell* v. *Longbottom*, [1894] 1 Q. B. 767).

(*k*) *Le Feuvre* v. *Lankester* (1854), 3 E. & B. 530 (defendant contracted to supply a town with water: he assigned the contract and the uncompleted works to the town authority, with the covenant, *inter alia*, that the authority would pay defendant £850 if they abandoned the works, or, having completed them, should obtain a specified supply of water of a certain quality. The money remained unpaid when the defendant was elected and acted as mayor of the town, but it was held that he was not disqualified, because the covenant was a security for the payment of money only).

(*l*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 12 (2). See, *e.g.*, *Todd* v. *Robinson* (1884), 14 Q. B. D. 739, C. A.; *City of London Electric Lighting Co.* v. *London Corporation*, [1903] A. C. 434. As to the Companies Acts, see title COMPANIES, Vol. V., pp. 1 *et seq.*

(*m*) Municipal Corporations Act, 1906 (6 Edw. 7, c. 12), s. 2; and see, generally, title INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES, Vol. XVII., pp. 1 *et seq.*

(*n*) *R.* v. *Owens* (1859), 2 E. & E. 86; but the fact of his being *ex officio* the returning officer does not prevent his seeking election as councillor provided that he does not act as returning officer (*R.* v. *White* (1867), L. R. 2 Q. B. 557); see *Fanagan* v. *Kernan* (1881), 8 L. R. Ir. 44; and title ELECTIONS, Vol. XII., p. 340.

The recorder of a borough is not, during his office, eligible to be an alderman or councillor of a borough (*o*).

An officer of the regular forces on the active list cannot hold any office in any municipal corporation (*p*).

Bankrupts.

632. A bankrupt cannot be elected to nor hold or exercise the office of mayor, alderman, or councillor (*q*).

(d) *Term of Office.*

Retirement.

633. Councillors are elected for three years (*r*); retiring councillors are eligible for re-election unless disqualified (*s*).

The charter of a new borough may fix the date of the first retirement of the councillors (*t*).

Avoidance of office: (i.) by bankruptcy;

634. A mayor, alderman, or councillor becomes immediately disqualified and ceases to hold office if he is declared bankrupt (*a*), or compounds by deed with his creditors (*b*), or makes an arrangement or composition with his creditors under the Bankruptcy Acts (*c*), by deed or otherwise (*d*). As regards subsequent elections the disqualification caused by a compounding or composition ceases on payment of the debts in full, and, when caused by an arrangement, it ceases upon his obtaining his certificate of discharge (*e*).

(*o*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 163 (6); see title MAGISTRATES, p. 544, *post*.

(*p*) Army Act, 1881 (44 & 45 Vict. c. 58), s. 146, as amended by the Army (Annual) Act, 1889 (52 & 53 Vict. c. 3), s. 6. But an officer of the auxiliary forces can; and his competence or liability to be nominated or elected to or to hold office of sheriff, mayor, or alderman, or an office in a municipal corporation, is not to be affected by reason of the battalion or corps to which he belongs being assembled for annual training at the time of such nomination or election, or during the time of his tenure of office (Army Act, 1881 (44 & 45 Vict. c. 58), s. 181 (5)); and see, generally, title ROYAL FORCES.

(*q*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 32 (1) (d); see as to removal of disqualification after discharge, p. 265, *ante*, and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 88 *et seq.*, and the text, *infra*.

(*r*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 13 (1), (2), 52. The third who retire each year (see title ELECTIONS, Vol. XII., pp. 339, 340) are those who have been longest in office without re-election (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 13 (3)). As to casual vacancies, see p. 299, *ante*.

(*s*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 37.

(*t*) *Ibid.*, s. 212.

(*a*) As to this, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 88.

(*b*) A composition with creditors which was not by deed and was not under the Debtors Act, 1869 (32 & 33 Vict. c. 62), was held not to disqualify under corresponding words in the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), s. 52 (*Aslatt* v. *Southampton Corporation* (1880), 16 Ch. D. 143). An assignment by a debtor of all his property by deed to a trustee for the benefit of those creditors who should sign the deed, without any sum by way of composition being mentioned, is not a "composition with creditors" (*R.* v. *Cooban* (1886), 18 Q. B. D. 269).

(*c*) See, generally, title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 1 *et seq.*

(*d*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 39 (1) (a); Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 34. The above provision does not disqualify the candidate for election (*R.* v. *Chitty* (1836), 5 Ad. & El. 609); but see now Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 32, as amended by the Bankruptcy Act, 1890 (53 & 54 Vict. c 71), s. 9, and note (*q*), *supra*.

(*e*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 39 (3). As to the cessation of the disqualification by bankruptcy, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 89, 91, 269.

SECT. 5. The Borough.

(ii.) by absence.

635. Continuous absence from the borough, except in case of illness, on the part of an alderman or councillor (*f*) for more than six months, and on the part of the mayor for more than two months, disqualifies the officer, and he thereupon ceases to hold office (*g*) and becomes liable to the same fine as for non-acceptance of office, recoverable summarily (*h*); but the disqualification, as regards subsequent elections, ceases on his return (*i*).

Procedure on avoidance of office.

636. When a councillor thus (*j*) becomes disqualified, the council must forthwith declare the office to be vacant, and must signify the same by notice signed by three members of the council, countersigned by the town clerk, and fixed on the town hall (*k*). Thereupon the office becomes vacant (*l*), but not before (*m*). No declaration appears to be necessary where actual bankruptcy supervenes, since by the statute the office becomes *ipso facto* vacant (*n*). Upon the disqualification attaching, it is not competent for the disqualified office-holder to resign (*o*).

(iii.) *The Aldermen.*

Election and retirement.

637. The number of aldermen is one-third of the number of councillors (*p*). They are elected (*a*) by the councillors for six

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(*f*) The absence on active service, or on service beyond the seas, of an officer or soldier of the auxiliary forces or of the reserve forces does not disqualify him nor vacate his office as a member of the borough council, nor cause him to incur any fine or other liability (Members of Local Authorities Relief Act, 1900 (63 & 64 Vict. c. 46), s. 2). The expressions "soldier," "reserve forces," "auxiliary forces," "active service," and "beyond the seas" have the meanings respectively assigned to them by the Army Act, 1881 (44 & 45 Vict. c. 58), ss. 189, 190 (6), (9), (12), (25); see title ROYAL FORCES.

(*g*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 39 (1) (b).

(*h*) *Ibid.*, s. 39 (4). As to fine on non-acceptance of office, see p. 296, *ante.*

(*i*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 39 (4).

(*j*) See p. 307, *supra*, and the text, *supra.*

(*k*) It must be fixed in some conspicuous place on or near the outer door of the town hall, or, where there is no such hall, in some conspicuous place in the borough or ward to which the notice relates (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 59), s. 232). In the case of disqualification by absence, the absenting member must be given an opportunity of explaining his absence before proceedings can be taken to elect another member; see *Richardson* v. *Methley School Board*, [1893] 3 Ch. 510.

(*l*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 39 (2). This procedure applies only in the case of a disqualification under *ibid.*, s. 39; compare the procedure on resignation; see p. 298, *ante.* As to disqualification arising from bankruptcy, see note (*n*), *infra.*

(*m*) *R.* v. *Leeds Corporation* (1838), 7 Ad. & El. 963; *R.* v. *Welchpool Corporation* (1876), 35 L. T. 594; *Hardwick* v. *Brown* (1873), L. R. 8 C. P. 406; see *Pease* v. *Lowden*, [1899] 1 Q. B. 386.

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 34: "If a person is adjudged bankrupt whilst holding the office of mayor, alderman, councillor . . . . his office shall thereupon become vacant."

(*o*) *Hardwick* v. *Brown* (1873), L. R. 8 C. P. 406; *Futcher* v. *Saunders* (1885), 49 J. P. 424.

(*p*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 14 (2).

(*a*) See title ELECTIONS, Vol. XII., pp. 354 *et seq.*; an alderman of a municipal borough shall not, as such, vote in the election of an alderman of the borough (Municipal Corporations Amendment Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 19), s. 1). As to their retirement and qualification, see *ibid.*; see also *ibid.*, p. 340, note (*a*). As to the order of retirement in the case of new boroughs, see

years (*b*). A retiring alderman is eligible for re-election, unless otherwise disqualified (*c*). An alderman elected to and accepting the office of councillor vacates his office of alderman (*d*).

Disqualification.

The rules as to the disqualification of councillors owing to bankruptcy, insolvency, and absence apply to aldermen (*e*).

(iv.) *The Mayor.*

Election.

638. The mayor (*f*) is elected (*g*) by the council from among the aldermen or councillors or persons qualified to be such (*h*). An outgoing mayor is eligible if not disqualified (*i*), and so is an outgoing alderman (*k*).

Term of office.

639. His term of office is for one year, but he continues in office until his successor has accepted office and made and subscribed the necessary (*l*) declaration (*m*); and although the mayor is a councillor whose office expires on the 1st November (*n*), and therefore ceases to be a councillor, he continues as a supernumerary member of the council until his successor as mayor has accepted office (*o*).

Remuneration, social position.

640. The council may grant to the mayor such remuneration as it thinks reasonable (*p*). Socially the mayor has precedence in all places in the borough (*q*), except in the city of Oxford and the borough of Cambridge, where the mayors have not precedence over the vice-chancellors of the universities (*r*).

Position as magistrate and chief officer.

During his term of office, and the year following unless he is disqualified to be mayor, he is by virtue of his office a justice for

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Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 212 (1) (b). As to filling casual vacancies, see p. 299, *ante*.

(*b*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 14 (1), (5).

(*c*) See p. 303, *ante*.

(*d*) *R.* v. *Bangor Corporation* (1886), 18 Q. B. D. 349, C. A.

(*e*) See p. 307, *ante*.

(*f*) The title of "lord mayor" has in recent times been conferred by letters patent upon the chief magistrate, *e.g.*, in Manchester, Liverpool, Birmingham, Bristol, York, Sheffield, Leeds, Norwich, Bradford, Newcastle-on-Tyne, Cardiff.

(*g*) See title ELECTIONS, Vol. XII., p. 352. As to a casual vacancy in the office of mayor, see p. 299, *ante*.

(*h*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 15 (1). But an outgoing alderman shall not, as alderman, vote in the election of a mayor (Municipal Corporations Amendment Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 19), s. 1 (1). As to the qualifications of aldermen and councillors, see p. 303, *ante*; the text, *supra*; and title ELECTIONS, Vol. XII., pp. 339, 354.

(*i*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 37.

(*k*) *Ibid.*, s. 15 (2).

(*l*) *Ibid.*, ss. 13, 52.

(*m*) *Ibid.*, s. 15 (3).

(*n*) See title ELECTIONS, Vol. XII., p. 339.

(*o*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 38; *R.* v. *Owens* (1859), 2 E. & E. 86.

(*p*) *Ibid.*, s. 15 (4). As to additional remuneration on special occasions, see *A.-G.* v. *Cardiff Corporation*, [1894] 2 Ch. 337; compare also *A.-G.* v. *Blackburn Corporation* (1887), 57 L. T. 385 (jubilee festivities); *A.-G.* v. *East Barnet Valley Urban District Council* (1911), 131 L. T. Jo. 218 (coronation festivities).

(*q*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 15 (5); *Ex parte Birmingham* (*Mayor*) (1860), 3 E. & E. 222. The mayor is not entitled to preside when sitting as a justice within the borough along with county justices transacting county business (*Lawson* v. *Reynolds*, [1904] 1 Ch. 718).

(*r*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 257 (2).

SECT. 5. The Borough.

the borough (*s*), and, whilst mayor of a borough other than a county borough, he is also a justice of the peace for the county in which the borough is situate (*a*). The mayor of a borough named in the Schedules to the Municipal Corporations Act, 1835 (*b*), is the successor of and represents the chief officer of the borough (*c*).

Disqualification.

641. The rules as to the disqualification of councillors by bankruptcy, insolvency, or absence apply to the mayor (*d*).

(v.) *The Deputy Mayor.*

Appointment.

642. During the illness or absence of the mayor he may appoint an alderman or councillor to act as his deputy (*e*), who may do all acts which the mayor might do, except that of taking the chair at the council, unless specially appointed by the meeting to do so (*f*), and except that of acting as a justice or in any judicial capacity, unless he is a justice (*g*).

(vi.) *Powers of the Council.*

Nature of powers.

643. The council exercises all powers which are vested in the corporation (*h*). The powers and duties possessed by or imposed on the municipal corporation may consist of those conferred or imposed upon it by the terms of its charter, or by prescription, or by statute. The last include those powers and duties which it may or must exercise under statutes specially relating to municipal corporations (*i*), or which it may or must exercise as being the local authority appointed to carry into execution the provisions of a statute relating to particular subjects (*k*), and those conferred upon it, as an urban district council, by the Local Government Act, 1894 (*l*).

(*s*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 155 (1). Before acting he must take the oaths required to be taken by justices (*ibid.*, s. 157 (2)); and see title MAGISTRATES, p. 539, *post*. The mayor is entitled to act as such justice whether the borough has a separate commission of the peace or not (*Wilson* v. *Strugnell* (1881), 7 Q. B. D. 548). Although a woman may be elected mayor she cannot, by virtue of her office, be a justice of the peace (Qualification of Women (County and Borough Councils) Act, 1907 (7 Edw. 7, c. 33), s. 1).

(*a*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 22, 35. As to the qualifications and oaths of justices, see title MAGISTRATES, pp. 538 *et seq.*, *post*. As to the precedence of the mayor as a justice, see Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 155 (2); *Lawson* v. *Reynolds*, [1904] 1 Ch. 718; and title MAGISTRATES, p. 540, *post*.

(*b*) 5 & 6 Will. 4, c. 76.

(*c*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 15 (6); as to the saving for existing corporations, see *ibid.*, s. 250.

(*d*) See p. 307, *ante*.

(*e*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 16 (1). The appointment must be signified to the council in writing and be recorded in its minutes (*ibid.*, s. 16 (2)). A defect in his appointment does not invalidate his acts (*ibid.*, s. 237). As to the appointment of a deputy mayor to act in elections when the mayor is absent or dead, see title ELECTIONS, Vol. XII., p. 340.

(*f*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 16 (3), Sched. II., r. 9.

(*g*) *Ibid.*, s. 16 (3).

(*h*) Whether by the Municipal Corporations Act, 1882, or otherwise (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 10 (1)).

(*i*) *I.e.*, under the Municipal Corporations Acts.

(*k*) See titles included in list of cross references, at pp. 233—236, *ante*.

(*l*) 56 & 57 Vict. c. 73, s. 21 (3). As to these conferred powers, see p. 311, *post*.

Powers conferred by Local Government Act, 1894.

Certain powers possessed by parish councils under the Local Government Act, 1894 (*m*), may be conferred upon a borough council or any representative body within the borough, by an order of the Local Government Board, on the application of the council or any representative body in the borough. This applies equally to a county borough (*m*).

The powers, duties, and liabilities of justices and quarter sessions transferred to urban district councils are transferred to county boroughs as if they were urban districts and as if their councils were district councils (*n*).

Powers under Municipal Corporations Act, 1882.

644. The powers and duties exercisable as a municipal corporation include the appointment of officers (*o*), the regulation of the meetings and proceedings of the council (*p*), the framing of bye-laws (*q*), the acquisition and holding of land (*r*), stock, and other property, including advowsons (*s*), the maintenance of bridges (*t*), the levying of rates (*a*), the control and expenditure of the borough fund (*b*), the power of borrowing (*c*), the control of the borough police (*d*).

Under Public Health Acts.

645. The council is the authority for the purpose of enforcing the Public Health Acts (*e*), and all the powers and duties formerly exercised in a borough under local Acts became in 1875 vested in and exercisable by the borough council (*f*). The Local Government Board has power by provisional order to repeal or amend any such local Act (*g*).

On conversion of urban district into borough.

646. When an urban district or part thereof is constituted, or included in, a borough, all the statutory powers, rights, liabilities, and property exercisable by, or attaching to, or vested in, the urban district council, pass to and become exercisable by, and vested in, the council of the borough (*h*).

SUB-SECT. 5.—*Officers.*

Officers.

647. The officers of the council, all of whom should be appointed

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(*m*) 56 & 57 Vict. c. 73, s. 33.

(*n*) *Ibid.*, s. 32. The powers transferred are those mentioned in *ibid.*, s. 27, for which see p. 266, *ante*.

(*o*) See the text, *infra*.

(*p*) See p. 314, *post*.

(*q*) See p. 328, *post*.

(*r*) See p. 318, *post*.

(*s*) See p. 295, *ante*. As to advowsons and ecclesiastical patronage, see title ECCLESIASTICAL LAW, Vol. XI., pp. 559 *et seq.*

(*t*) See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 189.

(*a*) See title RATES AND RATING.

(*b*) See p. 319, *post*.

(*c*) See p. 317, *post*.

(*d*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 190—196; and see title POLICE.

(*e*) See, generally, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*f*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 10; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 133—138; see also *Kidderminster Corporation* v. *Court* (1859), 1 E. & E. 770.

(*g*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 303.

(*h*) *Ibid.*, s. 310.

SECT. 5. The Borough.

under seal (*i*), consist of the town clerk (*k*), the treasurer (*l*), the clerk of the peace in a quarter sessions borough (*m*), and such other officers as by the council may be thought necessary (*n*).

Remuneration.

The remuneration of the officers, which is fixed by the council (*o*), covers all duties which are imposed by statute upon them (*p*). Subject to this, the remuneration and the right to payments for work not specifically mentioned in the agreement are governed by the terms and the construction of the appointment (*q*).

Security.

Officers must give security for the due execution of their offices (*r*).

Town clerk.

648. The appointment of a town clerk by the council is compulsory, and a vacancy in the office must be filled within twenty-one days of its occurrence, and the person appointed must not be a member of the council nor treasurer nor elective auditor (*s*).

Duties.

The town clerk holds office during the pleasure of the council (*t*). He has charge and custody of, and is responsible for, the charters, deeds, records, and documents of the borough, which must be kept according to the directions of the council (*a*).

Deputy.

The council may during the illness or absence of the town clerk appoint a deputy, who holds office at the pleasure of the council (*b*),

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(*i*) See *Arnold* v. *Poole Corporation* (1842), 4 Man. & G. 860; *R.* v. *Stamford Corporation* (1844), 6 Q. B. 433; *Smith* v. *Cartwright* (1851), 6 Exch. 927. Where, however, proceedings were taken by *certiorari* under the Municipal Corporation (General) Act, 1837 (7 Will. 4 & 1 Vict. c. 78), s. 44, to decide the validity of certain payments made to the town clerk by a corporation, it was held that it was no objection, at least after payment, that the retainer for extra services was not under seal (*R.* v. *Prest* (1850), 16 Q. B. 32; and as to this case, see also p. 320, *post*).

(*k*) See the text, *infra*.

(*l*) See p. 313, *post*.

(*m*) As to the clerk of the peace, see title MAGISTRATES, p. 624, *post*.

(*n*) Any unnecessary officer may be discontinued (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 19).

(*o*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 20.

(*p*) For example, a town clerk was held not entitled to extra remuneration for business done in pursuance of the directions of the Reform Act (5 & 6 Will. 4, c. 76) (*Jones* v. *Carmarthen Corporation* (1841), 8 M. & W. 605).

(*q*) See *Thomas* v. *Swansea Corporation* (1842), 2 Dowl. (N. S.) 470; *R.* v. *Prest*, *supra*.

(*r*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 20. As to sureties and the form of guarantee, see p. 275, *ante*. As to the liability of officers to account, see Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 21; *R.* v. *Downes* (1875), 1 Q. B. D. 25; *Lichfield Corporation* v. *Simpson* (1845), 8 Q. B. 65.

(*s*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 17, 18, 25. A town clerk has no lien on documents held merely by virtue of his office, but has a lien on the papers of a corporation with respect to which he has done work as a solicitor (*R.* v. *Sankey* (1836), 5 Ad. & El. 423); and see, generally, titles LIEN, pp. 1 *et seq.*, *ante*; SOLICITORS.

(*t*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 17 (2). The effect of holding office at the pleasure of the council is that the official can be dismissed at any time without notice and without any reason being given; see *Hayman* v. *Rugby School* (*Governors*) (1874), L. R. 18 Eq. 28, *per* MALINS, V.-C., at p. 68; *Ex parte Richards* (1878), 3 Q. B. D. 368.

(*a*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 17 (3); for the duties of the town clerk in connection with registration of voters and elections, see title ELECTIONS, Vol. XII., p. 131.

(*b*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 17 (5); and see note (*t*), *supra*.

and by or to whom all things required or authorised by law to be done by or to the town clerk may be effected (*c*). A defect in his appointment does not invalidate his acts (*d*). In the event of there being no town clerk and no deputy town clerk, or if they are incapable of acting, the mayor may appoint someone for the purpose of all acts required to be done by or with respect to the town clerk (*e*).

Treasurer.

649. The appointment of a treasurer is compulsory, and a vacancy in the office must be filled within twenty-one days of its occurrence (*f*). He must not be town clerk nor a member of the council (*g*) nor an elective auditor (*h*), and he holds office during the pleasure of the council (*i*). In the event of there being no treasurer, or of his incapacity to act, the mayor may appoint someone for the purpose of all acts authorised or required to be done by or with respect to the treasurer (*k*).

Duties.

He is responsible for the borough fund, and all payments to or out of the fund are made by him (*l*). His position is that of a trustee and not of a servant to the council, and it is his duty to disobey orders which are unlawfully made upon him by the council (*m*). If proceedings are necessary to collect or safeguard moneys which ought to be paid to the borough fund, he and he alone is the proper person to take them (*n*).

Officers under Public Health Acts.

As an urban authority under the Public Health Acts (*o*) the borough council is required to appoint the officers necessary for the execution of their statutory powers (*p*), and the provisions relating to the disabilities of such officers equally apply (*q*).

SUB-SECT. 6.—*Contracts.*

Contracts.

650. The contracts of the council are governed by the general law relating to the contracts of corporations (*r*), and although a municipal corporation when acting as an urban sanitary authority is one corporate body (*s*), it is, when so acting, governed by the provisions which regulate contracts made by such authorities (*t*).

(*c*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 17 (6).
(*d*) *Ibid*, s. 237.
(*e*) *Ibid.*, s. 43.
(*f*) *Ibid.*, ss. 18 (1), (3), 230 (1).
(*g*) *Ibid.*, s. 18 (4).
(*h*) *Ibid.*, s. 25 (2).
(*i*) *Ibid.*, s. 18 (2). As to the effect of this, see note (*t*), p. 312, *ante.*
(*k*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 43.
(*l*) *Ibid.*, s. 142 (1).
(*m*) *A.-G.* v. *De Winton*, [1906] 2 Ch. 106.
(*n*) *R.* v. *Frost* (1838), 8 Ad. & El. 822. In this case a mandamus was refused to a burgess who was seeking to compel the mayor to account for rents of corporate lands, on the ground that the treasurer was the proper person to take action.
(*o*) See, generally, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.
(*p*) See p. 272, *ante.*
(*q*) See p. 274, *ante.*
(*r*) See title CORPORATIONS, Vol. VIII., pp. 379 *et seq.*
(*s*) *Andrews* v. *Ryde Corporation* (1874), L. R. 9 Exch. 302.
(*t*) *Young & Co.* v. *Royal Leamington Spa Corporation* (1883), 8 App. Cas. 517. For the statutory provisions relating to contracts of urban sanitary authorities, see p. 268, *ante.*

SECT. 5.
The Borough.

SUB-SECT. 7.—*Proceedings.*

(i.) *Of the Council.*

Meetings.

651. The meetings and proceedings of the council are regulated by statute (*u*), but, subject thereto, the council may make, vary, and revoke standing orders for the regulation of its proceedings and business (*a*). There must be four quarterly meetings in each year for the transaction of general business (*b*), the first being held at noon on the 9th November, or on the 10th, if the 9th be a Sunday (*c*), and the others on such dates and at such times as the council may by standing order determine (*d*). Other meetings may be convened by the mayor on his own initiative, or on a written requisition signed by five members of the council, and on his refusal, or on his neglect for seven (*e*) days after the presentation of the requisition, to do so, any five members may convene a meeting (*f*). Three clear days' (*g*) notice of any meeting, stating the time and place thereof, must be fixed on the town hall (*h*). The notice must be signed by the mayor or the five members, as the case may be, and in the latter event it must specify the business to be transacted (*i*).

Summoning.

652. A summons to attend a meeting must be issued and left or delivered by registered post at the usual place of abode of each member of the council at least three clear days (*k*) before the meeting. It must be signed by the town clerk, and must specify the business proposed to be transacted at the meeting (*l*). Want of service of a summons on any member does not affect the validity of the meeting (*m*).

No business can be transacted at a meeting which is not specified in the summons, except in the case of a quarterly meeting, at which

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(*u*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 22 (1), and Sched. II., which last is to be read and have effect as part of the Act (*ibid.*, s. 7 (4)). Meetings must not be held on licensed premises (Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 21 (3), 61).

(*a*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), Sched. II., 13. If an action be brought to restrain a council from acting contrary to its standing orders the proceedings must be in the name of the Attorney-General (*Watson* v. *Hythe Borough Council* (1906), 70 J. P. 153); and see title CORPORATIONS, Vol. VIII., pp. 364, 365.

(*b*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), Sched. II., 1.

(*c*) *Ibid.*, s. 230; or a day appointed for public fast, humiliation, or thanksgiving (*ibid.*).

(*d*) *Ibid.*, Sched. II., 2.

(*e*) See note (*g*), *infra.*

(*f*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), Sched. II., 3, 4.

(*g*) Exclusive of the day of publication and of the day of the meeting. Sundays and the other days mentioned in *ibid.*, s. 230 (see note (*c*), *supra*, are not to be reckoned (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 230). As to periods of time generally, see title TIME.

(*h*) As to fixing on the town hall, see note (*k*), p. 308, *ante.*

(*i*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), Sched. II., 5.

(*k*) See note (*g*), *supra.*

(*l*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), Sched. II., 6.

(*m*) *Ibid.*, Sched. II., 7.

business prescribed by the statute may also be transacted (*n*). In case a quarterly meeting is adjourned in order to complete unfinished business, no other business can be transacted at the adjourned meeting, unless notice of it has been given in the summons of that adjourned meeting (*o*).

Chairman.

653. The mayor is the chairman at all meetings. In his absence the deputy mayor may be chosen to preside, but only if specially appointed to do so (*p*). Failing the presence of the mayor, or the presence and choice of the deputy mayor, an alderman or, in the absence of all the aldermen, a councillor may be chosen as chairman (*q*).

Conduct of business.

654. All questions are decided by a majority of the members voting, provided that the whole number of members present, whether voting or not, is not less than a third of the council (*r*), except in the matter of making bye-laws, for which purpose there must be a quorum of two-thirds of the council present (*s*).

Casting vote.

The chairman, if not disqualified from voting (*t*), has a second or casting vote in the event of the votes being equal (*a*); and he may give a conditional casting vote to operate in the event of the voting being equal (*b*).

Disqualification from voting.

No member may vote or take part in the discussion of any matter before the council in which he has, directly or indirectly, by himself or his partner, any pecuniary interest (*c*), but no penalty is imposed in the event of his so doing, and the council has no power to remove him (*d*).

(*n*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), Sched. II., 8. Such business relates to the quarterly meeting in November. The order of business at that meeting is the election of the mayor (*ibid.*, s. 61 (2); see p. 309, *ante*); the appointment of sheriff (if any) (*ibid.*, s. 170 (2)); the election of aldermen (*ibid.*, s. 60 (2); see p. 308, *ante*). As to the necessity of preserving this order, see title ELECTIONS, Vol. XII., p. 352. The assignment of an alderman for the purpose of returning officer at a ward election is also part of the business at this meeting (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 67).

(*o*) *R.* v. *Grimshaw* (1847), 10 Q. B. 747.

(*p*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 16 (3).

(*q*) *Ibid.*, Sched. II., 9.

(*r*) *Ibid.*, Sched. II., 10.

(*s*) *Ibid.*, s. 23 (2). In certain cases special majorities are required; see the Borough Funds Act, 1872 (35 & 36 Vict. c. 91); Honorary Freedom of Boroughs Act, 1885 (48 & 49 Vict. c. 29), s. 1; Municipal Corporations Act, 1893 (56 & 57 Vict. c. 9), s. 2; County Police Act, 1840 (3 & 4 Vict. c. 88), s. 14.

(*t*) See the text, *infra*.

(*a*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), Sched. II., 11. In two instances a casting vote is given to the chairman at a council meeting, although for some reason he has no first vote, namely, in the election of aldermen (*ibid.*, s. 60 (6), as amended by the Municipal Corporations Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 19), s. 1 (2)), and of mayor (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 61 (4)). As to these, see title ELECTIONS, Vol. XII., pp. 353, 355.

(*b*) *Bland* v. *Buchanan*, [1901] 2 K. B. 75.

(*c*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 22 (3). See also the cases referred to under *ibid.*, s. 12, p. 304, *ante*.

(*d*) *R.* v. *Ryde Corporation* (1873), 37 J. P. 725. As the council is not acting judicially the intervention of a disqualified councillor does not vitiate the proceedings (see *Murray* v. *Epsom Local Board*, [1897] 1 Ch. 35). When acting judicially the presence of a person interested in the question discussed may vitiate the proceedings (see *R.* v. *London County Council, Ex parte Akkersdyk, Ex parte Fermenia*, [1892] 1 Q. B. 190).

SECT. 5. The Borough.

Minutes.

655. Minutes of the proceedings of every meeting must be drawn up and entered in a book kept for that purpose (*e*), and signed at the same or the next ensuing meeting by the mayor or by a member of the council describing himself as, or appearing to be, chairman of the meeting at which the minutes are signed, and when so authenticated they are receivable in evidence without further proof (*f*). Until the contrary is proved, every meeting in respect of the proceedings of which a minute has been so made is to be deemed to have been duly convened and held, and all the members of the meeting are to be deemed to have been duly qualified (*g*).

Inspection of minutes of council.

The minutes are open to the inspection of a burgess at any reasonable time during the ordinary hours of business on payment of 1*s*., and he may make a copy thereof or take an extract therefrom (*h*), and this also applies to minutes of committees which have been submitted to the council for approval, and whether they have or have not been approved (*i*).

Admission of public.

656. Neither the public nor the burgesses nor representatives of the Press have any common law right to attend the meetings of the council, unless the council expressly or impliedly consents to such attendance (*k*).

(ii.) *Of the Committees.*

Appointment.

657. The council may appoint committees in its discretion (*l*). The committees may be either of a general or a special nature, and may consist of such number of councillors as the council may think fit. The acts of every committee must be submitted to the council for its approval (*m*), and this approval may be given although the acts approved have already been done (*n*).

Delegation of powers.

The delegation of powers by a council to a committee is not an

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(*e*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), Sched. II., 12.

(*f*) *Ibid.*, s. 22 (5). As to forgery of the signature to any minute, or the tendering in evidence of minutes, knowing that the signature is false or counterfeit, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 740.

(*g*) *Ibid.*, s. 22 (6).

(*h*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 233 (1), (6). Obstruction of inspection, or refusal to give copies or extracts to persons entitled, is punishable, on summary conviction, by a fine not exceeding £5 (*ibid.*, s. 233 (7)). As to enforcement of orders made on summary conviction, see title MAGISTRATES, p. 604, *post*.

(*i*) *Williams* v. *Manchester Corporation* (1897) 45 W. R. 412. As to the inspection of books, accounts, and documents of a district council, see p. 285, *ante*; and *R.* v. *Godstone Rural District Council*, [1911] 2 K. B. 465 (inspection of brief and opinion obtained with the view of defending threatened proceedings refused).

(*k*) *Tenby Corporation* v. *Mason*, [1908] 1 Ch. 457, C. A. As to the admission of Press representatives, see title PRESS AND PRINTING.

(*l*) As to the power to resign from a committee, see *R.* v. *Sunderland Corporation*, [1911] 2 K. B. 458. For special provisions relating to watch committees, see p. 321, *post*, and title POLICE. As to education committees, see title EDUCATION, Vol. XII., p. 19.

(*m*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 22 (2). As to proceedings of committees, see *ibid.*, s. 22 (4), (6). If a contract which requires a seal is entered into by a committee not appointed under seal, and it is not ratified by the council under seal, it is invalid (*Oxford Corporation* v. *Crow*, [1893] 3 Ch. 535).

(*n*) *Firth* v. *Staines*, [1897] 2 Q. B. 70.

absolute resignation of powers to the latter, and they may be resumed by the council at any time (*o*). A committee cannot delegate its powers to a sub-committee nor to any of its members (*p*).

SUB-SECT. 8.—*Borrowing Powers.*

General.

658. The council's powers of borrowing are regulated by statute, and unauthorised borrowing may be restrained by injunction (*q*). Under the Municipal Corporations Act, 1882 (*r*), the council may borrow money for the purchase of land or the erection of authorised buildings (*s*); for building and maintaining municipal buildings (*t*); and for maintaining and improving borough bridges (*a*). As sanitary authority the council may borrow for the purposes of their powers and duties (*b*). The council, in common with other authorities, has wide powers of borrowing conferred by many statutes (*c*), including the Borough Funds Acts, 1872 and 1903 (*d*).

Repayment of loans.

659. In the case of loans secured by mortgage or charge for the purchase of land, or in connection with municipal buildings and borough bridges, the Local Government Board may, as a condition of its approval of such loans, require that the principal and interest be repaid in thirty years, or any less period, either by instalments or by means of a sinking fund, or both (*e*). In that case the sums required for repayment become a statutory charge on all or any of the following securities, namely, the land comprised

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(*o*) Compare *Huth* v. *Clarke* (1890), 25 Q. B. D. 391.

(*p*) See *Cook* v. *Ward* (1877), 2 C. P. D. 255, C. A.

(*q*) *A.-G.* v. *De Winton*, [1906] 2 Ch. 106 (overdraft at bank for unauthorised purpose); and see title INJUNCTION, Vol. XVII., p. 225.

(*r*) 45 & 46 Vict. c. 50, which contains provisions relating to the payment of loans and investments existing previous to 1882 (see *ibid.*, ss. 125—127, 129—132, and the following cases thereunder: *Payne* v. *Brecon Corporation* (1858), 3 H. & N. 572; *Holdsworth* v. *Dartmouth Corporation* (1840), 11 Ad. & El. 490; *Pallister* v. *Gravesend Corporation* (1850), 9 C. B. 774; *Arnold* v. *Gravesend Corporation* (1856), 2 K. & J. 574; *Hallett* v. *Brighton Overseers* (1857), 7 E. & B. 342; *Great Western Rail. Co.* v. *Maidenhead Town Council* (1862), 11 C. B. (N. S.) 653).

(*s*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 106. The security may be a mortgage of land held or proposed to be purchased under its statutory powers, or the borough fund or rate (*ibid.*). The approval of the Local Government Board is necessary (*ibid.*, as modified by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 72). As to the manner of obtaining this approval, see Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 236. As to the borough fund and borough rate, see pp. 319, 320, *post.*

(*t*) *Ibid.*, s. 120. The money may be borrowed from the Public Works Loan Commissioners. The council may levy a special rate or an increase of the borough rate for the purpose, and the security may be a mortgage of those rates (*ibid.*). As to rating generally, see title RATES AND RATING.

(*a*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 119 (3), (4); see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 189, 190.

(*b*) See p. 282, *ante.*

(*c*) *E.g.*, see titles BURIAL AND CREMATION, Vol. III., p. 486; EDUCATION, Vol. XII., p. 51; ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 553, 554; PUBLIC HEALTH AND LOCAL ADMINISTRATION; TRAMWAYS AND LIGHT RAILWAYS.

(*d*) 35 & 36 Vict. c. 91; 3 Edw. 7, c. 14; see p. 380, *post.*

(*e*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 112 (1), as modified by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 72.

SECT. 5. The Borough.

in the mortgage, without prejudice to the security thereby created, or any other corporate land, or the borough fund, or the borough or other rates legally applicable to payment of the money borrowed or the expenses to be so defrayed, as the Board directs (*f*).

Sinking fund.

The sinking fund, if any, is created by investing, out of the rents and profits of the land, or out of the borough fund or rates, on which the sums required for the sinking fund are charged, such sums, at such times, and in such Government annuities as the Board directs, and by investing in like manner the dividends of those annuities (*g*). The sums required may also be invested in trustee investments (*h*).

SUB-SECT. 9.—*Holding Land.*

Power to purchase and hold land.

660. A municipal corporation may purchase and hold any land not exceeding five acres, either within or out of the borough, and, upon that or any other land belonging to or held in trust for them, may erect any building necessary or proper for any purpose of the borough (*i*).

Where the corporation has no power to purchase or acquire land, nor to hold land in mortmain, it may purchase or acquire land with the approval, and subject to the conditions of the Local Government Board (*k*), but such approval is not necessary for the purpose of acquiring such terms of holding as do not fall within the statutes relating to mortmain (*l*).

Disposal of land etc.

Corporate land may, with the approval of the Local Government Board, be disposed of by the council in such manner and on such terms and conditions as the Board impose (*m*).

Without such approval or statutory authority a council cannot sell, mortgage, or alienate corporate land (*n*), nor lease it except for certain specified terms and purposes (*o*), or for the renewal of

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(*f*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 112 (2). As to the manner in which loans are discharged, see Local Loans Act, 1875 (38 & 39 Vict. c. 83), s. 13.

(*g*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 113 (1). As to the annuities, their transfer, and dividends, see *ibid.*, s. 113 (2)—(5).

(*h*) See Trust Investment Act, 1889 (52 & 53 Vict. c. 32), s. 7; Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 1; see also title TRUSTS AND TRUSTEES.

(*i*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 105, where certain buildings are enumerated. As to the gaols, houses of correction, lunatic asylums, courts of justice, and judges' lodgings, which on 31st December, 1882, belonged to or were part of the county, see *ibid.*, s. 228 (3), (4).

(*k*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 107 (1), as modified by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 72. Certain sections of the Lands Clauses Consolidation Acts are made applicable thereto (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 107 (2)); and see title CHARITIES, Vol. IV., p. 137.

(*l*) *Truro Corporation* v. *Rowe*, [1901] 2 K. B. 870; and, as to the statutes relating to mortmain, see titles CHARITIES, Vol. IV., pp. 124 *et seq.*, 137 *et seq.*; CORPORATIONS, Vol. VIII., pp. 367 *et seq.*

(*m*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 109, 113—115, 236, as modified by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 72. The land may be disposed of in consideration of a perpetual yearly chief rent instead of a cash payment (*Scarborough Corporation* v. *Cooper* (1909), 101 L. T. 552).

(*n*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 108 (1).

(*o*) See *ibid.*, s. 108 (2); and as to renewal of leases, see *ibid.*, s. 110,

leases under covenants or usages existing on the 5th June, 1835, or where such renewals were ordinarily exercised before that date (*p*).

SUB-SECT. 10.—*The Borough Fund.*:

(i.) *Payments in.*

Constitution of borough fund.

661. The borough fund is created by paying into it the rents and profits of all corporate land; the interest, dividends, and annual proceeds of all money, dues, chattels, and valuable securities belonging or payable to the corporation or to any member or officer thereof in his corporate capacity; every fine or penalty for any offence under the Municipal Corporations Act, 1882 (*q*), unless it is otherwise to be applied (*q*); the proceeds of sale of the parish burgess lists, the lists of claimants and respondents, and the burgess roll (*r*); dividends and interest of corporate stock and money to which the corporation is beneficially entitled (*s*); sums levied by the borough rate (*t*); portions of the surplus of the proceeds of duties on local taxation licences and the probate duty grant (*a*); moneys raised by a watch rate or separate rate raised in the part of a parish liable to watch rate (*b*); and other sums specially directed by statute to be so paid. Purchase-moneys arising from the sale of corporate lands cannot be paid into the fund for the discharge of corporate debts (*c*).

(ii.) *Payments out.*

How made.

662. Payments out of the borough fund are made by the treasurer (*d*) and are regulated and limited by statute. The application of moneys to purposes not warranted is a breach of the trust reposed in the corporation, and persons procuring such breach of trust may be made personally liable for the same (*d*), and the corporation may be restrained therefrom by injunction (*e*).

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and *A.-G.* v. *Great Yarmouth Corporation* (1855), 21 Beav. 625. A lease for life given in exchange for an old lease surrendered requires the approval of the Local Government Board (*Canterbury Corporation* v. *Cooper* (1909), 73 J. P. 225, C. A.; and see this case as to the effect of such an arrangement). The like approval is required to restrictive covenants as well as an actual transfer (*Davies* v. *Leicester Corporation*, [1894] 2 Ch. 208, C. A.).

(*p*) There are also limited powers of leasing for special purposes, *e.g.*, recreation grounds and workmen's dwellings, for which see titles OPEN SPACES AND RECREATION GROUNDS; PUBLIC HEALTH AND LOCAL ADMINISTRATION. As to the application of purchase-money, see Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 114, 116, 117; *Re Derby Municipal Estates* (1876), 3 Ch. D. 289.

(*q*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 139. As to penalties, see pp. 325 *et seq.*, *post.*

(*r*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 48 (2); and see title ELECTIONS, Vol. XII, pp. 240, 246, 247.

(*s*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 118 (5).

(*t*) *Ibid.*, s. 149; and see p. 320, *post.*

(*a*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 23 (9).

(*b*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 200; see, further, titles POLICE; RATES AND RATING.

(*c*) *Ex parte Hythe Corporation* (1840), 4 Y. & C. (EX.) 55.

(*d*) *A.-G.* v. *Wilson* (1842), Cr. & Ph. 1.

(*e*) *A.-G.* v. *Aspinall* (1837), 2 My. & Cr. 613; *A.-G.* v. *Norwich Corporation* (1837), 2 My. & Cr. 406; *Arnold* v. *Gravesend Corporation* (1856), 2 K. & J. 574; *A.-G.* v. *Newcastle-upon-Tyne Corporation and North Eastern Rail. Co.*

SECT. 5. The Borough.

When order of council necessary.

663. Payments out of the fund may not be made without an order of the council, except in the following cases:—the remuneration of the mayor, recorder, stipendiary magistrate, town clerk, treasurer, salaried clerk of the peace, all other council officers, and the clerk to the justices; remuneration and allowances certified by the Treasury in respect of election petitions, and remuneration certified by the recorder to be due to an assistant recorder, assistant clerk of the peace, or additional crier (*f*); or where the payment is (1) made under statutory authority, or (2) made out of the surplus of a fund for improvements (*g*), or (3) paid under a lawful order made by a court of quarter sessions or justices (*h*).

Requirements of order.

664. All orders for payment made by the council must be signed by three members thereof and countersigned by the town clerk (*i*). The order may be removed into court by writ of *certiorari* (*k*), and the resolution authorising a payment may be so removed before any order has been drawn up and signed (*l*). The order may also be challenged by applying for an injunction to restrain the expenditure (*m*).

SUB-SECT. 11.—*The Borough Rate.*

Description.

665. The borough rate is the source of revenue by which the borough fund is replenished when the fund is insufficient for the purposes for which it is legitimately applicable, and with which, after a careful estimate has been made of the amount, the existing fund will suffice for these purposes (*n*). It must be strictly limited

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(1889), 23 Q. B. D. 492, C. A.; affirmed, [1892] A. C. 568; *A.-G.* v. *Manchester Corporation*, [1906] 1 Ch. 643; *A.-G.* v. *De Winton*, [1906] 2 Ch. 106; and see title INJUNCTION, Vol. XVII., p. 225.

(*f*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 140 (1), (2), Sched. V., Part I.

(*g*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 143 (1). As to what is or is not for the public benefit of the inhabitants, see *A.-G.* v. *Cardiff*, [1894] 2 Ch. 337; *Tynemouth Corporation* v. *A.-G.*, [1899] A. C. 293; *A.-G.* v. *Liverpool Corporation* (1872), 41 L. J. (Q. B.) 175.

(*h*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 140 (3). As to orders of courts of quarter sessions or justices, see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 445 *et seq.*; MAGISTRATES, pp. 602 *et seq.*, 639 *et seq.*, *post*. As to payments under the Public Health Acts, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*i*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 141 (1).

(*k*) *Ibid.*, s. 141 (. ; see title CROWN PRACTICE, Vol. X., pp. 173, 192. The court may order the persons signing the order to pay the costs of the proceedings (*R.* v. *Vaile* (1889), 23 Q. B. D. 483). The order for payment will not be quashed on the ground that the contract under which it is to be made was not under seal (*R.* v. *Prest* (1850), 16 Q. B. 32; and see pp. 268, 312, *ante*); nor will it be quashed if the council made it under a *bonâ fide* exercise of discretionary powers (*R.* v. *Brighton Corporation, Ex parte Shoosmith* (1907), 96 L. T. 762, C. A.).

(*l*) *R.* v. *Lichfield Corporation* (1843), 4 Q. B. 893.

(*m*) See title INJUNCTION, Vol. XVII., p. 225; *Tynemouth Corporation* v. *A.-G.*, [1899] A. C. 293.

(*n*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 144 (1). For assessment and levy of the rate, see Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 144, 150, 238; title RATES AND RATING. As to the watch rate, see Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 197—200; titles POLICE; RATES AND RATING.

to those purposes (*o*), and cannot be used to create a fictitious surplus in order to effect improvements to which the surplus of the borough fund may be devoted (*p*).

The rate may be retrospective, and the estimate may include both future and past expenses (*q*), subject to the limitation that the retrospective rate can only be raised in respect of the payment of charges and expenses incurred, or which have come in course of payment, within six months before the making of the rate (*r*).

Special rates.

666. If, before 1835, a rate was leviable in a borough for the purpose of watching (*s*) conjointly with other purposes, the rate may be levied for those other purposes solely, and any statutory provisions existing before 1835 in respect of those purposes remain unaffected. The rate, however, is limited. If before 1835 it could not exceed a given rate in the pound on the value of property rateable thereto, the rate leviable for the other purposes solely cannot exceed such proportion of that given rate as appears to have been expended for those other purposes by an account of the average yearly expenditure during the seven years previous to 1835, or during those of the same seven years during which the rate was levied (*t*).

SUB-SECT. 12.—*The Watch Committee.*

Constitution and purpose.

667. The watch committee consists of the mayor, as an *ex-officio* member, and such other members of the council, not exceeding a third of their total number, as the council may appoint. Three form a quorum, the committee acting by a majority of those present (*a*). The watch committee is responsible for the appointment, control, and management of the borough police (*b*).

SUB-SECT. 13.—*Freemen.*

Former position.

668. Before the year 1835 there existed in the corporate boroughs a certain class of persons known as freemen (*c*). They formed a constituent part of the corporation, and as such enjoyed special rights in the corporate property (*d*). The right to be admitted as freemen

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(*o*) See p. 319, *ante*.

(*p*) *A.-G.* v. *Newcastle-upon-Tyne Corporation and North-Eastern Rail. Co.* (1889), 23 Q. B. D. 492, C. A. As to utilising the surplus of the borough fund, see Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 143, and p. 320, *ante*.

(*q*) *R.* v. *Worksop Local Board of Health* (1865), 5 B. & S. 951; and see the cases cited in notes (*g*), (*h*), (*i*), p. 281, *ante*.

(*r*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 144 (3).

(*s*) As to the watch rate, see titles POLICE; RATES AND RATING.

(*t*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 123.

(*a*) *Ibid.*, s. 190; see, generally, title POLICE.

(*b*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 191; and see titles POLICE; RATES AND RATING.

(*c*) As to the right of freemen to vote, see title ELECTIONS, Vol. XII., pp. 178 *et seq.*, 189.

(*d*) See *Lincoln Corporation* v. *Holmes Common* (1867), L. R. 2 Q. B. 482. As to the rights of freemen when a portion of the common property was taken by a railway company under compulsory powers, see *Nash* v. *Coombs* (1868), L. R. 6 Eq. 51. Freemen now possess much the same rights of sharing in property as they possessed before 1835. As to these rights, see Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 205 (2), 206 (1) (2), 207, 208. As to the effect

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rested upon the custom of the borough, varied by the terms of its charter (*e*). Generally, the freedom of the borough might be acquired by birth, servitude to a freeman, purchase, gift, or marriage.

In 1835 the freemen ceased to be a part of the body corporate (*f*), but their existing rights to benefit from the property of the borough or body corporate and from the borough charities were preserved (*g*).

Present meaning of "freeman."

The term "freemen" now includes every person who had become such before 1835, or might have been admitted, otherwise than by gift or purchase, as such if the Municipal Corporations Act, 1835 (*h*), had not been passed, and every person who in and since 1882 was or is an inhabitant of a borough, or the wife, widow, son, or daughter of a freeman, or husband of a daughter or widow of a freeman, or is bound an apprentice (*i*).

Claim to admission as freemen.

669. A person claiming to be admitted a freeman in respect of birth, servitude (namely, apprenticeship), or marriage must make good his claim, which is examined by the mayor; and when the claim is established the claimant is entitled to be placed on the freemen's roll (*k*).

Honorary freedom.

670. The honorary freedom of a borough may be conferred on persons of distinction and persons who have rendered eminent services to the borough, but such freedom does not entitle them as such to a vote at parliamentary or other elections, or to share with other freemen the benefits of property. The privilege cannot be conferred unless authorised by at least two-thirds of the number of the council present and voting at a meeting specially called for, and with notice of, the purpose (*l*).

SUB-SECT. 14.—*Boundaries and Wards.*

(i.) *Boundaries.*

Alteration of borough boundary.

671. The boundary of the borough may be altered by a local Act or by an order of the Local Government Board. Confirmation

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of the earlier statute on these rights, see *Hopkins* v. *Swansea Corporation* (1839), 4 M. &. W. 621, 644; affirmed (1841), 8 M. & W. 901, Ex. Ch. As to exemption from tolls, see title HIGHWAYS, STREETS AND BRIDGES, Vol. XVI., p. 65.

(*e*) *E.g.*, see *R.* v. *Marshal* (1787), 2 Term, Rep. 2; *R.* v. *Powell* (1800), 8 Term Rep. 639; *Helleston Case* (1776), 2 Doug. El. Cas. 3; *Derby* (*Borough*) *Case* (1776), 3 Doug. El. Cas. 287.

(*f*) See *Lincoln Corporation* v. *Holmes Common* (1867), L. R. 2 Q. B. 482.

(*g*) See Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), s. 2; and see title CHARITIES, Vol. IV., p. 326, note (*o*).

(*h*) 5 & 6 Will. 4, c. 76.

(*i*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 201, 205. As to the preservation of the rights of freemen in dissolved corporations, see Municipal Corporations Act, 1883 (46 & 47 Vict. c. 18), s. 10. As to honorary freedom of the borough, see the text, *infra*.

(*k*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 204; see *R.* v. *Inman* (1820), 4 B. & Ald. 55; *R.* v. *Rowe* (1769), 4 Burr. 2287; *R.* v. *Doncaster Corporation* (1828), 7 B. & C. 630; and title ELECTIONS, Vol. XII., p. 179. An unqualified person is removed by *quo warranto*; see, *e.g.*, *Re Armstrong* (1856), 2 Jur. (N. S.) 211; *R.* (*Roycroft*) v. *County Cork Justices* (1910), 44 I. L. T. 120. As to this proceeding, see title CROWN PRACTICE, Vol. X., pp. 128 *et seq.*

(*l*) Honorary Freedom of Boroughs Act, 1885 (48 & 49 Vict. c. 29), s. 1. As to freemen of the London livery companies, see title COMPANIES, Vol. V., pp. 748—751.

by Parliament of an order is necessary (*m*). The measure effecting the alteration may increase or decrease the number of wards, alter the boundaries of the wards, and the apportionment of councillors amongst them. It may also alter the total number of councillors, and, in this instance, make a proportionate alteration in the number of aldermen (*n*). Care must be taken to prevent intersection of the boundaries of areas of local government (*o*).

Union of boroughs.

Boroughs may be united by the same procedure by which county boundaries may be altered; and confirmation by Parliament is necessary (*p*).

Alteration of areas within borough.

Any areas of local government within the borough may be altered by the same procedure by which county boundaries may be altered, but without confirmation by Parliament (*q*).

(ii.) *Wards.*

Division and alteration of wards.

672. The division of the borough into wards, the alteration in the number of wards, or the alteration of their boundaries is effected by an Order in Council upon the petition of a majority of the council to the King (*r*). The petition may pray for an alteration of boundaries without an alteration in the number of wards (*s*).

Notice of the petition and of the time when the Privy Council will take it into consideration is published in the *London Gazette* a month before the petition is considered (*a*).

When the Order in Council is made, the Secretary of State appoints a commissioner to prepare a scheme for determining the boundaries of the wards and apportioning the councillors among them (*b*).

A further petition for the above purposes may not be presented by the council before the expiration of seven years from the date of the previous Order in Council (*c*).

SUB-SECT. 15.—*Accounts.*

Under Municipal Corporations Act.

673. The treasurer (*d*) is required to make half-yearly accounts to such dates as the council, with the approval of the Local Government Board, may appoint, and, subject to such appointment, to the

(*m*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 54 (1)—(3). The powers of the Board to alter local government areas conferred by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 270, are, if not impliedly repealed, superseded in practice by the provisions of the Local Government Act, 1888 (51 & 52 Vict. c. 41).

(*n*) *Ibid.*, s. 54 (4).

(*o*) *Ibid.*, s. 60.

(*p*) *Ibid.*, s. 54 (1)—(3).

(*q*) *Ibid.*, s. 54 (1), (2).

(*r*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 30 (1), as altered by the Municipal Corporations Act, 1893 (56 & 57 Vict. c. 9), s. 2.

(*s*) *Ibid.*, s. 2.

(*a*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 30 (2).

(*b*) *Ibid.*, s. 30 (3). For the proceedings of the commissioner, his remuneration, the details of the scheme, and payment of expenses, see *ibid.*, s. 30, Scheds. IV., V.

(*c*) Municipal Corporations Act, 1893 (56 & 57 Vict. c. 9), s. 3.

(*d*) As to his appointment, see p. 313, *ante*. As to the duty of other officers to account, see Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 21.

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dates in use on the 31st December, 1882 (*e*). After the audit (*f*) of the accounts for the second half of the financial year the treasurer must print a full abstract of the year's accounts (*g*).

Inspection of accounts.

The accounts are open to the inspection of the council, at any reasonable time during the ordinary hours of business, without payment, and a member of the council may make a copy thereof or take an extract from them (*h*).

The abstract is open to inspection at the like hours and without payment by all the ratepayers of the borough (*i*), and copies of it must be delivered to any ratepayer on payment of a reasonable price for each copy (*k*).

Returns.

The town clerk is required (*l*) to make, within one month after the completion of the audit for the second half of the year, a return to the Local Government Board of the receipts and expenditure of the corporation for each financial year (*m*).

Under Public Health Acts.

674. Accounts of receipts and expenditure of the borough council, acting as an urban authority under the Public Health Acts (*n*), and of their committees and officers so acting, are to be made up half-yearly to the 30th September and the 31st March, and in such form as the Local Government Board prescribe (*o*).

SUB-SECT. 16.—*Audit.*

The auditors.

675. There are three borough auditors. Two are elective and are corporate officers (*p*), and subject to the provisions relating to such officers. They are elected by the burgesses or citizens (*q*) for a term of one year, and each of them must during his term of office be qualified to be a councillor (*r*), but must not be a member of the council, nor the town clerk, nor the treasurer (*s*). The third, the mayor's auditor, must be a member of the council, and is appointed by the mayor for one year on the ordinary day of election

Elective auditors.

Mayor's auditor.

(*e*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 26.

(*f*) See the text, *infra*.

(*g*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 27 (2).

(*h*) *Ibid.*, s. 233 (3), (6). Obstruction to inspection or refusal to give such copies or extracts is punishable, on summary conviction, by a fine not exceeding £5 (*ibid.*, s. 233 (7)). As to enforcement of orders of courts of summary jurisdiction, see title MAGISTRATES, p. 604, *post*.

(*i*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 233 (4), (6).

(*k*) *Ibid.*, s. 233 (4). As to obstructing inspection or refusing copies, see note (*h*), *supra*.

(*l*) Under a penalty not exceeding £20, recoverable by action on behalf of the Crown in the High Court (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 28 (5)).

(*m*) *Ibid.*, s. 28. An abstract of such returns is to be laid annually before Parliament by the Local Government Board (*ibid.*, s. 28 (6)).

(*n*) See, generally, title PUBLIC HEALTH AND LOCAL ADMINISTRATION. As to the accounts of the council as education authority, see title EDUCATION, Vol. XII., p. 52.

(*o*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 58 (1), (2). This practically supersedes the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 245.

(*p*) See p. 296, *ante*.

(*q*) As to their election, see title ELECTIONS, Vol. XII., pp. 355, 356.

(*r*) For the qualification of councillor, see p. 303, *ante*.

(*s*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 25 (1), (2).

of the elective auditors. Casual vacancies must be filled within ten days of their occurrence (*t*).

Elective auditors are not entitled to any remuneration for auditing the accounts of the borough treasurer (*a*), but, when auditing the accounts of the council as the sanitary authority, they are entitled to reasonable remuneration, not being less than two guineas for every day in which they are so employed (*b*).

Remuneration.

676. Within one month from the date to which the treasurer (*c*) is required to make up his accounts (*d*) in each half-year, he must submit them, with the necessary vouchers and papers, to the borough auditors (*e*), who must audit them (*f*). The powers and duties of the auditors, however, are limited to checking the accounts, examining into the legality of payments, and reporting illegal or improper payments to the council and burgesses. There is no machinery for compelling the due performance of these powers, nor have the auditors power to surcharge the members of the council (*g*). On the other hand, the audit is not conclusive, and does not prevent proceedings being brought on the information of a burgess to dispute the treasurer's accounts (*h*).

The audit.

677. Where there is a joint committee consisting of persons appointed by the borough council and by some other council, not being that of a borough, for purposes in which the two councils are jointly interested (*i*), the accounts of such committee are audited by a district auditor, subject to the usual regulations affecting such audit (*j*).

Audit of accounts of joint committee.

SUB-SECT. 17.—*Legal Proceedings.*

678. Legal proceedings (*k*) in matters connected with a borough

In general.

(*t*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 25 (1), (3), (5), (6). As to the penalty for acting as auditor after ceasing to be qualified, see *ibid.*, s. 41, and p. 296, *ante*. As to the re-eligibility of an elective auditor, see Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 37, and p. 299, *ante*. By virtue of a local Act or provisional order, audit by an auditor of the Local Government Board is (1911) in force in the following boroughs:—Bournemouth, Chelmsford, Cheltenham, Merthyr Tydvil, Plymouth, Poole, Southend, Swindon, and Tunbridge Wells.

(*a*) *Thomas* v. *Devonport Corporation*, [1900] 1 Q. B. 16, C. A.

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 246. The audit of the accounts of the council as sanitary authority (see p. 311, *ante*) is conducted in the same way and at the same time as the audit of the treasurer's accounts.

(*c*) See p. 313, *ante*.

(*d*) See p. 323, *ante*.

(*e*) As to the audit of the accounts of the council as education authority, see title EDUCATION, Vol. XII., p. 52; compare the provisions as to audit of the accounts of the county council; see p. 363, *post*.

(*f*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 27 (1).

(*g*) See *A.-G.* v. *De Winton*, [1906] 2 Ch. 106; *Thomas* v. *Devonport Corporation*, *supra*.

(*h*) *A.-G.* v. *De Winton*, *supra*.

(*i*) Under the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 57; and see p. 280, *ante*.

(*j*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 58 (2); and as to audits by district auditors, see p. 284, *ante*.

(*k*) As to the publication of notices and other documents required to be fixed on the town hall, see note (*k*), p. 308, *ante*.

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are governed by the provisions of the statute under which they are taken (*l*).

Under Municipal Corporations Act, 1882.

679. In the case of offences punishable and fines recoverable summarily under the Municipal Corporations Act, 1882 (*m*), the information must be laid within six calendar months after the commission of the offence (*m*), and an appeal lies to the quarter sessions from a conviction by a court of summary jurisdiction on the part of the person aggrieved (*n*).

Fines not recoverable summarily may be recovered by action in the High Court (*o*), as in the case of proceedings to recover penalties from a corporate officer (*p*).

No convictions, orders, warrants, nor other matters done, or purporting to be done, may be quashed for want of form, nor be removed by *certiorari* or otherwise into the High Court, unless it is an order of the council for the payment of money out of the borough fund (*q*), or is an order made without jurisdiction (*r*).

Penal actions against officers.

680. A penal action which lies against a corporate officer for acting in the office illegally (*s*) must be brought by a burgess of the borough, and it is a condition precedent to the action that the plaintiff should serve personally on the officer, within fourteen days after the cause of action arises, a notice in writing of his intention to bring the action, and that the action be commenced within three months after the cause of action arises (*t*). The defendant is entitled to security for costs from the plaintiff upon application made within fourteen

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(*l*) *E.g.*, when the borough council is proceeding as sanitary authority under the Public Health Acts (see p. 311, *ante*, and title PUBLIC HEALTH AND LOCAL ADMINISTRATION), the provisions of those statutes are applicable; see p. 289, *ante*. The Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 219—227, with the exception of *ibid.*, s. 221, relating to the application of penalties in quarter sessions boroughs, are applied to county councils (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 75). As to proceedings by and against corporations generally, see title CORPORATIONS, Vol. VIII., pp. 392 *et seq.*

(*m*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 219 (1); Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3. As to the application of penalties in quarter sessions boroughs, see Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 221; as to the duties of clerks of the peace as to fines and forfeitures, see *ibid.*, s. 222; and as to the service of summons or warrant, see *ibid.*, s. 223; and, generally, title MAGISTRATES, pp. 531 *et seq.*, *post.*

(*n*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 219 (2). As to appeals to quarter sessions, see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 267; MAGISTRATES, pp. 642 *et seq.*, *post.*

(*o*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 219 (3).

(*p*) Under *ibid.*, s. 41, as to which see p. 296, *ante.*

(*q*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 220. As to orders for payment out of the borough fund, see *ibid.*, s. 141, and p. 320, *ante.*

(*r*) See *R.* v. *Bradley* (1894), 63 L. J. (M. C.) 183; *Colonial Bank of Australasia* v. *Willan* (1874), L. R. 5 P. C. 417; *Ex parte Bradlaugh* (1878), 3 Q. B. D. 509; and see title CROWN PRACTICE, Vol. X., pp. 192 *et seq.*

(*s*) See p. 296, *ante*; and compare note (*g*), p. 264, *ante.*

(*t*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 224 (1). These provisions are not superseded by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61); *Humphriss* v. *Worwood* (1894), 64 L. J. (Q. B.) 437; and see titles LIMITATION OF ACTIONS, p. 176, *ante*; PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

days of the service of the writ (*u*), and, if successful, is entitled to costs taxed as between solicitor and client (*a*).

Half the penalty, if recovered, goes, after payment of the costs of action (*b*), to the plaintiff, and the other half to the borough fund (*c*).

If the ground of action is that the defendant was not qualified in respect of estate, the *onus* lies upon him to prove his qualification (*d*).

Quo warranto.

An application for an information in the nature of a *quo warranto* against a person claiming to hold a corporate office must be made within twelve months from the time when he became disqualified after election (*e*).

Showing cause.

The respondent may show cause in the first instance against the application, and if sufficient cause be not shown the court, on proof of due service of the necessary notice and affidavits, may make the rule for the information absolute, or may direct any issue of fact to be tried by a jury in the High Court (*f*).

Mandamus.

681. A mandamus to proceed to the election of a corporate officer may be applied for in the same manner as to notice and affidavits as in the case of proceedings by way of *quo warranto* (*g*).

Protection of persons acting under the Municipal Corporations Act, 1882.

682. Persons proceeded against in consequence of having acted in pursuance of execution or intended execution of the Municipal Corporations Act, 1882 (*h*), have the general statutory protection accorded to persons acting under other statutory powers (*i*).

The borough council may, unless otherwise directed by the court, pay out of the borough fund or borough rate (*k*) all or any part of any sums payable by its officer, agent, or servant as defendant in or in consequence of any action, prosecution, or proceeding, whether in respect of costs, charges, expenses, damages, fine, or otherwise (*l*).

(*u*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 224 (2).

(*a*) *Ibid.*, s. 224 (3). As to the effect of this provision upon the general discretion of the court as to costs, see titles PRACTICE AND PROCEDURE; PUBLIC AUTHORITIES AND PUBLIC OFFICERS; and see title SOLICITORS.

(*b*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 224 (5).

(*c*) See p. 319, *ante*.

(*d*) *Ibid.*, s. 224 (4).

(*e*) *Ibid.*, s. 225 (1)—(4). As to these proceedings, see, further, *R.* v. *County Cork Justices* (1910), 44 I. L. T. 120; and title CROWN PRACTICE, Vol. X., pp. 137 *et seq.*

(*f*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 224 (5)—(7).

(*g*) *Ibid.*, s. 225 (2)—(6), (8). As to when a mandamus will lie and the proceedings thereon, see title CROWN PRACTICE, Vol. X., pp. 80, 81, 110 *et seq.*; and see *ibid.*, p. 115.

(*h*) 45 & 46 Vict. c. 50.

(*i*) See Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), superseding the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 226 (1), (2). This, however, does not affect the express limitations of time for bringing proceedings under *ibid.*, s. 75, in relation to burgess lists, as to which see title ELECTIONS, Vol. XII., p. 539; and under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 224, as to which see p. 326, *ante*. As to such statutory protection, see title LIMITATION OF ACTIONS, p. 176, *ante*; PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*k*) As to the borough fund, see p. 319, *ante*; and as to the borough rate, see p. 320, *ante*.

(*l*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 226 (3). As to a similar power in county councils, see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 66.

SECT. 5.

The Borough.

Power to make bye-laws.

SUB-SECT. 18.—*Bye-laws.*

683. The council may make bye-laws for the good rule and government of the borough, and for the prevention and suppression of nuisances not already summarily punishable under any statute in force throughout the borough (*m*); as to fines for non-acceptance of office (*n*); for the purposes of the Public Health Acts (*o*); and when specially empowered by statute (*p*).

SUB-SECT. 19.—*Towns Improvement Clauses Act*, 1847.

Description.

684. The Towns Improvement Clauses Act, 1847 (*q*), embodies a number of provisions relating to the control and government of towns, and is applicable to such towns and districts when, and to the extent in which, its provisions are made applicable by any Act in which it is in whole or in part incorporated (*q*). It is divided into groups of sections with a general heading of the matters to which they relate, and may be in part incorporated with the special Act by a reference to any of such headings (*r*).

SUB-SECT. 20.—*Municipal Corporations Act*, 1883.

General description.

685. After the establishment of the 178 (*s*) municipal corporations in 1882, there still remained 74 smaller places which were, or

(*m*) See Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 23. Fines up to £5 may be provided for (*ibid.*). The meeting at which the bye-laws are made must consist of at least two-thirds of the whole number of the council (*ibid.*, s. 23 (2)). Breaches of the bye-laws may be prosecuted summarily (*ibid.*, s. 23 (5)). As to summary proceedings generally, see title MAGISTRATES, pp. 531 *et seq.*, *post.* As to nuisances generally, see title NUISANCE.

(*n*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 34.

(*o*) See, generally, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*p*) *E.g.*, under the Public Libraries Act, 1901 (1 Edw. 7, c. 19), s. 3 (see title PUBLIC HEALTH AND LOCAL ADMINISTRATION); for the use of locomotives on roads (see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 35 (4) (a); title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 117, 118, 237, 256); with respect to the sale of coal (see Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 28; title WEIGHTS AND MEASURES); see also the general provisions relating to bye-laws contained in the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34). As to evidence of bye-laws, see title EVIDENCE, Vol. XIII., p. 526; *Timothy* v. *Fenn* (1910), 102 L. T. 283; *Drew* v. *Harlow* (1875), 39 J. P. 420; *Moises* v. *Thornton* (1799), 8 Term Rep. 303, 307. Forging the seal or signature affixed or subscribed to a bye-law, or tendering in evidence any document as a copy of bye-laws with a false or counterfeit seal or signature, and knowing it to be false or counterfeit, is a misdemeanour (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 235). The liability is two years' imprisonment with hard labour (*ibid.*).

(*q*) 10 & 11 Vict. c. 34, s. 1. The Act in which it is incorporated is called "the special Act," and the term "the commissioners" is used to designate those persons, including corporations, entrusted by the special Act with the powers of executing it (*ibid.*, s. 2). As to the incorporation of provisions of the Act in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 160, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 214, note (*l*), 236, note (*a*), 247 *et seq.*

(*r*) Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 5. For the matters dealt with in the Act, see also titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 171; FOOD AND DRUGS, Vol. XV., pp. 40 *et seq.*; NUISANCE; PUBLIC HEALTH AND LOCAL ADMINISTRATION; RATES AND RATING; WATER SUPPLY.

(*s*) There are now (1911) 325 municipal cities and boroughs under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50).

were reputed to be, possessed of corporations. These had been reported upon by the commissioners who sat in 1876, but having been omitted from the legislation of 1882, were dealt with in 1883 (*t*), either by the grant of charters to the places, by which they became municipal boroughs, or by dissolving the corporations (*a*).

In the cases where the corporations were dissolved (*b*), all their property was applied for the public benefit of the inhabitants according to a scheme formulated by the Charity Commissioners or the Local Government Board, and was vested in such person or body as the scheme directed (*c*).

Powers, duties, and trusts existing in respect of a dissolved corporation were vested in and were exercised, performed, and administered by the persons nominated in the scheme (*d*).

SECT. 6.—*The Rural District* (*e*).

SUB-SECT. 1.—*The Rural District Council.*

(i.) *Constitution.*

Nature and name.

686. The administrative body of a rural district is a body corporate, consisting of a chairman and councillors (*f*), and is styled "the rural district council of ——." If there be any doubt about the name it is to be such as the county council directs (*g*). The council has perpetual succession and a common seal, and may hold land for the purpose of its powers and duties without licence in mortmain (*h*).

(*t*) By the Municipal Corporations Act, 1883 (46 & 47 Vict. c. 18).

(*a*) In 1883 there also existed a number of reputed or prescriptive boroughs which were not municipal corporations. As to some of these, special provisions were made for preserving their former privileges, but without granting to their corporations any municipal rights and powers. The places specially mentioned were Alnwick, Altrincham, Corfe, Langhorne, Malmesbury, Newport (Pembroke), Over, Romney Marsh, Winchelsea, as to which see Municipal Corporations Act, 1883 (46 & 47 Vict. c. 18), ss. 14—24. Alnwick also has a local Act (45 & 46 Vict. c. xxiii.). Provision was made for enabling another place, Havering-atte-Bower, to be reunited with the county of Essex (Municipal Corporations Act, 1883 (46 & 47 Vict. c. 18), s. 18).

(*b*) Municipal Corporations Act, 1883 (46 & 47 Vict. c. 18), s. 3 (1), (a).

(*c*) *Ibid.*, ss. 3 (1) (b), 4 (2). Provision was made for the vesting and management of the property pending a scheme (*ibid.*, s. 3 (2)); whilst other provisions of a more or less protective and temporary character gave further powers to the Charity Commissioners (*ibid.*, s. 8); and see title CHARITIES, Vol. IV., p. 180.

(*d*) Municipal Corporations Act, 1883 (46 & 47 Vict. c. 18), s. 9 (3). All questions in dispute as to property, powers, duties, and trusts were made determinable by the Charity Commissioners, with an appeal to the High Court by any person claiming to be or being interested in the property under the Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 8 (Municipal Corporations Act, 1883 (46 & 47 Vict. c. 18), s. 9 (4)).

(*e*) The rural district is that area which was formerly known as the rural sanitary district (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 21 (2)); see the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 9. As to the power to alter such districts, see p. 377, *post.*

(*f*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 21 (2), 24 (1).

(*g*) *Ibid.*, s. 24 (7). A name may be changed in the same way as in the case of an urban district council; see *ibid.*, s. 55 (3)—(5), and note (*d*), p. 262, *ante.*

(*h*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 24 (7); and see title CHARITIES, p. 137, note (*n*).

SECT. 6. The Rural District.

Chairman.

687. The chairman is elected by the councillors at their annual meeting for a term of one year, during which he is entitled to take the chair at all meetings (*i*). He may be chosen from persons who are not councillors (*k*); and a woman may be elected chairman if she is one of the councillors (*l*). The chairman (if a male) is *ex officio* a justice of the peace for the county in which the district is situate, unless personally disqualified by statute (*m*). A person cannot be a chairman if he suffers any of the disabilities which have been stated as applicable to urban district councillors (*n*).

If the chairman dies, resigns, or becomes incapable of acting, another member must be chosen to serve during the unexpired period of his chairmanship (*o*). If absent from any meeting the members present may elect a chairman for the meeting (*p*).

Vice-chairman.

688. A vice-chairman may be appointed by the council from among the councillors, to hold office during the term of office of the chairman, whose powers and authority he has during any absence or inability (*q*).

Councillors.

689. The councillors are elected for the parishes or other areas of the district or for the wards, if any, of the parishes (*r*) as determined and fixed by the Local Government Board (*s*).

They are the representatives of the parish or area on the board of guardians and are to be deemed guardians, and no other election of guardians is to be made for such parish or area (*t*).

Qualifications and disqualifications.

The rules as to the qualification and disqualification of councillors are the same as for urban district councillors (*a*), with the addition that a person qualified to be a guardian of a union in the district may be elected and a person disqualified to be a guardian cannot sit (*b*).

Acceptance of office etc.

The provisions as to acceptance of office, resignation, casual vacancies (*c*), vacation by absence (*d*), re-eligibility (*e*), tenure and

(*i*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 59 (1), applying the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 199, Sched. I. (3); and see title ELECTIONS, Vol. XII., pp. 382, 375.

(*k*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 59 (1).

(*l*) See note (*k*), p. 262, *ante*.

(*m*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 22. He must take the requisite oath if he has not already done so (*ibid.*); and see title MAGISTRATES, p. 539, *post*.

(*n*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 46; see p. 264, *ante*.

(*o*) *Ibid.*, s. 59 (1), applying the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 199, Sched. I. (4).

(*p*) *Ibid.*, Sched. I. (5).

(*q*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 59 (2).

(*r*) *Ibid.*, ss. 20 (3), 24 (1). Any areas for which, under a local or personal Act, guardians are elected are deemed parishes for the purpose of the election of councillors (*ibid.*, s. 60 (4)). As to poor law guardians, see title POOR LAW.

(*s*) *Ibid.*, s. 60 (1). See p. 378, *post*. As to their election see, generally, title ELECTIONS, Vol. XII., pp. 376 *et seq.*

(*t*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 24 (3).

(*a*) See p. 263, *ante*.

(*b*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 24 (4), 46 (5).

(*c*) Rural District Councillors Election Order, 1898, r. 25, and Sched. V. The fine imposed by way of penalty for non-acceptance of office goes to the credit of the parish for which the person fined was elected. For exempted persons, see note (*g*), p. 264, *ante*.

(*d*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 46 (6); see p. 265, *ante*.

(*e*) *Ibid.*, s. 48 (4), applying the Municipal Corporations Act, 1882 (45 & 46

retirement (*f*), are the same as in the case of urban councillors (*g*).

Number of councillors.

The number of councillors for each parish or other area in a rural district is to be the same as the number of guardians for the parish or area (*h*); but the county council (*i*) may from time to time fix or alter the number of councillors to be elected for each parish within the county, and for this purpose may exercise the powers of adding parishes to each other, and dividing parishes into wards, similar to those which are vested in the Local Government Board for the purpose of the election of guardians (*k*).

(ii.) *Powers, Duties and Liabilities.*

Powers in general.

690. The rural district council is the sanitary and highway authority of its area (*l*), and possesses the powers and duties already stated as having been transferred from the justices out of session and from the quarter sessions to urban district councils (*m*), and those under various statutes dealing with the interests of its district and the inhabitants (*n*). It may also have powers conferred upon it as the delegate or agent of the county council in matters affecting the rural area (*o*). It may exercise any of its powers in an adjoining district with the consent of the council of that district, and treat the expenses thereof as incurred in its own district (*p*), and it may delegate certain of its powers to a parochial committee formed for a contributory place or to the parish council of that place (*q*).

If a rural parish is co-extensive with a rural sanitary district, the district council is deemed to be, and to have the powers of, a parish council, unless and until its district is united with some other district or the county council otherwise directs (*r*).

Vict. c. 50), s. 37, as modified by the Rural District Councillors Election Order, 1898, r. 25 (1), and Sched. V.

(*f*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 20 (6), 24 (4); District Councillors and Guardians (Term of Office) Act, 1900 (63 & 64 Vict. c. 16), s. 1 (1), (2). County councils can regulate the retirement of councillors when they retire by thirds (see Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 60 (2), (3); District Councillors and Guardians (Term of Office) Act, 1900 (63 & 64 Vict. c. 16), s. 1 (3)).

(*g*) See pp. 263 *et seq.*, *ante*.

(*h*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 24 (2).

(*i*) Or joint committee if the district is in more than one county (*ibid.*, s. 60 (3)).

(*k*) *Ibid.*, s. 60 (1). The powers are those under the Acts for the relief of the poor; see title POOR LAW. As to the election of guardians, see title ELECTIONS, Vol. XII., pp. 389 *et seq.*

(*l*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 25 (1), 26 (1); see titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 25; PUBLIC HEALTH AND LOCAL ADMINISTRATION. As to the power to assist in maintaining rights of commons, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 599, 601.

(*m*) See p. 266, *ante*. The provisions relating to transfer apply, as to which see Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 67, 68, 70; and see note (*n*), p. 266, *ante*.

(*n*) See p. 267, *ante*.

(*o*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 28 (2), (3), 64.

(*p*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 285.

(*q*) See the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 15; Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 202, 203; Commons Act, 1899 (62 & 63 Vict. c. 30), s. 4.

(*r*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 36 (4).

SECT. 6. The Rural District.

Urban powers may be conferred.

691. The Local Government Board may by general orders to be laid before Parliament direct that the councils shall have such powers, duties and liabilities of urban authorities under the Public Health Acts (*s*) and any other Acts, and that such provisions of any of those Acts relating to urban districts shall apply to rural districts, as the Board may think fit (*t*).

Further, the Board may by order (*u*) declare that any provisions of the Public Health Acts (*s*) in force in urban districts shall be in force in a rural district or contributory place, and may invest the council with all or any of the powers, rights, duties, capacities, liabilities and obligations of an urban authority under the Public Health Acts (*s*). This power of the Board may be exercised on the application of the council, or of persons rated to the relief of the poor, the assessment of whose hereditaments amounts at least to one-tenth of the net rateable value of such district or contributory place (*v*), or of a county council, or, with respect to a parish or a part of a parish, of the parish council (*a*).

Where rural council ineffective.

692. In the event of a rural council being unable to act, either from failure to elect or otherwise, the county council may order elections to be held and may appoint persons to form the rural district council until an effective council is constituted (*b*).

Contracts.

693. The council may enter into any contracts necessary for carrying the Public Health Acts (*c*) into execution (*d*). Such contracts are governed by the ordinary law relating to the contracts of corporate bodies (*e*). The statutory provisions which require contracts of £50 and more to be in a certain form (*f*) do not apply to contracts of a rural council.

(iii.) *Officers.*

The officers.

694. The rural district council must appoint one or more medical officers of health (*g*) and one or more inspectors of nuisances, and also such assistants and other officers and servants as may be

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(*s*) See, generally, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*t*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 25 (5). This power is additional to that under the Public Health Act, 1875 (38 & 39 Vict. c. 55) (see the text, *infra*); (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 25 (6)).

(*u*) The order is to be published in the *London Gazette*, or in such other manner as the Board directs (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 276).

(*v*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 276. The investment may be made unconditionally or subject to specified conditions as to the time, portion of the district, or manner of the exercise or attachment of the powers etc. But if the investment is made on the application of the ratepayers of a contributory place the order of the Board cannot invest the council with any new powers beyond the limits of the contributory place (*ibid.*).

(*a*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 25 (7).

(*b*) *Ibid.*, s. 59 (5).

(*c*) See, generally, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*d*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 173.

(*e*) See title CORPORATIONS, Vol. VIII., pp. 379 *et seq.*

(*f*) See p. 268, *ante*.

(*g*) Districts may be united for the purpose of appointing such officers; see p. 338, *post*.

necessary and proper for the execution of its powers and duties (*h*).

Clerk and treasurer may be clerk and treasurer of guardians.

The council may utilise the services of the clerk and treasurer of the guardians, and, for such additional duties, may remunerate them as it may think proper, but subject to the approval of the Local Government Board. If the clerk of the union will not or cannot undertake the duties, the assistant clerk may be appointed (*i*).

Officers of authority, the powers of which have been transferred.

695. When the powers and duties of any authority, other than justices, are transferred by virtue of the Local Government Act, 1894 (*k*), to any district council, the officers of that authority become the officers of the council, on the same terms and tenure as before, and, so long as they perform the same duties, at a salary not less than formerly. For this purpose the body appointing a surveyor of highways is deemed to be a highway authority and any paid surveyor to be an officer of that body (*l*); and where by the Act a rural sanitary district is divided, any officer for the divided district holds office for each division, and his salary is borne by the respective districts in proportion to their rateable value at the commencement of the next local financial year (*m*).

Compensation.

696. Existing officers affected by changes are entitled to receive compensation for loss thereby sustained, payable as general expenses of the council (*n*).

Disabilities.

697. The provisions as to concern or interest in bargains or contracts with the council which apply to the officers of urban district councils are equally applicable to those of rural district councils (*o*).

(iv.) *Medical Officer of Health and Inspector of Nuisances.*

Appointment.

698. The provisions already stated as regulating the appointment of medical officers of health and inspectors of nuisances by urban district councils apply equally to their appointment by rural district councils (*p*), except that, on the appointment of a medical officer of health, when a portion of the salary is to be paid out of a county grant, there is a slight difference in the provisions relating to the notice of appointment (*q*).

(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 190.

(*i*) *Ibid.*

(*k*) 56 & 57 Vict. c. 73.

(*l*) *Ibid.*, s. 81 (1), (4); and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 25, note (*b*), 124. For the meaning of "existing" and "officer," see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 100, applied by the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 75. As to assistant overseers, see title POOR LAW.

(*m*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 81 (5).

(*n*) *Ibid.*, s. 81 (7); see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*o*) See p. 274, *ante*.

(*p*) See pp. 275, 277, *ante*. The General Order applicable is that of 23rd March, 1891, which, with the difference mentioned in the text, is practically identical with the order of even date relating to urban district councils (see note (*a*), p. 276, *ante*). Other orders relating to medical officers of health in rural districts are dated 11th November, 1872, 11th and 13th March, 1880 (applicable where part of the salary was payable out of moneys voted by Parliament), and 12th March, 1880 (applicable where no such payments were to be made).

(*q*) General Order, 1891 (Rural Districts), art. 3.

SECT. 6.

The Rural District.

(v.) *Alteration of Areas.*

By Local Government Board and county councils.

699. The Local Government Board was empowered by the Public Health Act, 1875 (*r*), to alter local government areas generally (*s*), and, by provisional order, to constitute any rural district or part thereof as a local government district, either on its own initiative (*t*) or in pursuance of a resolution of owners and ratepayers (*a*), but this power has not been exercised since the Local Government Act, 1888 (*b*), conferred wide powers for the same purpose on county councils (*c*), and the latter provisions have in practice superseded, if they have not impliedly repealed, the earlier provisions.

Special drainage districts.

Contributory place.

700. A rural district council may, by resolution approved by the Local Government Board, constitute a portion of its area as a special drainage district for the purpose of charging thereon exclusively the expenses of sewerage, water supply, or of other works, which by the Public Health Acts (*d*) are, or by order of the Board may be, declared to be special expenses. Such area thereupon becomes a separate contributory place (*e*).

SUB-SECT. 2.—*Proceedings of Council and Committees.*

(i.) *Meetings.*

Meetings.

701. The meetings and proceedings of the rural district council, including committees, are regulated in the same way as those of urban district councils other than boroughs (*f*).

The council is entitled to use, for the purpose of its meetings and proceedings, the board room and offices of any board of guardians for the union comprising its district at all reasonable hours, and the reasonableness of hours is a question to be determined by the Local Government Board in case of difference (*g*).

(ii.) *Inspection of Documents.*

Inspection of documents.

702. Every parochial elector of a parish in a rural district may, at all reasonable times, without payment, inspect and take copies of and extracts from, all books, accounts and documents belonging to, or under the control of, the district council of the district (*h*).

(*r*) 38 & 39 Vict. c. 55.
(*s*) *Ibid.*, ss. 270, 275.
(*t*) *Ibid.*, s. 271.
(*a*) *Ibid.*, s. 272.
(*b*) 51 & 52 Vict. c. 41.
(*c*) *Ibid.*, s. 57; and see p. 377, *post.*
(*d*) See, generally, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.
(*e*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 277; and as to contributory places, see p. 335, *post;* see also titles SEWERS AND DRAINS; WATER SUPPLY.
(*f*) Local Government Act, 1894 (56 & 57 Vict. c 73), s. 59 (1); and see pp. 278 *et seq.*, *ante.* Inspectors of the Local Government Board may attend (Public Health Act, 1875 (38 & 39 Vict. 55), s. 205).
(*g*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 59 (3).
(*h*) *Ibid.*, s. 58 (5); *R.* v. *Bradford-on-Avon District Council, Ex parte Thornton* (1908), 72 J. P. 348; *R.* v. *Godstone Rural Council,* [1911] 2 K. B. 465; *R.* v. *Wimbledon Urban District Council, Ex parte Hatton* (1897), 77 L. T. 599.

(iii.) *Finance.*

(a) *Expenses.*

Kinds of expenses.

703. The expenses incurred by a rural district council are either general expenses, special expenses, private improvement expenses, or those which, by the statute under which they are incurred, are expressly made payable by the owners or occupiers in respect of whose property the expenses are incurred, and in such cases they are recoverable in the special manner prescribed by the statute (*i*).

General expenses.

704. General expenses are those which are not directly chargeable on owners and occupiers (*k*), but are the expenses of the establishment and officers of the council, including compensation payable to existing officers (*l*); those in respect of disinfection and of the conveyance of infected persons (*m*), highway expenses (*n*), and all such other expenses as are not made special expenses by statute or by order of the Local Government Board (*o*).

General expenses are paid out of a common fund raised out of the poor rate of the parishes according to the rateable value of each contributory place (*p*).

Special expenses.

705. Special expenses are those which are determined by statute to be such; and the expenses of the construction, maintenance and cleansing of sewers in a contributory place; the expenses of providing and maintaining a water supply in a contributory place, so far as they are not defrayed out of water rates or rents under the Public Health Acts (*q*); the expenses and charges arising from and incidental to the possession of property transferred to the rural authority in trust for any contributory place; all other expenses in or in respect of any contributory place in the council's district which are determined by order of the Local Government Board to be special expenses (*r*). These expenses are a separate charge on each contributory place (*s*).

"Contributory places."

706. Contributory places consist of every parish not having any part of its area within a special drainage district or an urban district; every special drainage district; where a parish is wholly in a rural district and partly within a special drainage district, such part of it as is not within a special drainage district; where a

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(*i*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 229. The provisions of the Act relating to expenses are made applicable to rural district councils (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 29).

(*k*) See, for example, the Public Health Act, 1875 (38 & 39 Vict. c. 45), ss. 23, 98, and title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*l*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 81 (7); see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*m*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*n*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 29; and see, further, title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 126.

(*o*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 229.

(*p*) *Ibid.*

(*q*) See, generally, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*r*) Public Health Act, 1875 (38 & 39 Vict. c. 55). As to contributory places, see p. 334, *ante*, and the text, *infra*.

(*s*) *Ibid.*

SECT. 6. The Rural District.

parish is partly within an urban district, such part of it as is not within the urban district or within a special drainage district (*t*).

Special expenses may be raised as general expenses.

707. Expenses under the Local Government Act, 1894 (*u*), determined by the Board to be special expenses and a separate charge on a contributory place, which would if not so separately charged be raised as general expenses, may by direction of the Board be raised in the same way as general expenses (*v*).

Apportionment.

708. The expenses of sewers, water supply, or any other work for the common benefit of any two or more contributory places may be apportioned between the places by the council in such proportions as the council thinks just, and the apportionment to each place is deemed to be the special expenses incurred in respect of each place. An appeal lies from the apportionment to the Local Government Board, whose decision by order is final (*w*).

Payment by contributory places.

709. The council obtains payment from the contributory places in its district by issuing its precept to the overseers of each such place. Separate precepts should be issued in respect of general and special expenses, or, if one precept be issued including both kinds of expenses, the council must make general and special expenses separate items (*a*).

Private improvement expenses.

710. Certain expenses incurred by the council are declared by statute to be, or to be deemed to be, private improvement expenses, whilst others may be declared to be such by the council under statutory sanction. Of the former is the proportion of increased value owing to the demolition of obstructive buildings under the Housing of the Working Classes Act, 1890 (*b*). Of the latter are those incurred in enforcing the drainage of undrained houses and making new sewers for the purpose (*c*); in requiring proper provision of sanitary conveniences (*d*); in remedying nuisances in drains and private sanitary conveniences (*e*); in providing a proper water supply to houses in certain cases (*f*); in compelling the

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(*t*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 229. As to special drainage districts, see title SEWERS AND DRAINS.

(*u*) 56 & 57 Vict. c. 73.

(*v*) *Ibid.*, s. 29.

(*w*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 229. The appeal must be made, within twenty-one days of the apportionment, by way of memorial stating the grounds of complaint (*ibid.*).

(*a*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 230, which also deals with cases in which a contributory place or a parish is part of a parish or contributory place, and with the application of surplus left in the hands of overseers. See *ibid.*, s. 231, as to enforcing payment; and see *R.* v. *Fox, Ex parte Plympton St. Mary Rural District Council* (1908), 72 J. P. 331.

(*b*) 53 & 54 Vict. c. 70, s. 38 (8); see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*c*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 23; see title SEWERS AND DRAINS.

(*d*) *Ibid.*, s. 36; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*e*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 41; see titles PUBLIC HEALTH AND LOCAL ADMINISTRATION; SEWERS AND DRAINS.

(*f*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 62; Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 3; see title WATER SUPPLY.

sewering etc. of private streets when the council has for this purpose the powers of an urban district council (*g*).

Private improvement rate.

These expenses are paid by making and levying a private improvement rate in the same way and subject to the same statutory provisions as an urban district council may make and levy such rate (*h*).

Expenses of attending conferences.

711. The rural district council has the same power as is possessed by urban councils of paying as general expenses the cost of attendance at meetings of similar bodies for the purpose of discussing matters of public health and local government (*i*), and a similar order of the Local Government Board regulates the matter (*j*).

(b) *Borrowing Powers.*

Under Public Health Acts.

712. The council has the like powers of borrowing under the Public Health Act, 1875 (*k*), as are specified as being competent to an urban district council, and subject to the like terms and regulations (*l*).

The loans are raised on the credit of the common fund out of which general expenses are payable, or on the credit of any rate or rates out of which special expenses are payable, according as the loan is required for general or special expenses. Payment of the principal and interest may be secured by a mortgage of such fund or rates, as the case may be (*m*).

(c) *Accounts.*

How kept and made up.

713. The accounts of the council and of its committees and officers are to be made up half-yearly to the 31st March and the 30th September, in such form as the Local Government Board prescribes (*n*).

The books and accounts to be kept, under the general order of the Local Government Board (*o*), are the same as in the case of urban councils (*p*). The provision as to the annual report to be made to the Local Government Board by urban councils also applies, except as to the newspaper advertisement (*q*).

(d) *Audit.*

How made.

714. The accounts are audited by a district auditor, and the audit must be half-yearly. Subject to this and to the right of the Local

(*g*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150.
(*h*) *Ibid.*, s 232.
(*i*) Public Health and Local Government Conferences Act, 1885 (48 & 49 Vict. c. 22), s. 3.
(*j*) General Order, 28th December, 1896. Its terms are practically identical with the Order of 13th May, 1891, applicable to urban councils; see note (*o*), p. 282, *ante*.
(*k*) See, generally, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.
(*l*) See p. 282, *ante*.
(*m*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 233; see note (*a*), p. 282, *ante*.
(*n*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 58 (1), (2). As to the right of inspection, see p. 285, *ante*.
(*o*) General Order, 22nd March, 1880.
(*p*) See p. 283, *ante*.
(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 206; and see p. 283, *ante*.

SECT. 6. The Rural District.

Government Board to make rules modifying enactments as to publication of notice of the audit and of the abstract of accounts and the report of the auditor, the enactments relating to audit by district auditors of accounts of urban sanitary authorities and their officers, and to all matters incidental thereto and consequential thereon, apply (*r*).

SUB-SECT. 3.—*Union of Districts.*

Under Public Health Acts.

715. Rural district councils may apply to the Local Government Board to unite districts or contributory places for certain purposes of the Public Health Acts (*s*), and also for the purpose of appointing medical officers of health (*t*).

Two or more councils may combine for common purposes likely to be beneficial to them (*u*).

SUB-SECT. 4.—*Enforcement of Duties.*

Under Public Health Acts.

716. The proceedings for compelling urban district councils to perform their duties under the Public Health Acts (*v*) are available also in the case of defaulting rural district councils (*a*), or, upon a complaint made by a parish council of failure on the part of the rural district council in any of the above matters (*b*), and in maintaining and repairing highways, the county council may exercise powers similar to those of the Local Government Board (*c*) and appoint someone to perform the duties (*d*).

Under other statutes.

717. Special provisions are also made to deal with the default of the council in matters relating to allotments (*e*), factories and workshops (*f*), housing of the working classes (*g*), nuisances (*h*), rights of way (*i*), repair of highways (*k*), and removal of house refuse (*l*).

(*r*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 58 (2), (3). As to the audit of accounts of an urban sanitary authority under such enactments, see p. 284, *ante.* As to district auditors, see p. 284, *ante.* As to the report of the auditor and the publication of the financial abstract and other information relating thereto, see Order of the Local Government Board as to Audit of Accounts of Rural District Councils, Parish Councils, and Joint Committees, 20th May, 1895.

(*s*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 279. As to the Public Health Acts generally, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*t*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 286; and see p. 291, *ante.*

(*u*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 285; and see p. 291, *ante.*

(*v*) See, generally, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*a*) See p. 375, *post.*

(*b*) See p. 249, *ante.*

(*c*) *I.e.*, under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 299.

(*d*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 16 (1), (2); and see p. 375, *post.*

(*e*) See title ALLOTMENTS, Vol. I., p. 351.

(*f*) See title FACTORIES AND SHOPS, Vol. XIV., p. 455.

(*g*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 106; and see title NUISANCE.

(*i*) See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 163.

(*k*) *Ibid.*, p. 128.

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 43; and see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

SECT. 7.—*Joint Board for United Districts.*

SECT. 7. Joint Board for United Districts.

Formation of united district.

718. On the application of the councils of urban or rural districts the Local Government Board may by provisional order (*m*) direct rural districts or parts to be formed into a united district for all or any of the following purposes:—(i.) the procuring of a common supply of water; (ii.) the making of a main sewer or the carrying into effect of a system of sewerage for the use of all such districts or contributory places; (iii.) any other purposes of the Public Health Acts (*n*), including joint boards as port sanitary authorities (*o*).

Expenses.

The costs, charges, and expenses of and incidental to the formation of the united district are a first charge on the rates leviable in the district (*p*).

Governing body.

719. The united district is governed by a joint board, consisting of such *ex-officio* members and of such number of elective members as the provisional order determines. The board is a body corporate by a name determined by the provisional order, having perpetual succession and a common seal, and it may hold lands for the purposes of its constitution without licence in mortmain (*q*).

Effect of constitution.

720. Upon the joint board being so constituted the local authorities having jurisdiction in the component district or contributory places cease to exercise therein any powers, or to perform any duties, or to be subject to any liabilities or obligations, which come within the province of the joint board; but the latter may delegate to such authorities the exercise of any of its powers or the performance of any of its duties (*r*).

Miscellaneous.

721. Statutory provisions regulate the meetings and proceedings of the joint board (*s*), expenses (*t*), payment of contributions (*a*), the enforcement of such payment (*b*), borrowing (*c*), and the protection of the board and its officers from personal liability (*d*).

(*m*) For the contents of the order, see the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 281.

(*n*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 279. Joint boards existing in 1875 were preserved (*ibid.*, s. 326). As to provisional orders, see titles PARLIAMENT; PUBLIC HEALTH AND LOCAL ADMINISTRATION. As to sewerage, see title SEWERS AND DRAINS. As to water supply, see title WATER SUPPLY.

(*o*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 287; and see p. 292, *ante*. As to the power of the Board to create united districts in the case of main sewerage districts existing before 1875, see the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 323).

(*p*) *Ibid.*, s. 279.

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 280; and see title CHARITIES, Vol. IV., p. 137.

(*r*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 281.

(*s*) *Ibid.*, s. 282, Sched. I.

(*t*) *Ibid.*, s. 283; and see *Darenth Main Valley Sewerage Board* v. *Dartford Union Guardians* (1887), 19 Q. B. D. 270.

(*a*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 284.

(*b*) *Ibid.*, s. 292.

(*c*) *Ibid.*, s. 244.

(*d*) *Ibid.*, s. 265.

SECT. 8. The County.

SECT. 8.—*The County.*

SUB-SECT. 1.—*In General.*

Meaning of "county."

722. The term "county" is here used as meaning the "administrative county," or that area mapped out for local government, for which a county council is elected for administrative and financial purposes. When so used it does not include a county borough, unless expressly mentioned (*e*).

The area of the administrative county is in many instances conterminous with the geographical county or shire, but some of the larger counties or shires have been divided into two or more areas, each of which is an administrative county of itself (*f*).

SUB-SECT. 2.—*The County Council.*

(i.) *In General.*

Incorporation and its effects.

723. The county council is a body corporate by the name of the county council with the addition of the name of its administrative county (*g*). It has perpetual succession and a common seal, and may acquire and hold land for the purposes of its constitution without licence in mortmain (*h*).

(ii.) *Constitution.*

Description.

724. The county council consists of a chairman, aldermen, and councillors, and as regards constitution, election, tenure of office, conduct of proceedings, officers and members, is subject to the law already stated as respects a borough divided into wards (*i*), with the exceptions and modifications now to be mentioned.

Distinguishing characteristics.

A person elected as a member is not liable to pay a fine on non-acceptance of the office when his consent to nomination was not previously obtained (*k*); an election of a county councillor to

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(*e*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 100.

(*f*) For the administrative county of London, see titles ELECTIONS, Vol. XII., pp. 393, 397; METROPOLIS. As to county boundaries and their alteration, see Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 50—63; as to electoral divisions of counties, see *ibid.*, ss. 2, 51, 75, 100; title ELECTIONS, Vol. XII., pp. 194, note (*f*), 356 *et seq.* As to county court districts, see title COUNTY COURTS, Vol. VIII., pp. 411 *et seq.*

(*g*) The incorporation does not extend the liabilities of the council, so that liabilities arising from a transfer of property etc. from the justices to the council are subject to the same restrictions as attached in the hands of the justices; see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 64, and *Salford Corporation* v. *Lancashire County Council* (1890), 25 Q. B. D. 384, C. A. The county council succeeded to all the duties and liabilities which were formerly imposed on the inhabitants of the county and wherever any enactment requires or authorises land to be conveyed or granted to, or any contract or agreement to be made in the name of, the clerk of the peace, or the justices or others on behalf of the county or quarter sessions, the conveyance, grant, contract, or agreement is now made to or with the council itself (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 79 (2), (3)).

(*h*) *Ibid.*, s. 79 (1); and see title CHARITIES, Vol. IV., p. 137.

(*i*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 1, 2 (1), and s. 75, which applies, with modifications, the provisions of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), relating to these subjects; and see pp. 302 *et seq.*, *ante.*

(*k*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 75 (16) (c). The provisions relating to the application of fines, penalties, and forfeitures recoverable in a summary manner are also not applicable (*ibid.*, s. 75 (16) (a)).

fill a casual vacancy need not be held when the vacancy occurs within six months before the ordinary day of retirement of county councillors (*l*); the declaration on acceptance of office may be made at any time within three months after notice of the election, and may be made before any justice of the peace or commissioner for oaths (*m*).

(iii.) *Councillors.*

Election and number.

725. The councillors are called county councillors (*n*). Their number is determined from time to time by the Local Government Board, as well as their apportionment between each of the non-county boroughs in the county having sufficient population to return one councillor, and the rest of the county (*o*).

Qualifications and disqualifications.

The qualifications and disqualifications of a county councillor are the same as those of a borough councillor (*p*) with certain modifications (*q*).

(iv.) *Aldermen.*

Term of office etc.

726. The aldermen are called county aldermen (*a*). Their term of office, qualification, and disqualification are the same as those of borough aldermen, including the extension of the privilege to women (*b*), subject to the modifications above referred to in the case of county councillors (*c*). They are elected at the first quarterly meeting after the election of the new council (*d*).

(v.) *Chairman.*

Appointment, position, and privileges.

727. The head of the council is styled the chairman (*e*). He is elected at the first quarterly meeting (*f*) to serve for a year, or until

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(*l*) County Councils (Elections) Act, 1891 (54 & 55 Vict. c. 68), s. 1 (4).

(*m*) *Ibid.*, s. 5. As to the exemption from compulsory service, see p. 297, *ante.*

(*n*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 2 (2) (c). As to the date and period of service, mode of election, and the persons entitled to vote, see title ELECTIONS, Vol. XII., pp. 356 *et seq.*; and Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 2 (2) (d), 104 (1). The date of their retirement is 8th March, when the new council comes into office (County Councils (Elections) Act, 1891 (54 & 55 Vict. c. 68), s. 1 (2)).

(*o*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 2 (3) (a). As to the power of altering the number of county councillors and electoral divisions in a county, see p. 374, *post.*

(*p*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 2 (1), 75; see p. 302, *ante.*

(*q*) For these, see Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 2 (2) (a), (b), 5 (7), 75 (12), (14); County Councils (Elections) Act, 1891 (54 & 55 Vict. c. 68), s. 6; Highways and Bridges Act, 1891 (54 & 55 Vict. c. 63), s. 5.

(*a*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 2 (2) (c).

(*b*) Qualification of Women (County and Borough Councils) Act, 1907 (7 Edw. 7, c. 33).

(*c*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 2 (1), 75; see note (*q*), *supra.* As to their election, see title ELECTIONS, Vol. XII., p. 361. The first half of the county aldermen retired in March, 1892 (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 104 (2)); and the second half in March, 1895 (*ibid.*, s. 104 (3)).

(*d*) See p. 347, *post.*

(*e*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 2 (5) (a).

(*f*) See p. 347, *post.*

SECT. 8. The County.

his successor shall have been duly installed, and is chosen from among the county aldermen, including the outgoing aldermen, or county councillors or persons qualified to be such (*g*).

He possesses no social precedence in the area of his jurisdiction (*h*); but, if a man, by virtue of his office, is a justice of the peace (*i*).

He has power to convene meetings of the council, and, when present, is the chairman thereof, with a second or casting vote (*k*); and he has also a casting vote at the election of an alderman (*l*).

(vi.) *Vice-Chairman.*

Vice-chairman.

728. The council may appoint a member to be a vice-chairman (*m*).

SUB-SECT. 3.—*Officers.*

(i.) *In General.*

Officers of the council.

729. The chief officers of the county are the clerk of the peace and of the county council and his deputy, the treasurer, the surveyor, the medical officer of health (*n*), and the coroner (*o*); other officers may, and in some cases must, be appointed under special statutes (*p*): and beyond these the council may appoint such officers as may be necessary, or discontinue such as are no longer required (*q*).

Remuneration etc.

730. The remuneration of all officers appointed by the county council is determined by the council; and such officers are under the same obligations as to giving security and as to accounting for all matters committed to their charge as are officers appointed by a borough council (*r*).

(*g*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 15 (1)—(3), applied by Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 75.

(*h*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 75 (16) (b), expressly excluding the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 15 (5); compare, as to mayors, p. 309, *ante;* and further, as to the chairman, see title ELECTIONS, Vol. XII., pp. 359—361.

(*i*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 2 (5) (b); Qualification of Women (County and Borough Councils) Act, 1907 (7 Edw. 7, c. 33), s. 1. As to the oaths required of justices, see title MAGISTRATES, p. 539, *post.*

(*k*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), Sched. II. (3), (9), and (11), applied by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 75; see further, as to proceedings, p. 347, *post.*

(*l*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 60 (6), as amended by the Municipal Corporations Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 19), s. 1 (2), applied by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 75.

(*m*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 2 (6); see, further, title ELECTIONS, Vol. XII., p. 360, and see especially *ibid.*, note (*c*).

(*n*) See pp. 343—347, *post.*

(*o*) See title CORONERS, Vol. VIII., p. 212.

(*p*) See p. 347, *post.*

(*q*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 19, applied by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 75. For the position of officers transferred to the county council in 1888, see *ibid.*, ss. 118, 119, 120; and for compensation for loss of office, see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS. All persons serving under the council are agents within the meaning of the Prevention of Corruption Act, 1906 (6 Edw. 7, c. 34), s. 1 (3); and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 710.

(*r*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 20, 21, applied by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 75. As to the remuneration of clerks of the peace, see title MAGISTRATES; as to existing officers, see note (*q*), *supra;* and as to borough officers, see p. 311, *ante.*

731. Paid officials in the permanent employment of the county council who are required to devote their whole time to such employment are not eligible to serve in Parliament (*s*).

Ineligibility for Parliament.

(ii.) *Clerk of the Peace and of the County Council.*

Appointment

732. Subject to special provisions affecting certain counties, the clerk of the peace of the county is also clerk of the county council (*t*).

He is appointed and is removable by the standing joint committee of the county council and the quarter sessions (*a*).

Duties.

733. Subject to the provisions of any scheme or order (*b*) which may deal with his powers and duties (*c*), the clerk of the peace has charge of and is responsible for the records and documents of the county, subject to any directions of the *custos rotulorum* (*d*), or quarter sessions, or the county council (*e*). Returns and information required by either House of Parliament to be sent to the Secretary of State or Local Government Board must be made and furnished by him (*f*). He is under the same obligation as the town clerk of a borough to make financial returns each year to the Local Government Board (*g*).

Returns.

Temporary vacancy in office.

If the office of clerk of the peace becomes vacant, the existing deputy or, if there be no such deputy or none willing to act, any person appointed by the county council may act temporarily in the office until a person is duly appointed to fill the vacancy, and while so acting is in the same position as to remuneration, scope of powers and duties and otherwise, as the clerk whose place he fills, but his power so to act is limited to a period of six months from the occurrence of the vacancy (*h*).

(*s*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83 (13).

(*t*) As to the clerk of the peace generally, see title MAGISTRATES, pp. 624 *et seq.*, *post*,

(*a*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83 (2).

(*b*) *I.e.*, made under the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 59.

(*c*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 59 (4) (a). As to the clerk's duties with regard to elections, see title ELECTIONS, Vol. XII., pp. 195 *et seq.*

(*d*) This officer is the principal justice of the peace and civil officer of the county and keeper of its records. He was originally appointed by the Lord Chancellor and subsequently by the Crown (stat. (1545) 37 Hen. 8, c. 1, s. 1, repealed by stat. (1549) 3 & 4 Edw. 6, c. 1, but confirmed by stat. (1689) 1 Will. & Mar. c. 21, s. 3). He formerly appointed the clerk of the peace (*ibid.*, ss. 4, 5). Penalties were imposed upon the *custos rotulorum* who sold or received gratuities and upon the clerk of the peace who purchased or gave such gratuities as a consideration for appointment to the office (*ibid.*, s. 7); and see, further, title MAGISTRATES, p. 624, *post*. The clerk of the peace acts as the deputy of the *custos rotulorum* in the matter of keeping the records and documents of the county.

(*e*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83 (3). As to such documents as were the records of or were in the custody of the quarter sessions in 1888, see *ibid.*, s. 64 (1) (a).

(*f*) *Ibid.*, s. 83 (12). It is the duty of the county council to cause its clerk or other officer to make these returns (*ibid.*).

(*g*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 28 (51 & 52 Vict. c. 41), applied to county councils by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 75; see p. 324, *ante*.

(*h*) Recorders, Stipendiary Magistrates, and Clerks of the Peace Act, 1906 (6 Edw. 7, c. 46), s. 1 (2), (3).

SECT. 8. The County.

The chairman also has power, where there is no clerk to the council and no deputy, or if both are incapable of acting, to appoint a person to take the place of the clerk in respect of any acts authorised or required to be done by or with respect to the clerk (*i*).

(iii.) *Deputy Clerk.*

Appointment.

734. A deputy clerk may be appointed by the standing joint committee (*k*) to hold office during its pleasure, and to act as clerk during the illness or absence of the clerk of the peace, or in the event of his death, or in such other case as the committee may determine. When so acting the deputy has all the powers and capacities of the clerk of the peace or clerk of the council (*l*).

(iv.) *County Treasurer.*

Appointment, salary etc.

735. The appointment, removal and determination of the salary of the county treasurer are vested in the county council (*m*), which deals with such matters under the enactments formerly existing (*n*), unless it resolves to adopt the provisions of the Municipal Corporations Act, 1882 (*o*), relating to the treasurer of a municipal corporation, which they are expressly empowered to do (*p*), and in this event the earlier enactments are superseded (*q*). Failing such adoption, the treasurer is appointed under the powers formerly possessed by the justices in quarter sessions, who could appoint and remove the county treasurer at pleasure, allowing him such reasonable salary out of the county rate as they thought fit, and require him to give security for the proper discharge of his duties (*r*).

During the vacancy of the office, or the incapacity of the treasurer, acts required or authorised to be done by or in respect of him can

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(*i*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 43, applied by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 75.

(*k*) Deputies were formerly appointed and removed by the clerks of the peace themselves (stat. (1689) 1 Will. & Mar. c. 21), s. 4); and clerks of the peace holding office on 13th August, 1881, still retain that privilege (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 118 (1)), except in the Duchy of Lancaster, as to which see Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 83 (9), 118 (7). In the event of a clerk having such power to appoint or remove a deputy, and being unable to do so by reason of illness, absence, or other cause, the council may do so on his behalf, and may assign a portion of his salary or remuneration to such deputy (Recorders, Stipendiary Magistrates, and Clerks of the Peace Act, 1906 (6 Edw. 7. c. 46), s. 1 (1)).

(*l*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83 (4). This provision is without prejudice to the appointment of a deputy clerk for the purpose of a second court on the division of the court of quarter sessions for judicial business (*ibid.*), which power was exercisable by the clerk of the peace or his deputy under the Stipendiary Magistrates Act, 1858 (21 & 22 Vict. c. 73), ss. 9—11; see title MAGISTRATES, p. 626, *post.*

(*m*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (x).

(*n*) See the text, *infra.*

(*o*) 45 & 46 Vict. c. 50, s. 18, as to which see p. 313, *ante.* This provision does not apply unless the council so resolve.

(*p*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 75 (16) (e).

(*q*) *Ibid.*

(*r*) County Rates Act, 1738 (12 Geo. 2, c. 29), ss. 6, 11; County Rates Act, 1815 (55 Geo. 3, c. 51), s. 17. His salary was formerly fixed at £20 a year (*ibid.*).

be performed by or in respect of any person appointed for that purpose by the chairman (*s*).

Duties as to :

(i.) county rates ;

736. The treasurer must keep books of entries of all moneys received and payments made in respect of the county rates, and is required to deliver accounts upon oath, if required, of all such receipts and payments, distinguishing the particular uses to which the moneys have been applied, together with proper vouchers for the same (*t*). All such accounts and vouchers are to be deposited with the clerk of the peace of the county (*a*), and to be open to inspection by the county councillors without fee or reward (*b*). Upon the passing of his accounts by the county council the treasurer is completely discharged (*c*).

(ii.) county fund ;

It is the duty of the treasurer to receive all payments made to the county fund and to make all payments thereout (*d*).

(iii.) costs in criminal cases ;

The treasurer must obey the orders of the court of quarter sessions, or of any justice or justices out of sessions, for the payment of the costs of criminal proceedings and of such other costs as they are empowered to order ; and for such purpose he, or some other person on his behalf, is to attend at every court of quarter sessions (*e*). Such payments do not require the formalities of ordinary payments out of the county fund (*f*).

(iv.) financial returns.

The treasurer is under obligation to make certain financial returns to quarter sessions boroughs in the county, and also to county boroughs, relating to the costs of criminal proceedings at the assizes in respect of offenders committed for trial from the boroughs, and also particulars as to expenditure out of the county rate for general county purposes when the boroughs are liable to contribute to the county rate (*g*).

(*s*) This appears to be so from the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 43, which is applied to county councils by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 75.

(*t*) County Rates Act, 1738 (12 Geo. 2, c. 29), s. 7. He must keep separate accounts of sums received by him in connection with the county police; and such accounts when passed must be deposited with the other county documents (County Police Act, 1839 (2 & 3 Vict. c. 93), s. 23); and see title POLICE.

(*a*) County Rates Act, 1738 (12 Geo. 2, c. 29), s. 8. The statute also provided that the deposit might be made with the town clerk, high bailiff, or chief officer of any city, town corporate, or liberty (*ibid.*) ; but such provision may now be rejected as obsolete so far as county accounts are concerned; as to clerks of the peace and of the county councils, see p. 343, *ante*.

(*b*) County Rates Act, 1738 (12 Geo. 2, c. 29), s. 8.

(*c*) *Ibid.*, s. 9.

(*d*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 80 (1); as to the county fund, see, further, p. 358, *post*.

(*e*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 67. As to the costs of criminal proceedings, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 445 *et seq.* A justice may make an order on the treasurer to pay the expenses of burying dead bodies cast up from the sea or from tidal or navigable waters; see title BURIAL AND CREMATION, Vol. III., p. 548.

(*f*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 80 (1); as to these formalities, see p. 358, *post*.

(*g*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 153, applied to county boroughs by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 32 (8).

SECT. 8. The County.

Treasurer's accounts.

737. The treasurer's accounts are passed and his discharge is given by the county council as successors to the county quarter sessions (*h*). The accounts are audited with the other accounts of the council (*i*), and must be made up half-yearly to such dates as the council, with the approval of the Local Government Board, appoints (*k*), and, after the audit of the accounts of the county council for the second half of each financial year, the treasurer must print a full abstract of his accounts for that year (*l*).

(v.) *County Surveyor.*

Appointment; salary

738. The county surveyor is appointed by the county council as successor to the county quarter sessions. His remuneration is paid by the county council, and it has power to remove him (*m*). There is no statute which governs his appointment, or which confers the power of such appointment on any authority, except in so far as justices were empowered to appoint such surveyors for the repair of public bridges (*n*), and to allow them their "reasonable costs and charges" (*o*).

Duties.

The duties of the surveyor have relation chiefly to main roads, bridges, and other property of the council (*p*).

(vi.) *Medical Officer of Health.*

Nature of appointment.

739. A county council must appoint a medical officer of health, and may appoint more than one (*q*). He cannot be appointed for a limited period only, though, with the consent of the Local Government Board, temporary arrangements may be made for the performance of the duties of a medical officer of health, and the person appointed under these temporary arrangements has the full powers of the medical officer of health of the county (*r*). He is not removable without the consent of the Local Government Board (*s*).

(*h*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (iii.).

(*i*) *Ibid.*, s. 71 (3); and see p. 363, *post*.

(*k*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 71, applying the provisions of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 26—28, to county councils. If there be no such appointment the dates are to be those previously in use (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 26). See, further, as to accounts and audit, p. 362, *post*.

(*l*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 27 (2), applied by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 71 (2).

(*m*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (x).

(*n*) Statute of Bridges, 1530 (22 Hen. 8, c. 5), ss. 3, 4; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 184.

(*o*) Statute of Bridges, 1530 (22 Hen. 8, c. 5), s. 6.

(*p*) See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 196 *et seq.*

(*q*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 17, as amended by the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 68. The power of county and district councils to arrange for a medical officer for the county to act for an urban or rural district is abolished, without prejudice to any arrangement existing before the 3rd December, 1909 (Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 68 (3)).

(*r*) *Ibid.*, s. 68 (6).

(*s*) *Ibid.*, s. 68 (5).

Qualifications.

740. The medical officer must possess the same qualifications as are stated to be required in the case of an urban district (*t*). He cannot engage in private practice; nor can he hold any other public appointment without the express written consent of the Local Government Board (*a*).

Duties.

741. The duties of the medical officer are such as are prescribed by general order (*b*) of the Local Government Board, and such as are assigned by the county council (*c*).

(vii.) *Other Officers.*

Appointment.

742. In addition to the foregoing officers, a council must appoint inspectors of weights and measures (*d*), public analysts (*e*), agricultural analysts and official samplers, or may, in the case of such agricultural analysts and samplers, concur with other councils in making a joint appointment (*f*). It may, if thought fit, appoint inspectors for the proper execution of the statutes relating to the hours of employment in shops (*g*).

SUB-SECT. 4.—*Proceedings.*

(i.) *Of the Council.*

Regulations as to meetings and proceedings.

743. The meetings and proceedings of the county council are regulated and governed in the same way as those of a borough council (*h*), with certain modifications—namely: (i.) that the first quarterly meeting of a newly-elected council is held on the 16th March, or such other day within ten days after the ordinary day of retirement of county councillors as the council may fix (*i*); (ii.) that the first quarterly meeting in any year, not being the year for the election of the council, may be held on such day in March, April, or May as the council may determine (*k*); (iii.) that the county council may fix the hour of the quarterly meeting (*l*); (iv.) that the quorum of the council is one fourth instead of one

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(*t*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 18; and see p. 276, *ante*.

(*a*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 68 (7).

(*b*) The general order must be communicated to the county council and laid before Parliament as soon as possible. If an address is, within a period of twenty-one days, presented by either House to His Majesty praying that the order may be annulled, His Majesty in Council may annul the order, and it thereupon becomes void, but without prejudice to the validity of anything previously done under it (*ibid.*, s. 68 (8)).

(*c*) *Ibid.*, s. 68 (2). For the purpose of such duties he has the same power of entry on premises as are possessed by a medical officer of health of a district (*ibid.*, s. 68 (4))

(*d*) See title WEIGHTS AND MEASURES.

(*e*) See title FOOD AND DRUGS, Vol. XV., pp. 8 *et seq.*

(*f*) See title AGRICULTURE, Vol. I., pp. 287, 289.

(*g*) See title FACTORIES AND SHOPS, Vol. XIV., p. 528.

(*h*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 75; as to borough council meetings, see p. 314, *ante*.

(*i*) County Councils (Elections) Act, 1891 (54 & 55 Vict. c. 68), s. 1 (3).

(*k*) County Councils (Elections) Amendment Act, 1900 (63 & 64 Vict. c. 13), s. 2.

(*l*) County Councils (Elections) Act, 1891 (54 & 55 Vict. c. 68), s. 1 (3).

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third of the whole number as in the case of a borough council (*m*); (v.) that the meetings may be held at any place, either within or without the county, as the council may determine (*n*).

Restrictions on voting.

744. The county councillors of a larger quarter sessions borough (*o*) cannot act or vote on any question relating to matters involving expenditure on account of which the parishes in the borough are not liable to be assessed equally with the rest of the county to county contributions (*p*); nor may a member of the council, nor of a committee of the council, vote upon any resolution or question proposed or arising in relation to unhealthy areas or unhealthy dwelling-houses under the statutes relating to the housing of the working classes, if the resolution or question affects a house, building, or land in which he is beneficially interested (*q*).

Attendance of public.

745. It would seem that the ratepayers, much less the general public, cannot claim an absolute right to admission to the meetings without the council's consent, express or implied (*r*).

(ii.) *Of the Committees.*

(a) *Under the Local Government Act*, 1888.

Duty and power to appoint committees.

746. Every county council (*a*) must appoint a finance committee to regulate and control the county finances (*b*), and other committees may be appointed for such purposes as the council deems advisable (*c*), including the exercise of any transferred powers other than those of raising money by rate or loan (*d*).

Proceedings of committees.

747. The council may provide for the quorum, proceedings, area of authority, and place of meeting (*e*) of a committee, but subject thereto the committee may regulate its own proceedings, quorum, and place

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(*m*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 75 (15).

(*n*) *Ibid.*, s. 75 (21).

(*o*) As to these, see p. 372, *post*.

(*p*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 35 (6).

(*q*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 88 (1); penalty £50, but the vote does not invalidate the proceedings (*ibid.*, s. 88 (2)).

(*r*) See *Tenby Corporation* v. *Mason*, [1908] 1 Ch. 457, C. A.; *Purcell* v. *Sowler* (1877), 2 C. P. D. 215, 219, C. A.; *Pittard* v. *Oliver*, [1891] 1 Q. B. 474, 477, C. A.; and *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, [1892] 1 Q. B. 431, C. A. As to admission of Press representatives, see title PRESS AND PRINTING.

(*a*) This provision of the Local Government Act, 1888 (51 & 52 Vict. c. 41), does not apply to county boroughs (*ibid.*, s. 80 (5)). They are otherwise provided for; see p. 300, *ante*.

(*b*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 80 (3). A liability exceeding £50 may not be incurred without a resolution of the council passed on an estimate submitted by the finance committee, and after a notice of the meeting at which the resolution is passed stating the amount and purpose of such liability (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 80 (3), (4)). This is not applicable to county boroughs (*ibid.*, s. 80 (5)); see p. 300, *ante*.

(*c*) *Ibid.*, s. 75, applying for this purpose the provisions of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50); see p. 300, *ante*.

(*d*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 28 (2), (3).

(*e*) The place of meeting may be either within or without the county (*ibid.*, ss. 75 (21), 82 (1)).

of meeting (*f*). Such proceedings must be reported to the council, but, if and so far as the council directs, they need not be submitted for the approval of the council (*g*), so that, unlike a borough council, a county council may delegate executive powers to its committees. In all other respects the meetings and proceedings are governed by the provisions applicable to the committees of borough councils (*h*).

Joint committees: (i.) Standing joint committee;

748. A standing joint committee of the quarter sessions and the county council is necessary for the purpose of dealing with matters relating to the police, to the clerk of the peace, or to clerks of the justices and other joint officers, and for the purpose of dealing with matters requiring to be determined jointly by the quarter sessions and the county council (*i*). The acts and proceedings of this committee need not be submitted for the approval of the county council (*k*).

(ii.) to exercise transferred powers;

A joint committee may also be provided for the exercise of powers and duties, affecting two or more counties, transferred by the Local Government Board under provisional orders (*l*), or for the enforcement of the law against river pollution (*m*), in the case of a river or part thereof passing through several administrative counties (*n*); for the valuation of a county and county borough when necessary for calculating contributions and payments (*o*); for the purpose of administrative business in the counties of York, Lincoln, Sussex, Suffolk, and Northampton (*p*), and for matters affecting the assize courts at Manchester and other property formerly vested in the justices of the peace of the county palatine of Lancaster (*q*).

(iii.) for matters of joint interest;

For any purpose in which a county council, or court of quarter sessions, or council of a county borough is jointly interested, a joint committee may be constituted out of those respective bodies to exercise within their delegation all such powers as the appointing body might exercise for the purposes for which the joint committee is constituted, other than the making of a rate or the borrowing of money (*r*).

(iv.) for two or more administrative counties.

A standing joint committee, governed by the above provisions

(*f*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 82 (1). The chairman has a second or casting vote (*ibid.*).

(*g*) *Ibid.*, s. 82 (2). The above provisions apply to joint committees (*ibid.*, s. 82 (3)).

(*h*) *Ibid.*, s. 75; as to these, see p. 316, *ante*.

(*i*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 9, 30. As to police, see title POLICE.

(*k*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 75 (16) (f). The power of determining the places at which quarter sessions for the county of London shall be held is vested in the London County Council and not in the standing joint committee (*Standing Joint Committee of Quarter Sessions and County Council of the County of London* v. *London County Council* (1911), 75 J. P. 455); as to places outside the county of London, see *ibid.*, *per* Lord ALVERSTONE, C.J., at p. 458; *Re Somerset County Council* (1889), 54 J. P. 182.

(*l*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 10.

(*m*) Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75); see also Rivers Pollution Prevention (Border Councils) Act, 1898 (61 & 62 Vict. c. 34); see also title WATERS AND WATERCOURSES.

(*n*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 14; see title WATERS AND WATERCOURSES.

(*o*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 33 (2).

(*p*) *Ibid.*, s. 46.

(*q*) *Ibid.*, s. 47.

(*r*) *Ibid.*, s. 81.

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relative to joint committees generally, may also be appointed for two or more administrative counties, including county boroughs. In that case the members thereof are appointed by the quarter sessions and councils in such proportion and manner as they may arrange, or, in default, as may be determined by a Secretary of State (*s*).

(b) *Under other Statutes.*

Compulsory committees.

749. The county council is required to establish a public health and housing committee (*t*), an education committee (*a*), a small holdings and allotments committee (*b*), if a hospital district has been constituted, a hospital committee (*c*), a diseases of animals committee (*d*), under certain conditions an unemployment committee (*e*), and a local pension committee (*f*).

Powers of delegation.

In addition to the power of delegating powers and duties to committees, county councils have large powers to delegate to district councils and to the justices sitting in petty sessions (*g*), in manner directed by various special enactments (*h*).

SUB-SECT. 5.—*Financial Relations.*

(i.) *Between County Councils and the Exchequer.*

Contributions from the Exchequer.

750. Every county council, including the council of a county borough, is entitled to receive grants or assistance from moneys which would otherwise go to the national Exchequer. This is effected by allowances to the county council of certain licence duties and grants from the Local Taxation Account (*i*).

Collection and retention of local taxation duties.

Since the 1st January, 1909 (*k*), the county councils (*l*) have been empowered to collect and retain the duties on certain taxation

(*s*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 81 (7), (8).

(*t*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7. c. 44), s. 71 (1); see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*a*) See title EDUCATION, Vol. XII., pp. 19, 113.

(*b*) See titles ALLOTMENTS, Vol. I., p. 342; SMALL HOLDINGS AND SMALL DWELLINGS.

(*c*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*d*) See title ANIMALS, Vol. I., pp. 429, 431.

(*e*) See title WORK AND LABOUR.

(*f*) See title POOR LAW. For asylum visiting committees, see title LUNATICS AND PERSONS OF UNSOUND MIND, p. 467, *post;* for joint committees under the Light Railways Act, 1896 (59 & 60 Vict. c. 48), see title TRAMWAYS AND LIGHT RAILWAYS; for fishery committees, see title FISHERIES, Vol. XIV., p. 622; for committees under the Midwives Act, 1902 (2 Edw. 7, c. 17), see titles MEDICINE AND PHARMACY; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*g*) See Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 28 (2), (3); Explosives Act, 1875 (38 & 39 Vict. c. 17). They may employ a district council as agent (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 64).

(*h*) *E.g.*, Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68); Midwives Act, 1902 (2 Edw. 7, c. 17), s. 9; Education Act, 1902 (2 Edw. 7, c. 42), s. 17; Shop Hours Act, 1904 (4 Edw. 7, c. 31), s. 9; Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), ss. 18, 50; Cinematograph Act, 1909 (9 Edw. 7, c. 30), s. 5; Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 71.

(*i*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 34 (1). As to this account, see p. 351, *post.*

(*k*) The day fixed by Order in Council dated 19th October, 1908, and made under the Finance Act, 1908 (8 Edw. 7, c. 16), s. 6 (2).

(*l*) Including the councils of county boroughs (Finance Act, 1908 (8 Edw. 7, c. 16), s. 6 (5)).

licences (*m*), and towards the expenses of such collection have each received annually a share of a sum of £40,000, paid out of the Consolidated Fund to the Local Taxation Account (*n*), such share being based upon the proportion of the proceeds of the duties so collected in each county during the preceding year (*o*).

The duties so leviable consist of those on licences for dealing in and killing game, for dogs, guns, carriages, including the additional charges on motor cars (*p*), armorial bearings, and male servants. In the event of any such duty being altered the power to collect it ceases, unless provision is made to the contrary (*q*). As regards the additional duties on motor cars (*r*), although the county councils collect such duties, they are only entitled to retain such an amount as is equal to the amount of such duties during the year ending 31st March, 1910. Any excess is paid into the Exchequer, and in the event of the amount collected in any year being less than the amount so fixed, the deficiency is to be made good to the county councils out of the Consolidated Fund (*s*).

Grants from the Local Taxation Account.

Constitution of the account.

751. The Local Taxation Account is an account at the Bank of England into which are paid the following moneys, and from which contributions, as fixed by the Local Government Board, are paid to the county councils (*t*). The moneys which make up this account, besides the £40,000 before mentioned (*a*), are: (i.) local taxation licence duties not collected by the county councils; (ii.) local taxation (customs and excise) duties; (iii.) estate duty grant; (iv.) agricultural rates grant; (v.) those under the Tithe Rent Charge (Rates) Act, 1899 (*b*).

When occasion requires the fund can be supplemented by the Local Government Board borrowing temporarily, on the security of the account, sums which must be repaid with the interest during the same financial year out of moneys payable to the account (*c*).

Exchequer Contribution Account, and its application.

752. The Exchequer Contribution Account is an account which must be kept by the county councils and councils of county boroughs

(*m*) Formerly these duties were collected in the same way as those which have not been transferred; see title REVENUE.

(*n*) See the text, *infra*.

(*o*) Finance Act, 1908 (8 Edw. 7, c. 16), s. 6 (1)—(3); Order in Council, 19th October, 1908.

(*p*) Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 8; see title STREET AND AERIAL TRAFFIC; but see *infra* as to the additional duties imposed in 1910.

(*q*) Finance Act, 1908 (8 Edw. 7, c. 16), s. 6 (4). See titles ANIMALS, Vol. I., p. 403; GAME, Vol. XV., p. 246; REVENUE; STREET AND AERIAL TRAFFIC. As to collection etc., see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 20; Finance Act, 1908 (8 Edw. 7, c. 16), s. [illegible]

(*r*) Finance (1909-10) Act, 1910 ([illegible]).

(*s*) *Ibid.*, s. 88 (2). This provision has now been extended to the duties on all carriage licences, whether licences for motor cars or not (Revenue Act, 1911 (1 Geo. 5, c. 2), s. 18 (1)); see title REVENUE.

(*t*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 20 (1). The Board may vary the certificate, but until varied it is conclusive (*ibid.*, s. 20 (2)).

(*a*) See the text, *supra*.

(*b*) See titles RATES AND RATING; REVENUE.

(*c*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 27 (3). The Bank of England may lend the moneys (*ibid.*).

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separate from other accounts, and into which are paid the share received from the duties on local taxation licences, whether collected by themselves or received from the Local Taxation Account (*d*), the share received from the same account in respect of customs and excise duties (*e*), and the estate duty grant (*f*).

Contributions out of Exchequer Contribution Account, for:

Certain contributions in aid of local rates are payable out of the county fund and charged to the Exchequer Contribution Account (*g*). The grants are as follows:—

(i.) teachers and public vaccinators;

(i.) A grant towards the remuneration of teachers in poor law schools and for payments to public vaccinators (*h*), the amount being certified by the Local Government Board (*i*);

(ii.) paupers' school;

(ii.) A grant of school fees paid for pauper children (*k*);

(iii.) medical officer of health or inspector of nuisances;

(iii.) A payment to every local authority, whose area is wholly or partly in the county, of half the salary of a medical officer of health or inspector of nuisances appointed by such authority in accordance with the regulations made by the Local Government Board under the Public Health Acts, or any pre-existing Acts; subject, in the case of the medical officer, to a forfeiture of such sum to the Crown (*l*), in the event of the Board certifying to the county council that he has neglected his duty under the regulations to send proper reports and returns to the Board (*m*);

(iv.) registrar of births and deaths;

(iv.) A payment to the guardians who pay the registrars of births and deaths for a district wholly or partly in the county, equal to the amount paid out of local grants towards their remuneration during the financial year ending on the 31st March, 1889 (*n*);

(*d*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 23 (1) (a).

(*e*) Local Taxation (Customs and Excise) Act, 1890 (53 & 54 Vict. c. 60), s. 1 (1) (b).

(*f*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 23 (1) (b). As to the application of the account, see *ibid.*, ss. 23, 34 (1) (e).

(*g*) *Ibid.*, s. 24 (1), (2). The claim for the grant must be submitted in accordance with the requirements of the Board, and the amount is fixed on the same principles as was the case previous to 1888 (*ibid.*, s. 24 (6)). These contributions are substituted for annual local grants out of the Exchequer made prior to 1888. The grants were held payable in respect of the period between 24th September, 1888, and April, 1889 (*Re West Riding County Council* (1890), 54 J. P. 533). As to the extension of these grants to medical officers of health and sanitary inspectors in London, see the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 108 (1).

(*h*) Under the Vaccination Act, 1867 (30 & 31 Vict. c. 84), s. 5; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*i*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 24 (2) (a); and see title EDUCATION, Vol. XII., p. 88. If the union or area is situate in more than one administrative county, a proportionate part as certified by the Local Government Board is payable by the councils of each of such counties (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 24 (5)). The certificate of the Board ma[illegible] varied it is conclusive (*ibid.*, s. 24 (7)).

(*k*) *Ibid.*, s. 24 (2) (b); and see title EDUCATION, Vol. XII., p. 88.

(*l*) The payment is effected by the amount being deducted from the amount payable to the county council out of the Local Taxation Account, and, instead of being handed over to the county council, is paid to the Exchequer or other rightful recipient (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 27 (1)).

(*m*) *Ibid.*, s. 24 (2) (c); for cases where the area is situate in more than one administrative county, see note (*i*), *supra*.

(*n*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 24 (2) (d); for

(v.) A transfer to the account of the county fund (*o*).

(vi.) a payment to the guardians of every poor law union wholly or partly in the county (*p*), and

(vii.) a payment to the council of each borough (*q*), in respect of the maintenance of certain pauper lunatics (*r*);

(v.), (vi.), (vii.) pauper lunatics;

(viii.) The transfer to the account of the county fund, charged with the compensation for deficiencies in fees payable to the clerk of the peace of the county, or any other officer of quarter sessions for the county (*s*), of the amount of such compensation (*t*);

(viii.) clerk of the peace or officer of quarter sessions;

(ix.) A transfer to the police account of the county fund (*a*),

(ix.) county police;

(x.) a payment to the council of each borough maintaining a separate police force (*b*), and,

(x.) borough police;

(xi.) if within the county sums are raised by rates for the purpose of the metropolitan police, a payment to the receiver for the metropolitan police district (*c*),

(xi.) metropolitan police;

in respect of the police of such county or borough or district (*d*);

(xii.) The guardians of every poor law union wholly or partly in the county are entitled to receive from the county council (not being the London County Council) an annual sum, for the costs of the officers of the union and of district schools to which the union contributes, certified by the Local Government Board, and representing the expenditure of the guardians for the year ending 25th March, 1888, on the salaries, remuneration, and superannuation allowances of the officers, other than teachers in poor law schools, and on drugs and medical appliances (*e*).

(xii.) poor law officers.

(ii.) *Between County Councils and Boroughs.*

Adjustment of finances between counties and county boroughs.

753. The financial arrangements between counties and county boroughs within the area of the counties respecting the distribution of the proceeds of local taxation licences, probate (now estate) duty grant, and all other financial relations were adjusted at the outset either by agreement or by commissioners appointed for such purpose (*f*). All original and future adjustments were made, and are,

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cases where the district is situate in more than one administrative county, see note (*i*), p. 352, *ante*.

(*o*) See Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 24 (2) (e).

(*p*) See *ibid.*, s. 24 (2) (f); for cases where the union is situate in more than one administrative county, see note (*i*), p. 352, *ante*.

(*q*) See Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 24 (2) (g).

(*r*) See, further, title LUNATICS AND PERSONS OF UNSOUND MIND, p. 490, *post*.

(*s*) Under the Criminal Justice Act, 1855 (18 & 19 Vict. c. 126), s. 18; see title MAGISTRATES, p. 625, *post*.

(*t*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 24 (2) (h).

(*a*) *Ibid.*, s. 24 (2), (i); see title POLICE.

(*b*) See Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 24 (2) (j), and title POLICE.

(*c*) See Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 24 (2) (k). As to the manner in which the payment is made, see *ibid.*, s. 27 (1), and title POLICE.

(*d*) See, generally, title POLICE.

(*e*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 26 (1). The payment is apportioned when the union is situate in more than one county (*ibid.*, s. 26 (2)).

(*f*) *Ibid.*, s. 32 (1). Provision was made by the Act for the contributions to be paid pending the operation of the adjustment (*ibid.*, s. 32 (7)). If the county borough is deemed to be in more than one county, the necessary adjustment must be made between the counties (Local Government Act, 1888

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Method of adjustment.

General provisions as to adjustment.

readjustable at the end of five years of their operation if the Local Government Board is satisfied that they are inequitable. Failing agreement the adjustment is effected by an arbitrator appointed by the Board (*g*).

In making the adjustment regard must be had to all the circumstances of each case, to the existing property, debts and liabilities connected with the financial relations of the county and borough, and to the consideration that the county is not to suffer financially by reason of the boroughs therein being constituted county boroughs, and that the county borough is not to be in a worse financial position than it would have been in had it remained part of the county and had it shared in the grants of licence and estate duties. Regard must also be had to the benefit and value of the services which the borough receives in return for existing contributions (*h*). The adjustment should also provide, in the case of any expenses which may in future be incurred by the county wholly or partly on behalf of the borough, for the liability of the borough to contribute, and for equitable provision for the cessation of existing liabilities to contribute or to incur future expense (*i*).

Former exemption of boroughs having separate quarter sessions.

754. Boroughs having a separate court of quarter sessions were formerly wholly exempt from contributing to any rate or assessment in and for the county (*k*); but they were liable to pay any sums expended out of the county rate, which were not otherwise paid or chargeable, in respect of the costs of the maintenance, conveyance, transport, or punishment of all offenders committed for

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(51 & 52 Vict. c. 41), s. 32 (2)). County boroughs are entitled to receive a share from the Local Taxation Account as other administrative counties (*ibid.*, s. 33).

(*g*) *Ibid.*, s. 32 (6). As to the powers of such arbitrator, see *ibid.*, s. 62. As to the power of the county council and the council of a county borough to arrange as to police, see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 33 (1), and title POLICE.

(*h*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 32 (3). The statutory provisions relating to the adjustment of property, income, debts, liabilities and expenses, and as to borrowing for such purpose, are made applicable to this adjustment (*ibid.*, s. 32 (5)). As to these, see *ibid.*, s. 62, and p. 357, *post.*

(*i*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 32 (1). The equitable adjustment here referred to does not include compensation for the loss of contributing area. It does not contemplate that the whole financial position of the county and county borough is to remain the same relatively to each other, but that the position as regards the distribution of Exchequer contributions shall remain the same relatively, and the words "equitable provision for such cessation" mean that in adjusting the financial relations equitable provision must be made for the county and the county borough to bear that burden which was formerly joint, but is no longer so (*West Hartlepool Corporation* v. *Durham County Council*, [1907] A. C. 246, following the principles laid down in *Caterham Urban Council* v. *Godstone Rural Council*, [1904] A. C. 171). As to adjustments, see, generally, Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 32, 62; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 153. An agreement embodying a compromise of certain claims, one of which is not well founded in law, cannot be set aside on that ground (*Holsworthy Urban Council* v. *Holsworthy Rural District Council*, [1907] 2 Ch. 62).

(*k*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 150 (1). Power was reserved to collect the arrears of a county rate made before the grant of a separate court of quarter sessions (*ibid.*, s. 150 (2)); but this can have no operation now having regard to the provisions governing newly-constituted quarter sessions boroughs; see p. 373, *post.*

trial from the borough to the assizes for the county (*l*), and if such a borough was before the 11th July, 1832, chargeable with or liable to contribute to the county rate, it was to continue to be liable to contribute not only for the last-mentioned purpose, but for general county purposes with certain limitations (*m*).

Position of larger quarter sessions boroughs.

755. The exemption from contributing to the county rate is now partially removed in the case of larger quarter sessions boroughs, namely, those, not being county boroughs (*n*), having a population of 10,000 and upwards according to the census of 1881. In such cases the parishes in the borough are liable to be assessed to county contributions as the rest of the county (*o*), with the following exceptions:—

Total or partial exemption from county contributions.

Where such borough on the 13th August, 1888, was wholly or partly exempt from contributing towards costs incurred for any purpose for which the quarter sessions of the county are authorised to incur costs, the borough is not to be assessed by the county council to county contributions for costs incurred for such purpose, or, if partially exempt, beyond such partial exemption (*p*). But this exemption does not extend to any costs incurred for the purpose of any powers, duties, or liabilities of the justices of the borough which are transferred to the county council (*q*); nor does it extend to any costs of or incidental to the assizes of the county (*a*). The payment of these latter and of the costs of sessions are general county purposes to which the borough is assessed (*b*).

The costs of prosecution and defence which the county council is ordered to pay (*c*) may be adjusted between the borough and the county council by agreement, or, in default of agreement, by the Local Government Board. The Board may either determine the matter as arbitrators or otherwise, and may hold a local inquiry (*d*).

(*l*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 151; see *R.* v. *Monck* (1877), 2 Q. B. D. 544, C. A.

(*m*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 152 (1). The general county purposes did not include costs arising out of coroners' inquests, or expenses incurred under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), in respect of the county (see title FOOD AND DRUGS, Vol. XV., p. 34), or, where the borough had an inspector of weights and measures, the expenses of the inspection of weights and measures for the county, or payments to or in respect of special constables (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 152 (2)).

(*n*) As to these, see p. 300, *ante*.

(*o*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 35 (1).

(*p*) *Ibid.*, s. 35 (2).

(*q*) As to these, see p. 371, *post*.

(*a*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 35 (2).

(*b*) *Ibid.*, s. 35 (5); see also the Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15), and title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 445 *et seq.* As to the liability in respect of main roads, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 26 *et seq.*

(*c*) See p. 345, *ante*.

(*d*) Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15), s. 4 (4); and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 446. If the Board determines the matter as arbitrator, the provisions of the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), and amending Acts apply. If a local inquiry is held, the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 87 (1), (5),

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The county council and the borough council may agree for the cessation wholly or partly of any of the above exemptions in return either for a capital sum, or for an annual payment, or for a transfer of property or liabilities, or for the undertaking by the county council of any powers or duties, or in any other manner agreed upon (*e*).

Position of smaller quarter sessions boroughs.

756. The parishes of smaller quarter sessions boroughs may be assessed to all county contributions (*f*), and the liability to pay expenses in connection with prisoners committed for trial to the county assizes is the same as that of the larger quarter sessions boroughs (*g*). The property, debts, and liabilities of the county and of any such borough were adjusted between them (*h*).

Other boroughs.

757. A borough with a population of 10,000 and more, not being a county borough (*i*), and not having separate quarter sessions (*k*), but where the mayor, aldermen, and burgesses were on the 1st January, 1893, the legally constituted local authority for the purpose of the statutes, general or local, relating to weights and measures (*l*), is relieved from the expenses incurred by the county council in such matters. The relief takes the form of a yearly contribution from the county council amounting to the proportion, contributed towards those expenses of the county council by the several parishes and parts of parishes within the borough, and calculated according to the values stated in the basis for county rates (*m*) in force for the time being. If the receipts of the county council exceed its expenditure in respect of such matters, a proportionate part of the excess is to be deducted from any sum due to such borough as a recoupment under the statutes relating to contagious diseases of animals (*n*), or the sale of food and drugs (*o*).

Relief from expenses of Weights and Measures Act.

Relief as to expenses of Diseases of Animals Act.

The council of every borough which is assessed to the county rate is entitled to receive from the council of the county the proportionate amount paid by the parishes and parts of parishes in such borough

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apply; and as to local inquiries, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*e*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 35 (7).

(*f*) *Ibid.*, s. 38 (5); as to the transfer of powers from the borough council and justices to the county council, see p. 371, *post*. The obligation of paying the salary of the recorder, the clerk of the peace, and the clerk of the borough justices remains on the corporation (*Thetford Corporation* v. *Norfolk County Council*, [1898] 2 Q. B. 468, C. A., overruling *Ex parte Kent County Council and Dover Council, Ex parte Kent County Council and Sandwich Council*, [1891] 1 Q. B. 389, and *Re Herefordshire County Council and Leominster Borough Council, and Re Local Government Act*, 1888, [1895] 1 Q. B. 43).

(*g*) See p. 355, *ante*.

(*h*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 38 (6). The adjustment was made under *ibid.*, s. 62.

(*i*) As to the financial relations of such boroughs, see p. 353, *ante*.

(*k*) See title MAGISTRATES, p. 541, *post*.

(*l*) See title WEIGHTS AND MEASURES.

(*m*) As to this basis, see p. 359, *post*.

(*n*) See title ANIMALS, Vol. I., p. 430, and the text, *infra*.

(*o*) Weights and Measures Act, 1893 (56 & 57 Vict. c. 19), s. 1; and see title FOOD AND DRUGS, Vol. XV., p. 34. As to the similar relief from expenses relating to the sale of food and drugs, see *ibid.*

towards the expenses of the county council in the execution of the statutes relating to contagious diseases of animals (*p*).

Expenses relating to advertisements.

The expenses incurred by the county council in controlling advertisements cannot be raised within a borough having, according to the last census, a population of over 10,000 inhabitants (*q*).

SUB-SECT. 6.—*Finance of the County Council.*

Rating powers.

758. The county council has all the powers of rating formerly possessed by the justices in quarter sessions, namely, the making, assessing and levying of the county rate (*r*), the police rate (*s*), the hundred rates (*a*) and all other rates (*b*).

The annual budget.

At the beginning of every local financial year (*c*) an estimate of the receipts and expenses during that year must be submitted to the council, and the council must estimate the amount required to be raised in the first and in the second six months of the year by means of contributions. The estimate for the latter part of the year may, at the end of the first six months, be revised or altered according as the previous estimate is found to be greater or less than is actually needed (*d*).

Financial adjustment.

Any property, income, debts, liabilities and expenses of councils or authorities affected by any scheme, order, or matter done under the Local Government Act, 1888 (*e*), may be adjusted by the scheme or order itself (*f*), or by agreement (*g*), or, failing that, by arbitration (*h*). The adjustment of property, income, liabilities and expenses does not involve compensation for loss of rating area (*i*).

(*p*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 41. It would therefore appear that a borough is entitled to this repayment, although the council of that borough is not the local authority for the execution of this Act. The local authority, for the execution of this act, in the case of a borough is the council of such a borough as had a population of not less than 10,000 in the census of 1881 (*ibid.*, s. 3); see, further, title ANIMALS, Vol. I., pp. 429, 430.

(*q*) Advertisements Regulation Act, 1907 (7 Edw. 7, c. 27), ss. 4, 7. This also applies to urban districts of similar population (*ibid.*).

(*r*) See p. 359, *post.*

(*s*) See titles POLICE; RATES AND RATING.

(*a*) See title RATES AND RATING.

(*b*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (i).

(*c*) The local financial year is the twelve months ending 31st March (*ibid.*, s. 73 (1)). All statutes relating to the accounts of local authorities, their audit, returns of receipts and expenditure, and other matters, are made applicable, subject to the necessary adaptation by the Local Government Board (*ibid.*, s. 73 (2)).

(*d*) *Ibid.*, s. 74.

(*e*) 51 & 52 Vict. c. 41.

(*f*) *Ibid.*, s. 59 (4) (e).

(*g*) *Ibid.*, s. 62 (1); see *Holsworthy Urban Council* v. *Holsworthy Rural District Council*, [1907] 2 Ch. 62.

(*h*) Local Government Act, 1888, s. 62 (2). As to arbitration, see *ibid.*, s. 62; *South Mimms Rural District Council* v. *Barnet Urban District Council* (1900), 82 L. T. 421.

(*i*) *Caterham Urban Council* v. *Godstone Rural Council*, [1904] A. C. 171, overruling on this point *Re Rochdale Union and Haslingden Union*, [1899] 1 Q. B. 540, C. A.; and *Re Buckinghamshire County Council and Hertfordshire County Council*, [1899] 1 Q. B. 515; *West Hartlepool Corporation* v. *Durham County Council*, [1907] A. C. 246.

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SUB-SECT. 7.—*The County Fund.*

The county fund.

759. All the receipts of the county council for general or special county purposes are carried to the county fund, and all payments for such purposes are made in the first instance out of such fund (*k*).

Payments in. Payments out.

Payments to (*l*), and payments out of, the county fund must be made to and by the treasurer. Unless made in pursuance of specific statutory requirements, or of an order of a competent court, payments out can only be made in pursuance of an order of the council, signed by three members of the finance committee present at the meeting of the council, and countersigned by the clerk of the council (*m*); but such an order for payment, whether on account of capital or income, cannot be made except on a resolution passed by the council on the recommendation of the finance committee, after a notice of the meeting has been given stating the amount of the sum and the purpose for which it is to be paid, save in the case of ordinary periodical payments for which no special notice is necessary (*n*). Such order may include several payments (*o*).

Cheques.

Cheques issued in pursuance of an order require to be countersigned by the clerk or by a deputy approved by the council (*p*).

General county purposes and expenses.

760. General county purposes are all those which are declared by statute to be such, and those for contributions to which the council is authorised to assess the whole area of its county (*q*). General expenses are the costs incurred for general county purposes and those incurred by the council in the execution of its duties which are not made special expenses (*r*).

Special county purposes and expenses.

Special county purposes are those from contribution to which any portion of the county is exempt, and any purposes where the expenditure involved is restricted by law to any limited part of the county. Special expenses are the costs incurred for special county purposes (*s*), or such as may be directed to be special expenses.

Apportionment.

In determining the expenditure for any particular county purposes, whether general or special, a proper proportion of the officers, buildings, and other establishment charges may be added to the expenditure (*t*).

Income.

761. The income of the county council is derived from its property in the form of rent, royalties and tolls; fees payable to the clerk of the peace of the county (*a*); fines imposed for breaches of bye-laws and statutes; contributions from the

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(*k*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 68 (1).

(*l*) *Ibid.*, s. 80 (1). S. 80 (*ibid.*) is not applicable to county boroughs (*ibid.*, s. 80 (5)).

(*m*) *Ibid.* As to the remedy by *certiorari*, see *ibid.*, s. 80 (2); and title CROWN PRACTICE, Vol. X., pp. 173, 174.

(*n*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 80 (3), (4).

(*o*) *Ibid.*, s. 80 (1).

(*p*) *Ibid.*

(*q*) *Ibid.*, s. 68 (2).

(*r*) *Ibid.*

(*s*) *Ibid.*, s. 68 (3). As to accounts, see p. 362, *post.*

(*t*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 68 (8).

(*a*) See title MAGISTRATES, p. 625, *post.*

national Exchequer (*b*); the share of customs and excise duties (*c*); county rates (*d*); contributions from county boroughs (*e*); money transferred from the Exchequer Contribution Account when forfeited by a borough otherwise entitled to it owing to the Secretary of State withholding a certificate of efficiency in respect of the borough police (*f*); fees and costs, payable to clerks of petty sessional divisions, as are not excluded in the fixing of their salaries (*g*); and the county rate (*h*).

SUB-SECT. 8.—*The County Rate.*

Purpose.

762. The county rate (*h*) is the means by which contributions are raised when the general county account and the special county account of the county fund (*i*) are insufficient to meet the expenditure properly charged upon them respectively. Contributions for general expenses are assessed on all the parishes in the county, while those for special expenses are assessed on such parishes in the county as are liable to be assessed to county contributions for those purposes (*k*). They are assessed in proportion to the annual value of such parishes as determined by the standard or basis for the the county rate (*l*), and the enactments relating to this standard or basis, and to the county rate itself, are made applicable, and extend to all parishes within any borough which are liable to be assessed to county contributions (*m*).

Basis or standard.

763. The basis or standard for the county rate (*n*) is the means by which the county rate falls fairly and regularly upon the various parts of the county, the basis being founded and prepared rateably and equally according to the full and fair annual value (*o*) of the

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(*b*) As to these, see p. 350, *ante;* and as to their distribution, see p. 352, *ante.*

(*c*) As to this, see p. 351, *ante.*

(*d*) See the text, *infra.*

(*e*) See p. 353, *ante.*

(*f*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 25 (2); see title POLICE.

(*g*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 84 (2), including such fees and costs in the case of the clerk to the justices of a non-quarter sessions borough, with a population either under or over 10,000, which has a separate commission of the peace (*Cornwall County Council* v. *Truro Town Council* (1894), 58 J. P. 299; but see *Thetford (Mayor)* v. *Norfolk County Council*, [1898] 2 Q. B. 408).

(*h*) See, further, title RATES AND RATING.

(*i*) See p. 358, *ante.*

(*k*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 68 (4), (5).

(*l*) *Ibid.*, s. 68 (6); see the text, *infra.*

(*m*) *Ibid.* The operative statute is the County Rates Act, 1852 (15 & 16 Vict. c. 81), as later appears, but previously to the passing of this Act there had been another statute which, although unrepealed, is now obsolete, namely, the County Rates Act, 1844 (7 & 8 Vict. c. 33), ss. 1—6 (repealed so far as relating to county rates by the Statute Law Revision Act, 1861 (24 & 25 Vict. c. 101)), which empowered the justices in quarter sessions to levy county rates or police rates; see title POLICE. As to county rates in Lancashire, see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 46 (5).

(*n*) The term "county rate" means and includes every rate assessed in a county or division of a county for all or any of the purposes to which the county rate or stock is or may be made liable (County Rates Act, 1852 (15 & 16 Vict. c. 81), s. 51).

(*o*) These words are to be taken to mean the net annual value of any property

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property, of whatever kind, rateable to the relief of the poor in all parishes within the county (*p*).

Making the rate.

764. The county rate is made by the county council, whenever circumstances require it, by ordering and directing a fair and equal county rate to be made, for any authorised purposes, according to the basis or standard in force. For that purpose the council may assess and tax every parish within its jurisdiction, rateably and equally, according to a certain pound rate to be fixed and publicly declared by it upon the said basis or standard (*q*).

Retrospective rates.

The rate may include contributions in respect of the payment of costs incurred, or which have become payable at any time within six months before the demand of the rates (*r*).

Appeal.

A parish council, where there is one (*s*), or in other cases the overseers of the poor, or any inhabitant of the parish or place, may appeal against the rate (*s*) to the quarter sessions (*t*).

Collection.

765. The rate having been made, a printed list of the parishes assessed, and the amount of the rateable value upon which each parish has been respectively assessed, must be sent by the county council to the overseers or those charged with the collection or levy of the rate in every parish within the county (*a*), but such printed lists need only be sent, unless the county council otherwise directs, when a new basis or standard or an alteration in the existing basis or standard has been allowed and confirmed (*b*).

Issue of precepts.

The county council then orders precepts in the prescribed form (*c*), or as near thereto as may be, to be issued to the guardians of every union of parishes, of which union any parish is situate within the county, stating the sum assessed and charged for each rate on each parish in the union, the whole of which parish is situate within the county and to the guardians of every single parish within the county, stating the sum assessed and charged on

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as estimated for the purpose of assessing the poor rate (County Rates Act, 1852 (15 & 16 Vict. c. 81), s. 6); see as to this the Parochial Assessments Act, 1836 (6 & 7 Will. 4, c. 96), s. 1, and title RATES AND RATING.

(*p*) As to the method of fixing the basis, see the County Rates Act, 1852 (15 & 16 Vict. c. 81), ss. 1—20; Revenue Act, 1863 (26 & 27 Vict. c. 33), s. 22.

(*q*) County Rates Act, 1852 (15 & 16 Vict. c. 81), s. 21. Tenants of lands in ancient demesne are liable to county rates notwithstanding their tenure (*R.* v. *Aylesford* (*Inhabitants*) (1860), 2 E. & E. 538); as to rating agricultural land, see title RATES AND RATING.

(*r*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 68 (9); compare the provisions in the Public Health Act, 1875 (38 & 39 Vict. c 55), s. 210. Without statutory sanction retrospective rates cannot be levied (*R.* v. *Read* (1849), 18 L. J. (M. C.) 164; *R.* v. *Bedlington Overseers* (1884), 48 J. P. 486); see, further, title RATES AND RATING.

(*s*) County Rates Act, 1852 (15 & 16 Vict. c. 81), s. 22.

(*t*) *Ibid.* The right of hearing these appeals is expressly reserved to quarter sessions (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 8). For the grounds of procedure on appeal, see the County Rates Act, 1852 (15 & 16 Vict. c. 81), ss. 22—25; *West Riding of Yorkshire County Council* v. *Middleton Parish Council*, [1906] 2 K. B. 157; *R.* v. *Blackawton* (*Inhabitants*) (1830), 10 B. & C. 792; and titles MAGISTRATES, p. 638, *post;* RATES AND RATING.

(*a*) County Rates Act, 1852 (15 & 16 Vict. c. 81), s. 26.

(*b*) County Rate Act, 1866 (29 & 30 Vict. c. 78), s. 2.

(*c*) County Rates Act, 1852 (15 & 16 Vict. c. 81), ss. 26, 39.

such parish for each rate, and requiring the guardians of the union or parish, within a time stated in the precepts, to cause the aggregate of such sums to be paid out of the moneys held by them on behalf of each parish to the treasurer of the county (*d*). The precepts, which may be sent by registered post or otherwise (*e*), may include contributions for both general and special purposes, but the items must be separately stated (*f*).

SUB-SECT. 9.—*Borrowing Powers.*

Borrowing powers.

766. The powers of borrowing possessed by the county council, as in the case of other local authorities, are confined to those which are authorised by statute, and are in accordance with statutory restrictions (*g*). Temporary overdrafts at its bank can only be justified by the council on such grounds (*h*), even though the overdraft is not arranged on terms between the parties, but takes the form of the bank cashing cheques drawn for purposes authorised by statute when there is no balance at the bank to meet them (*i*). The powers of borrowing cannot be delegated to a committee (*j*).

Raising of loans.

Loans are raised either as one loan or as several loans, and either by the issue of stock, or by debentures of not less than £5, or annuity certificates under the Local Loans Act, 1875 (*k*), or by mortgage (*l*).

(*d*) Under the earlier Act the high constables were required to pay the county rates, which were collected, into the hands of a treasurer or treasurers appointed by quarter sessions to receive them, who in turn were required to pay over the moneys as directed by the justices (County Rates Act, 1738 (12 Geo. 2, c. 29), s. 6). As to guardians of the poor, see title POOR LAW.

(*e*) County Rates Act, 1852 (15 & 16 Vict. c. 81), ss. 26, 39.

(*f*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 68 (6). As to obeying and enforcing the precept, see *ibid.*, ss. 21, 26, 27, 39; and title RATES AND RATING.

(*g*) See the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 69; County Councils Mortgages Act, 1909 (9 Edw. 7, c. 38), s. 1; Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 236, 237; Development and Road Improvement Funds Act, 1909 (9 Edw. 7, c. 47), s. 8; Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 52.

(*h*) See *R.* v. *Reed* (*Sir Charles*) (1880), 5 Q. B. D. 483, C. A.; *A.-G.* v. *Tottenham Urban District Council* (1909), 73 J. P. 337; *A.-G.* v. *De Winton*, [1906] 2 Ch. 106; and see, further, p. 317, *ante*. But as to the power of the Local Government Board to remit sums disallowed or surcharged, see p. 286, *ante*.

(*i*) See *Cunliffe, Brooks & Co.* v. *Blackburn Benefit Society* (1884), 9 App. Cas. 857.

(*j*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 28 (3), 81 (3).

(*k*) 38 & 39 Vict. c. 83.

(*l*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 69 (8), (10), as amended by the County Councils Mortgages Act, 1909 (9 Edw. 7, c. 39), s. 1. The mortgages are made under the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 236, 237. The Local Government Act, 188 (51 & 52 Vict. c. 41), s. 69 (9), limited the period for which a county council might borrow by way of mortgage to one not exceeding five years. This provision is not only repealed, but, as to any money borrowed by way of mortgage before 25th November, 1909, is to be deemed not to have been in force (County Councils Mortgages Act, 1909 (9 Edw. 7, c. 38), s. 1). As to loss from forged transfers of stock etc., see title COMPANIES, Vol. V., pp. 195 *et seq.*

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County stock.

Regulations of the Local Government Board, confirmed by Order in Council (*m*), prescribe the manner in which county stock may be created, issued, transferred, dealt with, and redeemed (*n*). They may provide for the discharge of the loan so raised, and, in the case of consolidation of debt, for extending or varying the times of discharge. They may also provide for the consent of limited owners, for the application of the statutes relating to stamp duties and cheques, and for the disposal of unclaimed dividends. For any such purposes they may apply any enactments relating to kindred matters (*o*).

SUB-SECT. 10.—*Accounts and Audit.*

The several accounts.

767. The receipts and expenditure of the county are kept in three accounts :—(1) the Exchequer Contribution Account (*p*), (2) the general county account, and (3) the special county account; and the council must keep such accounts as will prevent the whole county from being charged with expenditure which is properly payable by a portion only of the county, and will prevent any sums raised in a portion only of the county being applied in reduction of expenditure payable by a larger part or the whole of the county, and will secure for a portion of the county exemption from contribution to which it is entitled, and ensure that sums specifically applicable to particular purposes are applied to no other (*q*).

General county account.

The general county account is the account of the county fund to which contributions for general county purposes (*r*) are carried, and out of which general expenses are paid (*s*). When the moneys standing to the credit of this account are insufficient, county contributions may be levied to meet the deficiency (*t*).

Special county account.

The special county account is the account of the county fund to which contributions for special county purposes (*a*) are carried, and out of which special expenses (*a*) are paid (*b*). Deficiencies are met by a levy of contributions on the parishes liable to be assessed for such purposes (*c*).

(*m*) The order can only be made if, in the thirty days during which the regulations have been submitted to Parliament, no resolution is passed against giving effect to the regulations (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 70 (3), (4)).

(*n*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 70 (1).

(*o*) *Ibid.*, s. 70 (2). The enactments referred to are the Local Loans Acts and Acts relating to stock issued by the London County Council or the corporations of municipal boroughs.

(*p*) See p. 351, *ante.*

(*q*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 68 (7).

(*r*) See p. 358, *ante.*

(*s*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 68 (2).

(*t*) *Ibid.*, s. 68 (4); and see p. 359, *ante.*

(*a*) See p. 358, *ante.*

(*b*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 68 (3). Separate accounts are required to be kept of the receipts and expenditure with respect to small holdings; see title SMALL HOLDINGS AND SMALL DWELLINGS; and see title ALLOTMENTS, Vol. I., p. 359.

(*c*) Local Government Act, 1888 (51 & 52 Vict. c. 41) s. 68 (5); see p. 359, *ante.*

Making up accounts.

768. The accounts of receipts and expenditure must be made up to the end of the local financial year, that is, for the twelve months ending the 31st March (*d*), in the form prescribed by the Local Government Board (*e*).

Returns to Local Government Board.

The statutory provisions which relate to the returns to the Local Government Board of the accounts of a borough, to the accounts of the borough treasurer, and to the inspection and abstract of such accounts, apply also to the accounts of the county council, their treasurer and officers, and the provisions relating to the returns to the Local Government Board extend to the return of a printed copy of the abstract of such accounts (*f*).

Audit.

769. The accounts of the county council, the treasurer, and officers are audited by the district auditors of the Local Government Board in the same way as the accounts of an urban district council and their officers are audited (*g*), subject to a modification in the scale of contribution towards the remuneration and expenses of the auditors (*h*), and ratepayers and owners of property in the county have similar rights and may appeal as in the case of such audit (*i*).

SUB-SECT. 11.—*Land and Property.*

(i.) *In General.*

Transfer.

770. With certain exceptions (*k*), all property formerly vested in quarter sessions, or in any justice or county officer for county purposes, is vested in the county council (*l*).

(*d*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 73 (1).

(*e*) *Ibid.*, s. 71 (1).

(*f*) *Ibid.*, s. 71 (2). The statutory provisions referred to are those of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 26—28, 233, as to which see pp. 323, 324, *ante*.

(*g*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 71 (3). The Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 247, 250, apply, and all enactments applying to audit by district auditors (Local Government Act, 1888 (51 & 52 Vict. 41), s. 71 (3)). As to these and such audit generally, see p. 284, *ante*.

(*h*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 71 (3). In the case of the accounts of urban district councils the scale of contribution provides for a stamp duty of £50 where the total expenditure comprised in the financial statement is £100,000 or upwards. The modification referred to provides for a stamp duty of £50 where the total expenditure exceeds £100,000 and is less than £150,000, £60 when the latter sum and less than £200,000, and £15 in addition for every £50,000 or part thereof beyond (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 71 (3), Sched. II.).

(*i*) *Ibid.*, s. 71 (3). As to these rights and as to appeal, see pp. 285, 286, *ante*.

(*k*) The exceptions are the existing records of or in the custody of the quarter sessions (see title MAGISTRATES, p. 624, *post*); property belonging to a charity for which the trustees and managers are to be appointed as formerly, until the Charity Commissioners otherwise direct; and property claimed by the justices as being theirs by presentation or by purchase out of their own funds, and not being property held for the purposes of the county (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 64 (1) (a), (b), (c)).

(*l*) *Ibid.*, s. 64; see *ibid.* for powers of management etc. Where the only remedy against the justices to be recouped payments was by

SECT. 8. The County.

Acquisition of property.

For the purpose of its powers and duties, including those executed through a standing committee, the county council may acquire, purchase, take on lease, or exchange any lands, or easements, or rights over lands, whether within or outside the county, and may also acquire, hire, erect and furnish any necessary halls, buildings and offices, whether within or without the county (*m*).

Sale and leasing of land.

Land may be sold with the consent of the Local Government Board. The proceeds must be applied towards the discharge of any loan in any manner sanctioned by the Board, or in any other way in which capital is applicable (*n*). The county council may, with such consent, let for any term any lands which it may possess, as and when it can conveniently spare the same (*o*), and, with the like consent, lease land for a term not exceeding twenty-one years for military purposes (*p*).

(ii.) *Special Properties.*

Shire and county halls, assize courts, judges' lodgings etc.

771. The administrative business of the justices in quarter sessions in respect of shire and county halls, assize courts, judges' lodgings, lock-up houses, court houses, justices' rooms, police stations, county buildings, works and property is now in the hands of the county council (*q*), and all such buildings are now vested in the county council (*r*), subject to the right of the justices in quarter sessions or out of session to use the same (*s*), for which last-mentioned purpose the standing joint committee (*a*) have complete control over and can direct the expenditure of the funds, which the

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mandamus it was held that the county council could not be suep in an action to recover such moneys (*Salford Corporation* v. *Lancashire County Council* (1890), 25 Q. B. D. 384, C. A.; *Bootle-cum-Linacre Corporation* v. *Lancashire County Council* (1890), 60 L. J. (Q. B.) 323, C. A.).

(*m*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 65 (1). For the purpose of purchase, lease, and exchange, the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 176—178, are made applicable (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 65 (2)). As to the rating of county buildings, see title RATES AND RATING. As to the application of the Mortmain Acts, see title CHARITIES, Vol. IV., pp. 132, 137, 138. As to the transfer of scientific and other institutions, see title LITERARY AND SCIENTIFIC INSTITUTIONS, p. 203, *ante*.

(*n*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 65 (3).

(*o*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 177, incorporated with and by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 65 (2).

(*p*) Military Lands Act, 1892 (55 & 56 Vict. c. 43), s. 11. The lease terminates if the land ceases to be used for such purposes (*ibid.*, s. 11 (2)); see title ROYAL FORCES. As to allowing a public building to be used as a county court, see title COUNTY COURTS, Vol. VIII., p. 414.

(*q*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (iv.); and see title POLICE. The right which the justices in quarter sessions had acquired by agreement with a private individual to use his room free of charge for quarter sessions purposes was held not to have been transferred under this provision (*Montgomeryshire County Council* v. *Pryce-Jones* (1892), 57 J. P. 308, C. A.).

(*r*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 64 (1).

(*s*) *Ibid.*, s. 64 (3); see p. 369, *post*, and title MAGISTRATES.

(*a*) See p. 349, *ante*.

county council must find the means of raising (*b*). Both the county council and the joint-committee may issue regulations for managing the buildings so long as the regulations do not conflict (*c*).

Duty to provide accommodation for assizes and sessions.

The county council must see that proper provision is made for a shire hall, county hall, or other building for holding the assizes or the grand or other sessions of the peace, and for lodgings for the judges attending the assizes (*d*).

Duty to repair same.

The duty of the county council to effect repairs of the above-mentioned buildings does not relieve any persons or districts from liability by custom to repair and finish such buildings, and in such cases the money spent by the council in such repairs and maintenance is assessed and rated on such persons and districts, and not on the whole county (*e*).

SECT. 9.—*Meetings of Owners and Ratepayers under Public Health Acts.*

How summoned.

772. Meetings of owners (*f*) and ratepayers are sometimes, though rarely, required to determine questions (*g*). They are summoned, on a requisition of twenty ratepayers and owners or twenty ratepayers or owners resident in the district or place (*h*), by the mayor or chairman of the urban district council, as the case may be, or, in rural districts, by the churchwardens or overseers, or, if none of these, by a person appointed by the Local Government Board (*i*). Notices of the meeting are advertised in the local newspapers and affixed to the principal doors of the churches and chapels (*k*).

The chairman is the person summoning the meeting, or, failing him, someone elected by the meeting (*l*). He puts the resolution (*m*),

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(*b*) *Re Somerset County Council* (1889), 54 J. P. 182.

(*c*) *Ibid.*

(*d*) See the County Buildings Act, 1826 (7 Geo. 4, c. 63), ss. 3—5, 8, 9; County Buildings Act, 1837 (7 Will. 4 & 1 Vict. c. 24), ss. 1—3; County Buildings Act, 1847 (10 & 11 Vict. c. 28), s. 1; Judges' Lodgings Act, 1839 (2 & 3 Vict. c. 69), s. 1; and as to assizes, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 72. As to the assize courts etc. at Manchester, see Manchester Assize Courts Act, 1858 (21 & 22 Vict. c. xxiv.); Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 47.

(*e*) County Buildings Act, 1826 (7 Geo. 4, c. 63), s. 13. As to the transferred duties and liabilities with regard to bridges, see, generally, title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 184—189.

(*f*) For definition, see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4, and title PUBLIC HEALTH AND LOCAL ADMINISTRATION; compare titles BURIAL AND CREMATION, Vol. III., p. 410; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 113, note (*a*).

(*g*) *E.g.*, under the following sections of the Public Health Act, 1875 (38 & 39 Vict. c. 55):—s. 166 (provision of markets by urban authorities; see title MARKETS AND FAIRS); s. 216 (as to highway parishes in urban districts; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 126); s. 272 (constitution of a local government district; see p. 334, *ante*); and under the Highway Rate Assessment and Expenditure Act, 1882 (45 & 46 Vict. c. 27), s. 9.

(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), Sched. III. (1).

(*i*) *Ibid.*, Sched. III. (2). Security for payment of costs incurred in relation to such meeting must be given (*ibid.*, Sched. III. (3)).

(*k*) *Ibid.*, Sched. III. (4).

(*l*) *Ibid.*, Sched. III. (5).

(*m*) *Ibid.*, Sched. III. (6).

SECT. 9. Meetings of Owners and Ratepayers etc.

and if the majority of the meeting consent he can adjourn the meeting from time to time (*n*). The declaration of the chairman, in the absence of proof to the contrary, is sufficient evidence of the decision of the meeting (*o*).

Poll and voting.

A poll may be demanded on the resolution by any owner or ratepayer. In this case the poll is taken by means of voting papers in the prescribed form (*p*). The polling takes place under the same terms and conditions as formerly prevailed in the election of local boards (*a*). Owners and ratepayers are given a number of votes in proportion to their rating, the former being also able to vote in respect of their ownership and occupation of the same property, and either personally or by proxy (*b*). Members of corporations or bodies of persons cannot vote individually as owners of the property of the corporation or body, but partners in a firm, consisting of not more than six persons, may vote as if the property were divided equally among them (*c*). Where there is no register of owners and proxies, an owner or proxy is entitled to a voting paper on making a proper claim (*d*).

Election.

The person who has summoned the meeting is the returning officer (*e*), and he gives the necessary notice of the election. He may issue a list of voters, and has power to inspect and take copies of parish books and documents (*f*). He secures the delivery of the voting papers at the addresses of the voters three days at least before the day appointed for their collection (*g*). The only voting papers recognised are those which have been delivered and subsequently collected on the authority of the returning officer, but provision is made for failure to deliver or collect (*h*). Having collected the voting papers he must forthwith determine the result, signing and certifying it and delivering it to the council to be deposited at its office, open to inspection (*i*).

(*n*) Public Health Act, 1875 (38 & 39 Vict. c. 55), Sched. III. (5).

(*o*) *Ibid.*, Sched. III. (6).

(*p*) *Ibid.*, Sched. IV., Form O.

(*a*) *Ibid.*, Sched. III. (6). The rules relating to the election of local boards are contained in Sched. II. (8)—(17), (20), (21), (36)—(38), (44)—(49), (51)—(54), (66), (68), (69), subject to the modifications effected by Sched. III. (6). Sched. II. was repealed by the Local Government Act, 1894 (56 & 57 Vict. c. 73), and it only exists to the extent stated for the purpose of such polling.

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), Sched. II. (12)—(14). As to the number of votes given in a district divided into wards, see *ibid.*, Sched. II. (8), (9). As to the special definitions of "owner" and "ratepayer" for these purposes, see *ibid.*, Sched. II. (10), (11), respectively. As to the proxies to be used, see *ibid.*, Sched. II. (15), Sched. IV., Form M. As to a claim to be registered as an owner or proxy, see *ibid.*, Sched. II. (20), (21), Sched. IV., Form L.

(*c*) *Ibid.*, Sched. II. (16), (17).

(*d*) *Ibid.*, Sched. III. (6), adopting Sched. II. (20), (21).

(*e*) *Ibid.*, Sched. III. (6).

(*f*) *Ibid.*, Sched. II. (36)—(38).

(*g*) *Ibid.*, Sched. II. (44), (45)—(47), relating to the filling up of the voting papers. Penalties may be inflicted on the returning officer for default in his duties (*ibid.*, Sched. II. (68)), and on persons guilty of offences in the election (*ibid.*, Sched. II. (69)).

(*h*) *Ibid.*, Sched. II. (48), (49).

(*i*) *Ibid.*, Sched. II. (51), (53), (54).

SECT. 9. Meetings of Owners and Ratepayers etc.

Publication of resolution when passed.

Costs.

When passed a copy of the resolution must be forwarded by the summoning officer to the Local Government Board, advertised in the local papers, and affixed to the churches and chapels (*k*).

When the resolution results in the constitution of a local government district the costs of the meeting and poll are payable out of the general district rates; in urban districts the same costs are payable out of the fund or rate applicable to the general purposes of the Public Health Acts (*l*).

SECT. 10.—*Powers, Duties and Liabilities of the County Council.*

SUB-SECT. 1.—*Transferred Powers, Duties and Liabilities.*

(i.) *In General.*

773. Powers, duties and liabilities of an administrative character have been or may be (*m*) transferred by provisional order from certain Government departments and various authorities to the county council, and in some cases to joint committees of county councils (*n*). Enactments relating to transferred matters are to be

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(*k*) Public Health Act, 1875 (38 & 39 Vict. c. 55), Sched. III. (7).

(*l*) *Ibid.*, Sched. III. (8).

(*m*) See Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 10. The provisional order must be confirmed by Act of Parliament (*ibid.*).

(*n*) As to the determination of questions arising as to the extent of any transfer, see *ibid.*, s. 29; R. S. C., 10th August, 1892 (Yearly Practice of the Supreme Court, 1912, pp. 930, 931), and the following cases:—*Re Local Government Act*, 1888, *Ex parte Staffordshire Quarter Sessions* (*Chairman*) (1889), 54 J. P. 72 (as to rates levied in a stipendiary district); *Re Somerset County Council* (1889), 54 J. P. 182 (difference between county council and standing joint committee as to the maintenance of buildings for assizes and sessions); *Re West Riding County Council* (1890), 54 J. P. 533 (as to the liability to make local grants for a period before 1st April, 1889); *Re Staffordshire and Derbyshire County Councils* (1890), 54 J. P. 566 (as to liability under a local Act to repair a bridge in two counties); *Re Salop County Council* (1891) 56 J. P. 213 (as to liability under agreements to share the expense of a county lunatic asylum); *Re Warminster Local Board and Wilts County Council* (1890), 25 Q. B. D. 450 (as to maintenance of main roads); *Re Local Government Act*, 1888, *Ex parte Leicestershire County Council and County of Leicester Standing Joint Committee*, [1891] 1 Q. B. 53 (as to the division of a county into police districts); *Ex parte Kent County Council and Dover Council, Ex parte Kent County Council and Sandwich Council*, [1891] 1 Q. B. 389 (as to expenses of quarter and borough sessions); *Montgomeryshire County Council* v. *Pryce-Jones* (1892), 57 J. P. 308, C. A. (as to transfer of agreement for use of private room for sessions); *Marlborough Town Council* v. *Wilts County Council* (1894), 58 J. P. 213 (as to maintenance of main roads); *Cornwall County Council* v. *Truro Town Council* (1894), 58 J. P. 299 (as to liability for salary of borough justices' clerk); *Re Norfolk County Council* v. *Bittering* (*Highway Surveyor*) (1894), 58 J. P. 497 (as to right to take gravel from a pit for repairs of main road); *Re Bedfordshire County Council and Bedford Urban Sanitary Authority*, [1894] 2 Q. B. 786 (as to main roads when urban authority elects to maintain them); *Re Herefordshire County Council and Leominster Borough Town Council, and Re Local Government Act*, 1888, [1895] 1 Q. B. 43 (as to fees payable to justices' clerk in a borough having a separate commission of the peace and less than 10,000 inhabitants); *Re Cardigan County Council* (1890), 54 J. P. 468; *Ex parte Kent County Council and Dover Council, Ex parte Kent County Council and Sandwich Council*, [1891] 1 Q. B. 725, C. A.; *Thetford Corporation* v. *Norfolk County Council*, [1898] 2 Q. B. 468, C. A.

SECT. 10. Powers etc. of the County Council.

construed with such modifications as may be necessary to carry the Local Government Act, 1888 (*o*), into effect (*o*).

(ii.) *Powers, Duties and Liabilities transferred by the Local Government Act*, 1888.

Powers etc. transferred from quarter sessions exercised by county council alone.

774. The county council alone exercises the administrative business of the county formerly exercised by the quarter sessions or their committees in the following matters (*p*):—

Finance.

In matters of finance it makes, assesses, levies, applies and expends the county (*q*), police (*r*), hundred (*s*) and all rates; makes orders for payment out (*t*) of such rates, or out of the county stock (*a*), or county fund (*b*); prepares and revises the basis or standard for the county rate (*c*); exercises the powers of borrowing (*d*); passes the accounts of and discharges the county treasurer (*e*); fixes the tables of fees to be taken by and the costs to be allowed to inspectors, analysts, and other county officers other than the clerk of the peace and the clerks to the justices (*f*); determines and pays the salaries of all officers whose remuneration is payable out of the county rates other than the clerk of the peace and the clerks to the justices (*g*); provides for and pays the salary of the county coroner and determines the fees, allowances and disbursements to be paid by him (*h*); provides and pays compensation for damage done by riots (*i*); provides for the expenses incurred in the execution of the Acts under which the county council is the authority in place of the

(*o*) 51 & 52 Vict. c. 41, s. 78. A county council cannot perform any judicial business (*ibid.*). No transfer affects the jurisdiction of quarter sessions and justices as to rating appeals (*ibid.*, s. 8); see titles MAGISTRATES, p. 638, *post*; RATES AND RATING.

(*p*) The transfer is subject to existing powers, duties, and liabilities (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 28 (1).

(*q*) See p. 359, *ante*.

(*r*) As to management of the police, see title POLICE.

(*s*) See title RATES AND RATING.

(*t*) See p. 358, *ante*.

(*a*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (i.); see p. 362, *ante*.

(*b*) See p. 358, *post*.

(*c*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (i.). These provisions are not applicable to county boroughs (*ibid.*, s. 34 (3)). As to the basis or standard for the county rate, see p. 359, *ante*.

(*d*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (ii.); see p. 361, *ante*.

(*e*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (iii.); see p. 346, *ante*.

(*f*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (ix.). As to county officers generally, see p. 342, *ante*; and as to the clerk of the peace, see p. 343, *ante*; and as to justices' clerks, see title MAGISTRATES, pp. 611 *et seq.*, *post*. The county council does not determine, although it pays, the salaries of these clerks. The provisions as to county officers do not apply to county boroughs (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 34 (3)).

(*g*) *Ibid.*, s. 3 (x.); see note (*f*), *supra*.

(*h*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (xi.). This provision does not apply to county boroughs (*ibid.*, s. 34 (3)). See also title CORONERS, Vol. VIII., p. 222; and see especially *ibid.*, pp. 217, 218; and, as to special divisions of counties, *ibid.*, pp. 214—221.

(*i*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (xii). The liability thus transferred is imposed by the Riot (Damages) Act, 1886 (49 & 50 Vict. c. 38).

SECT. 10. Powers etc. of the County Council.

quarter sessions (*k*); and provides and pays the costs of matters in connection with the registration of parliamentary voters (*l*).

Property and institutions.

In matters relating to county property and institutions the county council, as successor to the quarter sessions, deals with shire halls and the other property already specified (*m*); the provision and maintenance of asylums for pauper lunatics (*n*); county bridges and their approaches (*o*).

Officers.

In connection with officers, the county council appoints and removes the county treasurer (*p*), the county surveyor (*q*), the public analysts (*r*), any officer under the Explosives Act, 1875 (*s*), and any officer whose remuneration is paid out of the county rate other than the clerk of the peace and the clerks to the justices (*t*), or the coroner (*u*).

Division of county.

The county council also exercises certain powers of dividing the county into coroners' districts (*a*), and polling districts (*b*), and of appointing places of election and revision courts (*c*).

Licensing.

In matters of licensing, the transferred powers of the justices are those of licensing, under any general Act, places for music and dancing, and of granting certain racecourse licences (*d*).

Miscellaneous.

The county council also exercises the powers and performs the

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(*k*) See the text, *infra*.

(*l*) See title ELECTIONS, Vol. XII., p. 246.

(*m*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (iv.); see further, p. 364, *ante*, and also as to the obligation to make provision for the accommodation of the quarter sessions and justices, see p. 364, *ante*. As to reformatory and industrial schools, see title EDUCATION, Vol. XII., pp. 78, 79.

(*n*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (vi.); see title LUNATICS AND PERSONS OF UNSOUND MIND, pp. 479 *et seq.*, *post*. Any asylum provided in whole or in part at the cost of a county is included in the expression "county lunatic asylum" (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 86 (5)).

(*o*) *Ibid.*, s. 3 (viii.); see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 184—189.

(*p*) See p. 344, *ante*. This provision is not applicable to county boroughs (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 34 (3)).

(*q*) See p. 346, *ante*.

(*r*) See p. 347, *ante*.

(*s*) 38 & 39 Vict. c. 17. The reference here is to the powers of the justices in quarter sessions under *ibid.*, s. 75; see, further, title EXPLOSIVES, Vol. XIV., pp. 390, 391.

(*t*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (x.); see note (*f*), p. 368, *ante*. As to the clerk of the peace, see p. 343, *ante*, and as to clerks to the justices, see title MAGISTRATES, pp. 611 *et seq.*, *post*.

(*u*) See title CORONERS, Vol. VIII., pp. 215, 234.

(*a*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (xi.). This is not applicable to county boroughs (*ibid.*, s. 34 (3)); see, further, title CORONERS, Vol. VIII., p. 214.

(*b*) As to electoral divisions and polling districts, see the Polling Districts (County Councils) Act, 1908 (8 Edw. 7, c. 13), s. 2.

(*c*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (xii.); and see title ELECTIONS, Vol. XII., pp. 262, 308.

(*d*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (v.); see, further, title THEATRES AND OTHER PLACES OF ENTERTAINMENT.

The reference to racecourses is confined to the Racecourses Licensing Act, 1879 (42 & 43 Vict. c. 18), which affects only a radius of ten miles from Charing Cross; see, further, title GAMING AND WAGERING, Vol. XV., pp. 286, 287.

SECT. 10. Powers etc. of the County Council.

duties formerly vested in or imposed upon the quarter sessions as county authority under the Highways and Locomotives (Amendment) Act, 1878 (*e*); as local authority under the Acts relating to contagious diseases of animals (*f*), destructive insects (*g*), fish conservancy (*h*), wild birds (*i*), weights and measures (*k*), gas meters (*l*), and stamps (*m*); also matters arising out of the Riot (Damages) Act, 1886 (*n*); the registration of the rules of scientific societies (*o*), the registration of charitable gifts (*p*), the certifying and recording of places of religious worship (*q*), the confirmation and record of the rules of loan societies (*r*).

Powers etc. transferred from quarter sessions exercised by county council and quarter sessions jointly.

775. Other powers which were formerly exercised only by the quarter sessions have been transferred to the jurisdiction of a standing joint committee representative of the county council and the justices of quarter sessions.

Such powers are those relating to the control of the county police (*s*), the appointment and removal of the clerk of the peace (*t*), the fixing of the salaries of the justices' clerks of petty sessional

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(*e*) 41 & 42 Vict. c. 77; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 14, 99, note (*t*).

(*f*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (xiii.); see title ANIMALS, Vol. I., pp. 429 *et seq.*

(*g*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (xiii.); see title AGRICULTURE, Vol. I., p. 281.

(*h*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (xiii.); see title FISHERIES, Vol. XIV., pp. 622 *et seq.*

(*i*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (xiii.); see title ANIMALS, Vol. I., pp. 405 *et seq.*

(*k*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (xiii.); see title WEIGHTS AND MEASURES.

(*l*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (xiii.). This provision does not extend to county boroughs (*ibid.*, s. 34 (3)); see title GAS, Vol. XV., p. 344.

(*m*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (xiii.). The reference to stamps is to the Local Stamp Act, 1869 (32 & 33 Vict. c. 49), which enabled the justices in quarter sessions to order that all fees and penalties payable to the treasurer should be paid and received by stamps when the clerks of petty and special sessions and justices within the county were paid by salary. Questions arising as to the application of the Act are among the matters to be referred to and determined by the standing joint committee.

(*n*) 49 & 50 Vict. c. 38; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (xiv.).

(*o*) Under the Scientific Societies Act, 1843 (6 & 7 Vict. c. 36); see title LITERARY AND SCIENTIFIC INSTITUTIONS, p. 207, *ante*.

(*p*) Under the Charitable Donations Registration Act, 1812 (52 Geo. 3, c. 102); see title CHARITIES, Vol. IV., p. 244.

(*q*) Under the Places of Religious Worship Act, 1812 (52 Geo. 3, c. 155), s. 2; see title ECCLESIASTICAL LAW, Vol. XI., p. 817.

(*r*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 4; see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (xv.); and see title LOAN SOCIETIES, p. 219, *ante*.

(*s*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 9, 30; and see title POLICE. This includes the control over the division of the county into police districts (*Ex parte Leicestershire County Council and County of Leicester Standing Joint Committee*, [1891] 1 Q. B. 53).

(*t*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83, and p. 343, *ante*.

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divisions in the county (*a*); to joint officers; to matters required to be determined jointly by the quarter sessions and the county council (*b*); to any matters arising with respect or incidental to the above-mentioned police, clerks or joint officers, or joint matters; to the provision of accommodation for the quarter sessions or justices out of session, or to the use by them or the police or clerks of any buildings, rooms or premises (*c*); or to the application of the Local Stamp Act, 1869 (*d*), to any sums received by clerks to justices (*e*); or to any matters required to be determined jointly by the quarter sessions and the county council (*f*).

Powers etc. transferred from justices.

776. Beyond the administrative powers and business of the quarter sessions the county council takes by transfer from the justices of the county out of session the powers in respect of the licensing of places for stage plays (*g*), and their powers and duties in respect of the execution as local authority of the statute relating to explosives (*h*).

Transfer of duties of inhabitants of county.

777. The duties and liabilities of the inhabitants of the county are now the duties and liabilities of the county council (*i*), but such transfer does not create any new liabilities; and any common law or statutory restrictions on the duties and liabilities formerly existing in the case of the inhabitants of the county continue in the hands of the county council (*k*).

Exercise of transferred powers in boroughs, and county boroughs.

778. The powers, duties and liabilities of the quarter sessions or justices, which, in the case of the county, are transferred to the county council, are also transferred to the council of a county borough, in so far as that council was not already possessed of

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(*a*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 30, 84 (2); and see title MAGISTRATES, pp. 611 *et seq.*, *post*. This applies to the clerks of county petty sessional divisions (*Cornwall County Council* v. *Truro Town Council* (1894), 58 J. P. 299), but not to the clerks to the borough justices (*Thetford Corporation* v. *Norfolk County Council*, [1898] 2 Q. B. 468, C. A., overruling *Ex parte Kent County Council and Dover Council, Ex parte Kent County Council and Sandwich Council*, [1891] 1 Q. B. 389, and *Re Herefordshire County Council and Leominster Borough Town Council, and Re Local Government Act*, 1888, [1895] 1 Q. B. 43).

(*b*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 30 (1).

(*c*) *Ibid.*, s. 30 (1), (3). The joint committee have complete control over and can direct the expenditure of the funds, which the county council is under obligation to raise (*Re Somerset County Council* (1889), 54 J. P. 182).

(*d*) 32 & 33 Vict. c. 49; see note (*m*), p. 370, *ante*.

(*e*) See title MAGISTRATES, p. 613, *post*.

(*f*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 30 (3).

(*g*) See title THEATRES AND OTHER PLACES OF ENTERTAINMENT.

(*h*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 7; see Explosives Act, 1875 (38 & 39 Vict. c. 17), and title EXPLOSIVES, Vol. XIV., p. 360. As to the transfer of powers from borough councils and borough justices, see the text, *infra*.

(*i*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 79 (2).

(*k*) Compare *Salford Corporation* v. *Lancashire County Council* (1890), 25 Q. B. D. 384, C. A., and consider, for example, the liabilities for non-repair of county bridges which are the same as formerly; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 188.

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them (*l*), whether they were formerly vested in or attached to the court of quarter sessions or justices of the borough or of the county in which the borough is situate (*m*). But the provisions of transfer relating to county officers, the standing joint committee, coroners, gas meters, and rates, and the basis or standard for the county rate, have no application to county boroughs (*n*), nor has the council of the borough transferred to it any of the powers in relation to the division of the county into polling districts for parliamentary elections, the appointment of places of election for the county, the revision courts, and the costs of matters to be done for the registration of parliamentary voters for the county (*o*).

In other boroughs.

779. The position of other boroughs depends upon whether they are quarter sessions boroughs, and if so, whether they had in 1881 a population of 10,000 or less, or whether they have been constituted quarter sessions boroughs since 1888, or whether they are boroughs with a separate commission of the peace (*p*).

In larger quarter sessions boroughs.

780. In quarter sessions boroughs, not being county boroughs, having in 1881 a population of 10,000 and upwards, the council of the borough retains, as formerly, its powers as local authority under any Acts (*q*). Subject thereto and to certain provisions as to contributions (*r*) and highways (*s*), such boroughs form part of the county for administrative purposes (*t*).

In smaller quarter sessions boroughs.

In boroughs which have a separate court of quarter sessions and a population according to the census of 1881 of less than 10,000, the county council has, by transfer, the powers, duties and liabilities formerly possessed by the borough council and the borough justices relating to the provision and maintenance etc. of asylums for pauper lunatics (*a*), and the former powers, duties, and liabilities of the borough council as regards coroners (*b*), and the appointment of analysts under the Acts relating to the sale of food and drugs (*c*);

(*l*) As to what are county boroughs, see p. 300, *ante*.

(*m*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 34 (1) (c).

(*n*) *Ibid.*, s. 34 (3). These matters have either no application to such boroughs, *e.g.*, county rates, or are provided for by other statutes, *e.g.*, the borough officers are regulated by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), see p. 300, *ante*; the purposes of the standing joint committee are met by the council or watch committee, see pp. 302, 321, *ante*; as to coroners, see title CORONERS, Vol. VIII., pp. 218, 225; as to gas meters, see title GAS, Vol. XV., p. 344.

(*o*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 34 (6). As to the power of the borough council to divide the borough into polling districts for its own elections, see title ELECTIONS, Vol. XII., p. 308.

(*p*) See p. 301, *ante*. As to the effect of a subsequent grant of quarter sessions to a borough, see p. 373, *post*.

(*q*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 35 (1); and see also pp. 301, 348, 355, *ante*.

(*r*) See p. 373, *post*.

(*s*) See Local Government Act, 1888 (51 & 52 Vict. c. 41), and title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 14.

(*t*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 35 (1).

(*a*) See title LUNATICS AND PERSONS OF UNSOUND MIND, pp. 479 *et seq.*, *post*.

(*b*) See title CORONERS, Vol. VIII., p. 225.

(*c*) See title FOOD AND DRUGS, Vol. XV., pp. 6—8.

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under the Acts relating to reformatory and industrial schools (*d*), fish conservancy (*e*), explosives (*f*), and under the Highways and Locomotives (Amendment) Act, 1878 (*g*). For the above, and all other administrative purposes of the county council, the area of the borough is included in the county and is subject to the authority of the county council (*h*), and its parishes are liable to be assessed to all county contributions (*i*). A transfer under the above provision includes the transfer of any agreement relating to the above matters which such a borough may have entered into with other authorities, and subject to the terms and conditions thereof (*k*).

In smaller boroughs generally.

Boroughs, whether with or without a separate court of quarter sessions, which by the census of 1881 had a population less than 10,000, form part of the county for all matters relating to the police force (*l*), the appointment of analysts under the Acts relating to the sale of food and drugs (*m*), the execution of the Destructive Insects Act, 1877 (*n*), gas meters (*o*), weights and measures (*p*), and the execution of the Acts relating to explosives (*q*); but the borough council retains the powers of making regulations in respect of dairies and milkshops (*r*).

In quarter sessions boroughs created since 1888.

781. The area of a borough, other than a county borough, which has been granted a court of quarter sessions since the 13th August, 1888, is subject to the authority of the county council, and its parishes are assessed to county contributions as they were before such grant; and the mayor, aldermen and burgesses, or borough council, take no further power, duties, or liabilities by the grant than are necessary for establishing and maintaining the court so granted (*s*).

(*d*) See title EDUCATION, Vol. XII., p. 73.
(*e*) See title FISHERIES, Vol. XIV., p. 601.
(*f*) See title EXPLOSIVES, Vol. XIV., p. 360.
(*g*) 41 & 42 Vict. c. 77; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 38 (1), (2); see, further, title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 14, 26, 117.
(*h*) And the county coroners (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 38 (5)); see title CORONERS, Vol. VIII., p. 225.
(*i*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 38 (5); see, further, as to the financial relations, p. 356, *ante*.
(*k*) *Re Salop County Council* (1891), 56 J. P. 213, in which case an agreement had been made by three quarter sessions boroughs of less than 10,000 inhabitants with two counties and a borough in one of them to share the expenses of a county lunatic asylum.
(*l*) See title POLICE.
(*m*) See title FOOD AND DRUGS, Vol. XV., p. 68.
(*n*) 40 & 41 Vict. c. 68; and see title AGRICULTURE, Vol. I., p. 280.
(*o*) See title GAS, Vol. XV., p. 344.
(*p*) See title WEIGHTS AND MEASURES.
(*q*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 39 (1), (3); see title EXPLOSIVES, Vol. XIV., p. 360.
(*r*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 39 (2). The regulations are made under the Contagious Diseases (Animals) Act, 1878 (41 & 42 Vict. c. 74), s. 34, as amended by the Contagious Diseases (Animals) Act, 1886 (49 & 50 Vict. c. 32), s. 9. In all other respects these Acts were repealed by the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), Sched. V., and under *ibid.*, s. 3, the county council is the local authority in boroughs to which the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 39, refers; see, further, title ANIMALS, Vol. I., pp. 429 *et seq.*
(*s*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 37.

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In boroughs with separate commission of peace.

782. In a borough, whether a quarter sessions borough or not, having a separate commission of the peace, and not being a county borough, all the powers, duties and liabilities of the court of quarter sessions or justices of the borough, which, in the case of the counties, are transferred to the county council, are exercised within the borough by the county council, with the exception of those relating to pauper lunatics. These are reserved for the borough council unless the borough is one of the smaller quarter sessions boroughs (*t*), in which case the county council exercises these powers also (*a*).

SUB-SECT. 2.—*Conferred Powers, Duties, and Liabilities.*

Areas of local government.

783. County councils may make representations to the Local Government Board as to the boundaries of a county or borough, the union of county boroughs and counties, the union of counties or boroughs or the division of a county, the constitution of county boroughs, the alteration of county electoral divisions or of the number of county councillors and electoral divisions, or the alteration of areas of local government partly situate in the county (*b*).

Bills in Parliament and legal proceedings.

County councils have the same powers of promoting and opposing bills in Parliament and of prosecuting or defending any legal proceedings necessary for the promotion or protection of the interests of the inhabitants of the county as are possessed by borough councils (*c*), except that in the case of the county council the consent of owners and ratepayers is not necessary (*d*).

County councils association.

For the purpose of consultation as to their interests in common with other county councils and for the discussion of matters of local government, county councils are authorised to make contributions to an association formed for these purposes (*e*).

Emigration and colonisation.

County councils may advance money to persons or bodies of persons, whether corporate or unincorporate, to aid in the emigration or colonisation of inhabitants of the county, with a guarantee for repayment of such advances from any local authority in the county, or the Government of any colony (*f*).

Local inquiries

784. County councils have power to hold local inquiries (*g*) as to

(*t*) See p. 372, *ante*.

(*a*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 36.

(*b*) *Ibid.*, s. 54; see the Polling Arrangements (Parliamentary Boroughs) Act, 1908 (8 Edw. 7, c. 14), s. 2.

(*c*) Under the Borough Funds Act, 1872 (35 & 36 Vict. c. 91) (see p. 380, *post*), and the Railway and Canal Traffic (Provisional Orders) Amendment Act, 1891 (54 & 55 Vict. c. 12), s. 1.

(*d*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 15, extended to the promotion of Bills by the County Councils (Bills in Parliament) Act, 1903 (3 Edw. 7, c. 9), s. 1 (1), (5), which also deals with expenses and appeals (*ibid.*, s. 1 (2), (3)); and see, generally, title PARLIAMENT.

(*e*) See County Councils Association Expenses Act, 1890 (53 & 54 Vict. c. 3), s. 1.

(*f*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 69 (1) (d).

(*g*) The county council cannot charge on the parish or district the remuneration of a barrister appointed by the county council to hold the inquiry (*Middlesex County Council* v. *Kingsbury Urban Council*, [1909] 1 K. B. 554, C. A.). As to the power of county councils to contribute to the expenses of inquiries by the Charity Commissioners, see title CHARITIES, Vol. IV., p. 357.

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the advisability of altering local government areas in their districts (*h*); as to the establishment of isolation hospitals (*i*); as to the compulsory acquisition of land by a parish council (*k*).

Other powers and duties are conferred or imposed upon county councils by a large number of statutes (*l*).

SUB-SECT. 3.—*Power to compel Performance of Duties by other Councils.*

As to sewers, water, and highways.

785. Upon receiving a complaint from a parish council (*m*) that the district council has neglected its duties under the Public Health Acts (*n*) in respect of providing the parish with sewers or of maintaining sewers, or of supplying the parish with water, or in respect of maintaining and repairing highways, the county council may, after inquiry, either resolve that the duties and powers of the district council for the purpose of the matter complained of shall be transferred to the county council, or may make such an order as is mentioned in the Public Health Act, 1875 (*o*), s. 299, and may appoint a person to perform the duty mentioned in the order (*p*).

Procedure.

A copy of every report which is required by the regulations of the Local Government Board to be sent to the Board by the medical officers of urban and rural district councils is also required to be sent to the council of the county within which such district lies (*q*), and if it appears from such report that the Public Health Act, 1875 (*r*), has not been properly put in force within any district, and that some matter of public health in the district requires remedy, the county council may represent the case to the Local Government Board (*a*).

As to rights of way and roadside wastes.

786. On the complaint by the parish council, or in some cases the parish meeting, as to the failure of the district council, in certain cases, to protect public rights of way, or roadside wastes,

(*h*) See Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 72.

(*i*) Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), ss. 6, 7: see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*k*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 9; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 9, 167 *et seq.*

(*l*) See titles referred to in the list of cross references at pp. 233—236, *ante*. As to powers to compel performance of duties by other councils, see the text, *infra*.

(*m*) See p. 249, *ante*. As to the right of the parish meeting to make the complaint, see p. 259, *ante*.

(*n*) See, generally, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*o*) 38 & 39 Vict. c. 55, s. 299; and see titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 150, 151; PUBLIC HEALTH AND LOCAL ADMINISTRATION; SEWERS AND DRAINS; WATER SUPPLY; and, as to notice of the resolution, see note (*c*), p. 376, *post*.

(*p*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 16 (1), (2). When the order is made the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 299—302, apply (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 16 (2)).

(*q*) *Ibid.*, s. 19 (1). As to the consequences of not sending such copy, see note (*m*), p. 277, *ante*.

(*r*) 38 & 39 Vict. c. 55.

(*a*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 19 (2). The Board may hold a local inquiry (*ibid.*, s. 87 (1)). As to this, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

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the county council may transfer to itself the powers and duties of the district council (*b*).

Joint committees.

787. If the rural district is in two or more counties the complaint is made by the parish council to the county council in whose district the parish is situate. When the subject-matter affects more than one county the complaint is referred to a joint committee of their councils; and if any members of the joint committee are not appointed, those who have been appointed are to act. Questions relating to the constitution of joint committees are settled by the Local Government Board (*c*).

As to closing or demolition orders.

788. The county council has power to compel rural district councils in its area to perform their duties in respect of the housing of the working classes. In the case of unhealthy or obstructive buildings against which a rural district council has failed to proceed by making and enforcing a closing or demolition order the council of the county in which such district lies may give written notice to the district council that such proceedings ought to be adopted. In the event of continued failure of the district council, the county council may, by resolution, declare the district council to be in default, and thereupon the powers of the district council in such matter, except the power of making a scheme of reconstruction, are vested in the county council, but at the expense of the defaulting district council (*d*).

As to provision for housing.

Similarly, where a rural district council has failed in a proper case to make provision for the housing of the working classes, the county council, upon complaint by a parish council or parish meeting, or by four inhabitant householders of the rural district, and after holding a local inquiry, may resolve that the powers of the rural district council in respect of which it is in default be transferred to them (*e*).

(*b*) See the Local Government Act, 1894 (56 & 57 Vict. s. 73), s. 26 (4). As to the right of the parish meeting to make complaint, see pp. 249, 259, *ante*.

(*c*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 63 (2); and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 29, 30, 150, 151, 162, 163. In the above cases of the powers of the district council being transferred by resolution to the county council (see p. 375, *ante*), notice of the resolution must be sent forthwith to the district council and the Local Government Board. The expenses incurred by the county council are a debt from the district council, payable as part of its expenses in the execution of the Public Health Acts, and they may be raised in like manner. The county council may borrow for the purposes in exactly the same way as the district council might have done (see p. 337, *ante*), and may charge the fund or rate with the payment of principal and interest of the loan, and the loan with interest must be paid, and the charge has the same effect, as if the loan were lawfully raised and charged on the fund or rate by the district council (see p. 337, *ante*). Separate accounts must be kept by the county council. The county council may by order vest all or any of its powers, duties, property, debts and liabilities in relation to any of the transferred powers in the district council (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 63 (1)).

(*d*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 45 (2); see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*e*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 12. In such case the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 63,

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As an alternative to the above courses the county council may represent the matter by way of complaint to the Local Government Board, and the Board may, amongst other remedial measures, order the county council to execute the necessary works or things (*f*).

SUB-SECT. 4.—*Powers of County Councils to adjust Local Government Areas over County Districts and Parishes.*

Powers over county districts and parishes.

789. The county council has power to make the following alterations in respect of a county district, *i.e.*, the district of an urban or rural council, not being a borough (*g*), or in respect of a parish (*h*), namely: the alteration or definition of the boundary; the division of districts or parishes; the union of districts or parishes with others; the transfer of part of a parish to another; the conversion of a rural district, or part, into an urban district; the conversion of an urban into a rural district; the transfer of the whole, or part, of a district to another; the formation of new urban or rural districts (*i*); the division of an urban district into wards; the alteration of the number or boundaries of wards; the alteration of the number of members of a district council; and the apportionment of the members among the wards.

Joint committees.

If the areas are situate in two or more counties, or their alteration will affect the boundaries of a poor law union situate in two or more counties, the powers are exercised by a joint committee of the county councils interested (*k*).

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applies, as to which see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*f*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 10 (1), (3).

(*g*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 100.

(*h*) This power does not in any way affect the powers of the Local Government Board in respect of the union, division, or alteration of parishes (*ibid.*, s. 57 (7); see p. 238, *ante*). But in practice it supersedes, if it does not destroy, the power conferred by the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 270—275, upon the Local Government Board of altering the area of local government districts. As to further powers with regard to parishes, see p. 379, *post*. As to the adjustment of property, income, debts, liabilities and expenses which are affected by any such order of a county council, see the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 68; as to local inquiries by a county council, see p. 374, *ante*.

(*i*) An urban district thus created has the same position as if created under the Public Health Act, 1875 (38 & 39 Vict. c. 55) (*R.* v. *Barnes, Ex parte Ratcliff* (1896), 13 T. L. R. 25); but the extension of a district by such an order does not give to the urban authority whose district is extended the power of supplying the extended portion with water, except under the conditions imposed by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 52, and it is doubtful whether the Local Government Board can in its order confer such a power upon the urban authority as would interfere with the rights of other persons under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 52 (*Huddersfield Corporation* v. *Ravensthorpe Urban Council*, [1897] 2 Ch. 121, C. A.); and see title WATER SUPPLY.

(*k*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 36, 42. As to procedure etc., see also Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 57, 59, 60, 87; Order of the Local Government Board, 14th September, 1889.

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SUB-SECT. 5.—*Powers of County Council to control Government of County Districts, Rural Districts, and Unions.*

Fixing and altering number of guardians or councillors.

790. The county council may by order fix or alter the number of guardians or rural district councillors to be elected for each parish in its county, and for this purpose may exercise powers similar to those vested in the Local Government Board (*l*) of adding parishes to each other and dividing parishes into wards (*m*).

Regulating retirement.

The county council may also, in order to regulate the retirement of guardians or rural district councillors, in cases where they retire by thirds, and to secure that as nearly as possible one-third of such guardians and councillors shall retire in each year, direct in which year or years of each triennial period the guardians or councillors for each parish, ward, or other area shall retire (*n*).

Joint committees.

If the poor law union is situated in more than one county, the above powers must be exercised by a joint committee of the county councils concerned (*o*).

Miscellaneous: in rural districts;

791. The county council may also direct the name which a rural district shall bear (*p*); may apply to the Local Government Board that urban powers shall be conferred on rural district councils (*q*); may assist in preserving rights of common (*r*); may take steps on the default of the rural district council in certain matters (*s*); and may make such orders as may be necessary for the proper constitution of the rural district council (*t*).

in urban districts;

The county council may also take steps for the proper constitution of the urban district council (*a*).

(*l*) Under the Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 6; and see title POOR LAW.

(*m*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 60 (1). If guardians are elected under any local or personal Act for districts, by whatever name called, this and the other provisions of *ibid.*, s. 60, apply to that district (*ibid.*, s. 60 (4)).

(*n*) *Ibid.*, s. 60 (2). See also the power of the county council to order simultaneous retirement of guardians and rural district councillors, *ibid.*, ss. 20 (6) (a), 24 (4); and for a similar power in respect of urban district councillors, *ibid.*, s. 23 (6); and see title ELECTIONS, Vol. XII., p. 362.

(*o*) See Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 60 (3).

(*p*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 24 (7); see p. 329, *ante*.

(*q*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 25 (7); see p. 332, *ante*.

(*r*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 26 (2); see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 600, 601.

(*s*) As to obstruction of rights of way, see p. 375, *ante*; and as to default respecting the housing of the working classes, see p. 376, *ante*.

(*t*) Local Government (Elections) Act, 1896 (59 & 60 Vict. c. 1), s. 1. By *ibid.*, s. 2, the Act was to expire in 1897 unless continued. It has been continued each year since and is still in operation. By *ibid.*, s. 1 (3), the council may delegate the exercise of its powers to a committtee.

(*a*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 57 (5); Local Government (Elections) Act, 1896 (59 & 60 Vict. c. 1), s. 1. This latter Act is still in operation. See also p. 268, *ante*, and as to directing the simultaneous retirement of the councillors, see title ELECTIONS, Vol. XII., p. 362.

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Other powers exercisable by the county council in matters affecting parishes are those relating to the compulsory acquisition of land by a parish council (*b*); loans by parish councils (*c*); complaints by a parish council or parish meeting that a rural district council is in default (*d*); the security to be given by the treasurer of a parish council (*e*); the custody of documents (*f*); the division of a parish into wards (*g*); the conferring of powers of a parish council on a parish meeting (*h*); the consent of a parish meeting to matters affecting part of a parish with defined boundaries (*i*); the grouping of parishes (*k*); the creation or dissolution of a parish council (*l*); the removal of disqualification in favour of a parish councillor (*m*); the ordering of a new election of a parish council (*n*), or parish councillor or guardian or auditor (*o*); the scale of election expenses (*p*); the name of a divided parish (*q*); securing the proper constitution of the parish councils (*r*).

in and concerning parishes.

Powers of Local Government Board to transfer powers.

792. The Local Government Board have power to transfer to county councils certain powers and duties, either by provisional orders or by direct orders (*s*).

(*b*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 9; and see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 167 *et seq.*

(*c*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 11 (2), 12; see p. 244, *ante.*

(*d*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 16, 19 (8); see p. 375, *ante.*

(*e*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 17 (6); see p. 250, *ante.*

(*f*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 17 (9); see p. 253, *ante.*

(*g*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 18; see p. 238, *ante.*

(*h*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 19 (10); see p. 258, *ante.*

(*i*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 37; see note (*a*), p. 258, *ante.*

(*k*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 1 (1), 38; see p. 240, *ante.*

(*l*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 39; see pp. 239, 240, *ante.*

(*m*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 46 (3); see p. 241, *ante.*

(*n*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 47 (5); see p. 241, *ante.*

(*o*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 48 (5); and as to guardians, see title POOR LAW.

(*p*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 48 (7); see title ELECTIONS, Vol. XII., pp. 363, 373.

(*q*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 55 (2); see p. 239, *ante.*

(*r*) Local Government (Elections) Act, 1896 (59 & 60 Vict. c. 1), s. 1; and see p. 241, *ante.*

(*s*) See the Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 4, 10; Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), Part III.; Local Government (Transfer of Powers) Act, 1903 (3 Edw. 7, c. 15); Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 13.

Part II.—Conferring of Powers.

SECT. 1.

Borough Funds Acts, 1872 and 1903.

SECT. 1.—*Borough Funds Acts*, 1872 *and* 1903.

SUB-SECT. 1.—In *General.*

General powers to take proceedings.

Powers under Borough Funds Acts, 1872 and 1903.

793. Local authorities as trustees are entitled to take any proceedings, including the opposition of Bills in Parliament, which may be necessary for the protection of their own corporate existence, or of their rights, property, and privileges, and to charge the expenses upon their public funds or rates (*a*). They are also in many instances and for specific purposes expressly authorised by statutes to incur expenses (*b*). But beyond these common law and special statutory powers a further statutory power (*c*), of more general scope, has been conferred on certain of such authorities, subject to conditions and restrictions, which, however, does not affect such common law and special statutory powers, or any statutory rights vested in or exercisable by the inhabitants of the district (*d*), nor does it apply to applications for any Bill in Parliament for any object which would be obtainable by provisional order (*e*). The bodies which have this general statutory power are borough councils, urban district councils (*f*), and county councils (*g*), but not rural district councils (*h*).

Local and personal Bills.

794. Under this power it is competent for such authorities, when they deem it expedient to do so, to promote or oppose any local and personal Bill in Parliament, or to prosecute or defend any legal

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(*a*) See *A.-G.* v. *Brecon Corporation* (1878), 10 Ch. D. 204.

(*b*) See, generally, the titles to which cross references are given at pp. 233—236, *ante.*

(*c*) Under the Borough Funds Act, 1872 (35 & 36 Vict. c. 91); Borough Funds Act, 1903 (3 Edw. 7, c. 14). The former Act does not apply to the City of London (Borough Funds Act, 1872 (35 & 36 Vict. c. 91), s. 11); see title METROPOLIS.

(*d*) Borough Funds Act, 1872 (35 & 36 Vict. c. 91), s. 8; Borough Funds Act, 1903 (3 Edw. 7, c. 14), s. 4. See *Brooks, Jenkins & Co.* v. *Torquay Corporation*, [1902] 1 K. B. 601, where it was held that the Borough Funds Act, 1872 (35 & 36 Vict. c. 91), s. 8, exempted from the requirements of this Act the costs incurred by an urban district council in opposing a provisional order for the extension of a borough on the ground that such costs, when sanctioned by the Local Government Board, were authorised by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 298.

(*e*) Borough Funds Act, 1872 (35 & 36 Vict. c. 91), s. 10.

(*f*) *Ibid.*, s. 1. The statute terms them "governing bodies," and the term "district" is defined to mean the borough, place, township or district within which the governing body has jurisdiction (*ibid.*, s. 1); and the term "council" in the Borough Funds Act, 1903 (3 Edw. 7, c. 14), s. 9, includes the council of every borough, including metropolitan boroughs, which were excluded by the Borough Funds Act, 1872 (35 & 36 Vict. c. 91), s. 11.

(*g*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 15; County Councils (Bills in Parliament) Act, 1903 (3 Edw. 7, c. 9); and see p. 374, *ante.*

(*h*) See definition of "governing bodies" in the Borough Funds Act, 1872 (35 & 36 Vict. c. 91), s. 1, and *Cleverton* v. *St. Germain's Union Rural Sanitary Authority* (1886), 56 L. J. (Q. B.) 83.

SECT. 1.
Borough Funds Acts, 1872 and 1903.

proceedings (*i*) necessary for the promotion or protection of the interests of the inhabitants of their districts. For such purposes they may apply their funds or rates to the payment of the costs and expenses, and if there be several funds or rates under their control they may determine out of which the expenses shall be payable and in what proportion (*k*). The same power includes the right of these councils to be petitioners and to appear to oppose Bills to confirm provisional orders made under the Railway and Canal Traffic Act, 1888 (*l*), and to provide or contribute towards the expenses of the appearance or opposition of a petitioner out of their funds or rates (*m*).

Bills to confirm provisional orders under Railway and Canal Traffic Act, 1888.

795. The above power cannot be used to promote or oppose a Bill the promotion of or opposition to which has been decided by a committee of either House of Parliament to be unreasonable or vexatious (*n*); nor can any member of the local authority be paid for acting as counsel or agent in the matter (*o*). Further, a Bill for the establishment of gas or water works cannot be promoted in competition with any like existing works established by Act of Parliament (*p*).

Limits on the power.

Beyond the special conditions attached to the promotion of Bills by a borough or urban district council (*q*) the following conditions are imposed in relation both to their promotion and opposition by any local authority:—

Conditions under which power is exercisable.

(i.) There must be a resolution in favour of such promotion or opposition passed by an absolute majority of the whole council at a meeting of the council; (ii.) there must be, over and above the ordinary notices required for the convening of such meeting, ten clear days' notice by public advertisement of the meeting, and of its purpose, in a local newspaper; (iii.) the resolution must have been published twice in a local newspaper (*q*); (iv.) the resolution must have received the approval of the Local Government Board (*r*), which cannot be given until the expiration of seven days after the second publication of the resolution, and meanwhile any ratepayer in the district may give notice in writing to the Board objecting to such approval (*s*); (v.) in the case of the promotion of a Bill, no further expense can be incurred or charged after the deposit of the

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(*i*) See *Tynemouth Corporation* v. *A.-G.*, [1899] A. C. 293. As to proceedings in Parliament, see title PARLIAMENT.

(*k*) Borough Funds Act, 1872 (35 & 36 Vict. c. 91), s. 2.

(*l*) 51 & 52 Vict. c. 25, s. 24; see title RAILWAYS AND CANALS.

(*m*) Railway and Canal Traffic (Provisional Orders) Amendment Act, 1891 (54 & 55 Vict. c. 12), s. 1. In the case of county councils the consent of owners and ratepayers is not necessary (*ibid.*).

(*n*) Borough Funds Act, 1872 (35 & 36 Vict. c. 91), s. 2.

(*o*) *Ibid.*, s. 3.

(*p*) *Ibid.*, s. 2; and see titles GAS, Vol. XV., pp. 310 *et seq.*; and WATER SUPPLY.

(*q*) Borough Funds Act, 1872 (35 & 36 Vict. c. 91), s. 4; see the text, *infra*.

(*r*) Borough Funds Act, 1872 (35 & 36 Vict. c. 91), s. 4. The power formerly possessed by a Secretary of State is transferred to the Local Government Board (Borough Funds Act, 1903 (3 Edw. 7, c. 14), s. 8).

(*s*) Borough Funds Act, 1872 (35 & 36 Vict. c. 91), s. 5.

SECT. 1. Borough Funds Acts, 1872 and 1903.

Bill, unless the propriety of the promotion has been confirmed by a like absolute majority at a further special meeting after a like notice, held not less than fourteen days after the deposit of the Bill in Parliament (*t*).

Costs and local inquiries.

796. Costs, charges and expenses, before they become chargeable, require to be examined and allowed by some person authorised by the Local Government Board (*a*); and the Board may direct a local inquiry to be held upon any application, by any person or persons nominated by the Board for the purpose, and may charge the costs and expenses of such inquiry upon the local authority or the applicant (*b*).

SUB-SECT. 2.—*Promotion of Bills by Borough and Urban District Councils.*

Consent of parochial electors.

797. Beyond the general conditions already specified, no expense in relation to the promotion of a Bill can be charged by the council of a borough or urban district until the consent of the parochial electors (*c*) has been obtained after the due deposit of the Bill (*d*). Non-compliance with the statutory provisions does not invalidate the charge of expenses in relation to the promotion if the provisions have been substantially complied with and the failure has not affected the result of the proceedings (*e*).

Procedure for obtaining consent.

798. Within seven days from the first deposit of the Bill notice must be given by placards and by advertisement in a local newspaper, in two successive weeks, that a public meeting of electors will be held on a specified day (*f*) for the purpose of considering the question of the promotion of the Bill, and indicating the resolutions to be submitted to the meeting (*g*).

The public meeting.

The public meeting must be held in accordance with the notice, and the mayor or chairman (*h*), if able and willing, presides (*i*).

(*t*) Borough Funds Act, 1872 (35 & 36 Vict. c. 91), s. 4. The consent of owners and ratepayers to opposing Bills is no longer necessary (Borough Funds Act, 1903 (3 Edw. 7, c. 14), s. 7 (1)). As to a substituted consent in the case of promoting Bills, see the text, *infra*.

(*a*) Borough Funds Act, 1872 (35 & 36 Vict. c. 91), s. 6.

(*b*) *Ibid.*, s. 7.

(*c*) That is, those for the time being enrolled in the register of parochial electors in force in the borough or urban district (Borough Funds Act, 1903 (3 Edw. 7, c. 14), s. 9).

(*d*) *Ibid.*, s. 1. In the Railway and Canal Traffic (Provisional Orders) Amendment Act, 1891 (54 Vict. c. 12), s. 1, references to the Borough Funds Act have effect as references to both Acts (Borough Funds Act, 1903 (3 Edw. 7, c. 14), s. 7 (2)).

(*e*) *Ibid.*, s. 6.

(*f*) Not being less than fourteen nor more than twenty-eight days after the first advertisement (*ibid.*, Sched. I. (1) (e)).

(*g*) *Ibid.*, Sched. I. (1), (2). The notice must also state the title and objects of the Bill, the fact that it has been deposited and the date of its first deposit, that copies of it may be inspected and purchased at a specified place in the borough or district during the fourteen days after the date of the first advertisement, and that extracts may be taken free of charge (*ibid.*).

(*h*) That is, the mayor of the borough or the chairman of the urban district council (*ibid.*, s. 9).

(*i*) *Ibid.*, Sched. I. (3). If unable or unwilling, the council may appoint

With the consent of the majority the meeting may adjourn for not more than seven days (*k*).

The resolutions.

The question of the promotion of the Bill is put by the president (*l*), either by a single resolution in favour of the promotion, or by a series of resolutions in favour of the promotion of parts or clauses of the Bill, but so that the whole Bill is covered. The meeting decides for or against the resolutions (*m*); and the decision of the meeting on the resolution or resolutions is final, unless a poll is demanded (*n*).

The poll.

A poll may be demanded as to any resolution on a requisition by not less than 100 electors (*o*), or one-twentieth in number of the electors, whichever is the less. If the decision is adverse to the resolution the council may demand a poll (*p*).

Unless the requisition, or the Bill, or the parts or clauses in question be withdrawn, the mayor or chairman must proceed with the poll (*q*); and the polls on any number of resolutions may be taken at the same time and on the same voting paper. The result of the voting is to be declared as soon as practicable by the mayor or chairman, and his decision as to any question arising in respect of a voting paper is final (*a*).

Subject to the above provisions the poll is to be taken in accordance with regulations framed, and in forms prescribed, by the Local Government Board (*b*).

Withdrawal of Bill on adverse poll.

If the poll is adverse to the Bill or parts of it, the council must

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a president; failing both, or in the absence of both after ten minutes from the appointed time, the meeting may choose an elector (see note (*c*), p. 382, *ante*) to be president (Borough Funds Act, 1903 (3 Edw. 7, c. 14), Sched. I. (3)).

(*k*) *Ibid.*, Sched. I. (4).

(*l*) At the opening of the meeting, the president or a member or officer of the council must explain the Bill (*ibid.*, Sched. I. (5)).

(*m*) *Ibid.*, Sched. I. (6). The president is to explain to the meeting the resolutions he proposes to put, and the question of promotion must be put as so proposed, but the meeting may require separate resolutions, or further separate resolutions to be put (*ibid.*).

(*n*) *Ibid.*, Sched. I. (7).

(*o*) See note (*c*), p. 382, *ante* A requisition for a poll by electors must be in writing signed by the persons making it, and must be delivered to the mayor or chairman within seven days after the date of holding the meeting or an adjournment thereof (Borough Funds Act, 1903 (3 Edw. 7, c. 14), Sched. I. (9)).

(*p*) *Ibid.*, Sched. I. (8). A requisition for a poll by the council requires authority by a resolution of the council, a copy of which is to be delivered to the mayor or chairman within seven days after the holding of the meeting or an adjournment thereof, unless the regulations do not admit of an ordinary meeting of the council being held in time, in which case the time is extended to three days after the next ordinary meeting of the council (*ibid.*, Sched. I. (10)).

(*q*) *Ibid.*, Sched. I. (11). As to the mayor and chairman, see notes (*h*), (*i*), p. 382, *ante*. As to the withdrawal of a requisition under the former provisions, see *R.* v. *Dover* (*Mayor*), [1903] 1 K. B. 668.

(*a*) Borough Funds Act, 1903 (3 Edw. 7, c. 14), Sched. I. (12)—(15). If the mayor or chairman is unable or unwilling to perform any of the above duties the council may appoint someone for the purpose (*ibid.*).

(*b*) *Ibid.*, Sched. I. (16). Various other provisions are made to secure the fair and proper taking of the poll, and penalties are imposed for breaches thereof (*ibid.*, s. 5).

SECT. 1. Borough Funds Acts, 1872 and 1903.

take all necessary steps to withdraw it or such parts of it; and an equality of votes is deemed to be an adverse poll (*c*). On the withdrawal of the whole or parts, no further expense must be incurred in respect thereof, but all costs, charges, and expenses incurred by the council or mayor or chairman in or incidental to the preparation and promotion of a Bill up to and including its withdrawal, if withdrawn, and in or incidental to the holding of the meeting and taking of the poll are, when taxed by a taxing officer in one of the Houses of Parliament, and allowed by the Local Government Board, to be charged on and payable out of such one or more of the council's public funds or rates as the council, having regard to the nature and objects of the Bill, may determine to be just and proper, and, when charged on more than one fund or set of rates, in such proportions as it may determine (*d*).

SECT. 2.—*Local Acts.*

Power of Local Government Board.

799. Where a local Act is in force in any area comprising the whole or part of the district of an urban district council (*e*) and relates to the same subject-matters as the Public Health Acts (*f*), the Local Government Board may, on the application of the council by provisional order (*f*), wholly or partially repeal, alter, or amend the local Act (*g*); but this power cannot be exercised in respect of an Act for the conservancy of rivers, or of an Act which confers powers or privileges on any person for his own pecuniary benefit (*h*).

Limits of power.

Contents of order.

The provisional order may provide for the extension of the provisions of the local Act beyond the district within the limits of the Act, or for the exclusion of the whole or a portion of any such district from the application of the Act. It may also provide what local authority is to have jurisdiction for the purposes of the Public Health Acts in any included or excluded area (*i*).

Settlement of differences.

Differences as to powers, rights, duties, capacities, liabilities, obligations, or property arising out of any transfer under the

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(*c*) Borough Funds Act, 1903 (3 Edw. 7, c. 14), s. 2.

(*d*) *Ibid.*, s. 3.

(*e*) Or rural district council, or council of a borough (see p. 262, *ante*).

(*f*) See generally, and as to provisional orders, titles PARLIAMENT; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*g*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 303. As to the effect of this or similar sections, see *Monmouth Corporation* v. *Monmouth* (*Churchwardens etc.*) (1878), 38 L. T. 612; *North Eastern Rail. Co.* v. *Tynemouth Corporation* (1868), L. R. 3 Q. B. 723. Power was given to the Local Government Board to continue the effect of the provisions of local Acts in a borough which provided for sanitary expenses being divided between landlords and tenants under contracts existing in 1872 (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 320). But the provision is now practically spent. As to proceedings under local Acts which are still in force, see *ibid.*, s. 340.

(*h*) *Ibid.*, s. 303. As to limitation of rates under a local Act not applying to rates for expenses under *ibid.*, see *ibid.*, s. 227; and as to rating exemptions under local Acts applying to general district rates, see title RATES AND RATING.

(*i*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 303.

provisional order may be (*k*) settled, and any accounts in connection with the same are to be adjusted, by order of the Board (*l*).

SECT. 2. Local Acts.

Any officer of the authority under the local Act who by virtue of the provisional order is removed from his office, or deprived of emoluments of office, may be awarded compensation (*m*).

Compensation to officers.

SECT. 3.—*Public Health Acts.*

SUB-SECT. 1.—*Under the Public Health Acts Amendment Act,* 1890.

(i.) *Urban Councils.*

800. Urban councils, by a resolution passed at a meeting of the council (*n*), may acquire the powers under this Act by adopting all or any of its parts (*o*).

Method of adoption.

The resolution comes into operation at such time, not less than one month after the first publication of the advertisement, as may be fixed by the council, and the parts adopted then extend to its district (*p*).

801. Having adopted this Act (*q*), an urban authority, whether a municipal corporation or an urban district council, with power in any capacity to borrow money, may, with the consent of the Local Government Board, exercise that power by the creation and issue of stock in accordance with, in all respects, the regulations of the Board (*r*).

Power to borrow and raise stock.

(*k*) This is not made the only method.

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 304.

(*m*) *Ibid.*, s. 309. This provision is now largely superseded by the powers which are given to county councils and the Local Government Board when dealing with or affecting the areas of local authorities; see p. 377, *ante*, and see, further, on the matter generally, title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*n*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 3 (3); see further, as to procedure for adoption, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*o*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), ss. 3 (1), 11 (3) (referred to in this sub-section of the title as "this Act"). Part II. of this Act relates to telegraph wires etc.; see titles ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 549, 551, 552; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 259, 260; NUISANCE; TELEGRAPHS AND TELEPHONES. Part IV. relates to music and dancing; see titles THEATRES AND OTHER PLACES OF ENTERTAINMENT. Other powers which may be acquired relate to sanitary matters generally (see title PUBLIC HEALTH AND LOCAL ADMINISTRATION) and finance (see p. 386, *post*).

(*p*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 3 (4).

(*q*) *Ibid.*, s. 52 (1).

(*r*) The regulations are to be laid before Parliament, and if no resolution is passed against them they become operative when confirmed by an Order in Council (*ibid.*, s. 52 (3), (4)). The regulations in force are dated 26th September, 1891; 3rd August, 1897; 8th August, 1901. They may provide for the discharge of the loan raised by stock; in the case of consolidation of debt, for extending or varying the times within which loans may be discharged; for the consent of limited owners; for the application of the Acts relating to stamp duties (see title REVENUE) and cheques; for the disposal of unclaimed dividends; and for the application, with or without modifications, of the Local Loans Act, 1875 (38 & 39 Vict. c. 83) and the Local Loans Sinking Fund Act, 1885 (48 & 49 Vict. c. 30), and of any Act relating to stock issued by the corporation of any municipal borough (Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 52 (2)).

SECT. 3. Public Health Acts.

Capital duty.

802. Before the issue of loan capital (*s*) a duly stamped statement of the amount proposed to be secured must be delivered to the Commissioners of Inland Revenue (*t*). The statement should not be delayed beyond the issue of the scrip certificates (*a*).

(ii.) *Rural Councils.*

Power of rural councils to adopt.

803. Rural councils may adopt by the same methods as urban councils the provisions of Part III. of this Act (*b*) relating to matters more particularly dealt with elsewhere (*c*).

Power to apply provisions to rural districts.

The Local Government Board may declare that any provisions in any part of this Act (*d*) which are not in force in a rural district shall be in force in such district or any part of it, and may invest the rural district council with any of the powers, rights, and liabilities which an urban council may acquire by adopting this Act (*e*).

(iii.) *Expenses and Proceedings.*

Expenses.

804. Expenses under this Act (*f*) are defrayed by the urban council as part of its expenses under the Public Health Acts, and by rural councils as general expenses under those Acts (*f*).

Miscellaneous.

The provisions of the Public Health Act, 1875 (*g*), govern legal proceedings and bye-laws under this Act (*h*).

(*s*) This applies to loan capital issued by local authorities, *i.e.*, county councils, municipal corporations, district councils, dock trustees, harbour trustees or other local bodies however called, corporations, companies or bodies of persons formed or established in the United Kingdom (Finance Act, 1899 (62 & 63 Vict. c. 9), s. 8 (1), (5)). For the definition of loan capital, see *ibid.*, s. 8 (5); title COMPANIES, Vol. V., p. 362. For instances of the application of this provision to companies issuing debenture stock in redemption of existing stock, see *A.-G.* v. *Regent's Canal and Dock Co.*, [1904] 1 K. B. 263, C. A.; *London and India Docks Co.* v. *A.-G.*, [1909] A. C. 7.

(*t*) Finance Act, 1899 (62 & 63 Vict. c. 9), s. 8 (1), (2); see, further, for rates of duty, penalties etc., title COMPANIES, Vol. V., p. 362. A rebate may be granted, at the rate of 2*s.* for every £100 of capital, issued after the 9th August, 1907, and wholly or partly applied for the purpose of the conversion or consolidation of the existing loan capital. The rebate does not, however, apply to duty payable in respect of a mortgage or marketable security which has been paid on a trust deed or other document securing the loan capital issued (Finance Act, 1907 (7 Edw. 7, c. 13), s. 10 (1)). In order to give effect to this rebate, and so that the payment of duty and the rebate may constitute one transaction, the Commissioners may postpone the delivery of the above-mentioned statement until the issue of the capital, when it is represented that the issue of loan capital is to be so applied (*ibid.*, s. 10 (2)). As to stamp duties generally, see title REVENUE.

(*a*) See *A.-G.* v. *Liverpool Corporation*, [1902] 1 K. B. 411.

(*b*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), ss. 3 (2), 11 (3), 50. This is a general provision which does not affect the power of the Local Government Board to invest such councils with other owers (*ibid.*).

(*c*) See titles NUISANCE; PUBLIC HEALTH AND LOCAL ADMINISTRATION; SEWERS AND DRAINS; and see title HIGHWAYS, STREETS, AND BRIDGES,

(*d*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 49. Vol. XVI., pp. 1 *et seq.*

(*e*) *Ibid.*, s. 5; see, further, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*f*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 4.

(*g*) 38 & 39 Vict. c. 55.

(*h*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), ss. 6, 9. Informations, complaints, warrants and summonses may contain several sums (*ibid.*, s. 8).

An appeal is given to quarter sessions to any person aggrieved by any order, judgment, determination, or requirement of a council under this Act; by the withholding of any order, certificate, licence, consent, or approval by the council; and by any summary conviction (*i*), except in cases in which there is an appeal to the Local Government Board (*j*).

The powers conferred are cumulative, but offenders are not liable to penalties under more than one Act in respect of the same offence (*k*).

SUB-SECT. 2.—*Under the Public Health Acts Amendment Act,* 1907 (*l*).

Its parts.

805. The Act of 1907 (*m*) is divided into ten parts, the first of which is general in character, and applies generally, and the remaining parts only operate as and when applied (*n*). The expenses of executing the part applied are, in the case of urban authorities, part of their expenses incurred in executing the Public Health Acts; and in the case of rural authorities are general expenses unless otherwise directed by the Local Government Board (*o*).

Expenses.

Miscellaneous.

Offences under the Act of 1907 (*p*) or under bye-laws made under any of the Public Health Acts are prosecuted, and penalties etc. recovered, as under those Acts (*p*); appeals to quarter sessions are allowed (*q*), except as otherwise expressly provided in the Act of 1907 (*r*), and except when an appeal lies to the Local Government Board (*s*). Such an appeal is declared to exist in any case under

(*i*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 7 (1).

(*j*) *Ibid.*, s. 7 (2). That is, under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 268, as to which see title PUBLIC HEALTH AND LOCAL ADMINISTRATION. As to procedure on appeals to quarter sessions, generally, see title MAGISTRATES, p. 650, *post.*

(*k*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 10.

(*l*) 7 Edw. 7, c. 53; referred in this sub-section of the title as "the Act of 1907." It came into operation on 1st January, 1908 (*ibid.*, s. 2 (1), (3), (5)). It is construed as one with the Public Health Acts (see, generally, title PUBLIC HEALTH AND LOCAL ADMINISTRATION), which may be cited as the Public Health Acts, 1875—1907.

(*m*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), ss. 1, 2 (2).

(*n*) Any part or sections of the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), ss. 3 (1), 13, may, on the application of an urban sanitary authority (which includes a borough council), an urban district council, or a rural district council, be declared to be in force in the district, in any contributory place therein (*ibid.*, ss. 3 (1), (4), 13); the Act may be made to supersede the provisions of any local Act in such district or contributory place (*ibid.*, s. 3 (11)). Such powers when conferred are cumulative (*ibid.*, s. 11). As to contributory places, see p. 335, *ante.* As to the authority to make, and the form of the order, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*o*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 4. The rights of the Crown are not affected by anything done under this Act; see title CONSTITUTIONAL LAW, Vol. VII., pp. 205, 206.

(*p*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 6. More than one sum may be contained in any information, complaint, warrant or summons (*ibid.*, s. 8).

(*q*) *Ibid.*, s. 7 (1). The instances are the same as those in the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 7 (1).

(*r*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 7 (1). Other provisions are found in *ibid.*, ss. 42 and 48, giving an appeal from a requirement of the local authority to a court of summary jurisdiction. As to appeals to quarter sessions generally, see title MAGISTRATES, p. 638, *post.*

(*s*) That is, under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 268.

SECT. 3. Public Health Acts.

the Act of 1907 (*t*), in which the local authority gives a decision in a matter as to which it can recover expenses in a summary manner or can declare them to be private improvement expenses (*t*). Bye-laws are regulated by the provisions of the Public Health Acts, except that the confirming authority for bye-laws relating to the police is the Secretary of State (*a*). Compensation, costs, damages, or expenses, when directed to be paid, and the method of determining the amount if not otherwise directed, are to be ascertained as under the Public Health Acts (*b*).

SUB-SECT. 3.—*Local Government Board Inquiries.*

806. The Local Government Board may cause to be made such inquiries as are directed by the Public Health Acts (*c*), and such inquiries as they see fit, in relation to any matters concerning the public health or any matters with respect to which their sanction, approval, or consent is required by the Public Health Act, 1875 (*d*).

(*t*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 7 (2).
(*a*) *Ibid.*, s. 9.
(*b*) *Ibid.*, s. 10.
(*c*) See, generally, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.
(*d*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 293, 296.

LOCOMOTIVES.

See RAILWAYS AND CANALS; STREET AND AERIAL TRAFFIC.

LODGING HOUSES.

See LANDLORD AND TENANT; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

LONDON.

See METROPOLIS.

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See CONSTITUTIONAL LAW; COURTS; ECCLESIASTICAL LAW; MAGISTRATES; PARLIAMENT.

LORD HIGH STEWARD.

See CONSTITUTIONAL LAW; COURTS; PARLIAMENT.

LORDS, HOUSE OF.

See CONSTITUTIONAL LAW; COURTS; PARLIAMENT; PRACTICE AND PROCEDURE.

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Part I.—Definitions and Classification.

SECT. 1.—*Definitions.*

A defect of reason.

807. Lunacy or insanity may be shortly defined as a defect of reason, consisting either in its total or partial absence or in its perturbation (*a*). The perturbation or absence of reason which constitutes insanity is an abnormal state of the mind of a man judged by a standard which recognises a normal standard of rationality and pronounces that man to be insane. Sanity exists when the brain and the nervous system are in such a condition that the mental functions of feeling and knowing, emotion, and of willing, can be performed in their regular and usual manner. Insanity means a state in which one or more of the above-named mental functions is or are performed in an abnormal way or not performed at all by reason of some disease of the brain or nervous system (*b*). The question whether any man is lunatic or insane can only be decided by reference to the ordinary standard of human intelligence.

Judged by ordinary standard of human intelligence.

Illusions and hallucinations.

A man who suffers at times from illusions or hallucinations is not necessarily insane (*c*); he may be able at other times to recognise

(*a*) Pope, Law and Practice of Lunacy, 2nd ed., 1; *Banks* v. *Goodfellow* (1870), L. R. 5 Q. B. 549, 565; *Smee* v. *Smee* (1879), 5 P. D. 84; *Jenkins* v. *Morris* (1880), 14 Ch. D. 674, C. A.

(*b*) 2 Stephen, History of the Criminal Law of England, 130.

(*c*) 1 Taylor, Principles and Practice of Medical Jurisprudence, 6th ed., 846.

such illusions or hallucinations for what they really are: it is the persistence of such illusions or hallucinations which is indicative of insanity. A man, who, having conceived something extravagant to exist which has no existence but in his own heated imagination, and who is incapable of being permanently reasoned out of that conception, is said to be under a "delusion"; and, if the delusion is one which, in the judgment of an ordinary person, no man in possession of his senses could have entertained, the man suffering from such delusion is to be held lunatic or insane (*d*).

SECT. 2.—*Classification.*

SUB-SECT. 1.—*In General.*

Legal terminology.

808. The legal terminology of insanity is neither consistent nor comprehensive. The various expressions denoting insanity are not used in an uniform sense, nor are there any names to distinguish civil incapacity from criminal irresponsibility (*e*). The word "lunatic," which is first found in the Statute Book in stat. (1541-2) 33 Hen. 8, c. 20, is there applied to those who have become insane after birth, and is used by Coke (*f*) and Hale (*g*) as applicable to persons whose insanity is temporary or intermittent. In stat. (1541-2) 33 Hen. 8, c. 20, however, the word is used as an alternative for madness, and in stat. (1548) 2 & 3 Edw. 6, c. 8, the words "lunatic" and "idiot" are used indiscriminately, and similarly, in the writ *de lunatico inquirendo*, the word is used to cover all forms of insanity. In the Lunacy Act, 1890 (*h*), the word "lunatic" means an idiot or person of unsound mind. The expression *non compos mentis* is used in the old Statute of Limitation (*i*) as a general term, and is approved of by Coke as being "most sure and legal" (*j*).

Division in relation to nature of mental incapacity.

In relation to the nature of their mental incapacity the insane have been divided into three main classes (*k*): (1) Idiots, that is, persons who were born insane; (2) lunatics, that is, persons who

(*d*) *Boughton* v. *Knight* (1873), L. R. 3 P. & D. 64, 68; and see *East India Co. and Prinsep* v. *Dyce Sombre* (1856), 4 W. R. 714, 716.

(*e*) Pope, Law and Practice of Lunacy, 2nd ed., 10, 11; and compare Bract. 420; *Ex parte Cranmer* (1806), 12 Ves. 445, 450, 451, n.; and Co. Litt. 246 b.

(*f*) *Beverley's Case* (1603), 4 Co. Rep. 123 b; Co. Litt. 247 a.

(*g*) 1 Hale, P. C. 34.

(*h*) 53 & 54 Vict. c. 5, s. 341.

(*i*) Stat. (1581) 23 Eliz. c. 3, s. 3; Limitation Act, 1623 (21 Jac. 1, c. 16), s. 7.

(*j*) Co. Litt. 246 b; and see *Ex parte Barnsley* (1744), 3 Atk. 168, *per* Lord HARDWICKE, L.C., at p. 173; compare 1 Taylor, Principles and Practice of Medical Jurisprudence, 6th ed., 811.

(*k*) Apart from some variations in terminology, both Coke and Hale agree in this division. Coke divides persons *non compos mentis* into four classes: (1) idiot from birth; (2) he who by sickness, grief, or other accident wholly loses his memory or understanding; (3) a lunatic who *aliquando gaudet lucidis intervallis* and has sometimes his understanding and sometimes not; (4) by his own vicious act, as a drunkard (Co. Litt. 247 a; *Beverley's Case* (1603), 4 Co. Rep. 123 b, 124 b). Hale distinguishes *dementia* or insanity as being (i.) idiocy or fatuity *a nativitate vel dementia naturalis:* (ii.) *dementia accidentalis vel adventitia*, which may be classified as (1) partial, either (a) in respect of things *quoad hoc vel illud insanire*, or (b) in respect of degrees, and (2) total; or as (1) permanent or fixed, when it is called *phrenesis*, and (2) interpolated and by certain periods or

SECT. 2. Classification.

have become insane since birth; and (3) lunatics by their own act, for instance, drunkards (*l*).

The second class above mentioned may be subdivided into (i.) persons completely insane, either with or without hope of recovery; (ii.) persons insane with lucid intervals; and (iii.) persons suffering from partial insanity or monomania (*m*).

Statutory division.

809. The Lunacy Act, 1890 (*n*), in effect divides lunatics so found by inquisition into two classes: (1) persons of unsound mind so as to be incapable of managing themselves or their affairs; and (2) persons of unsound mind so as to be incapable of managing their affairs though capable of managing themselves.

The provisions of the Lunacy Act, 1890 (*o*), relating to management and administration are extended to persons who are not lunatics so found, but with regard to whom it is proved that through mental infirmity arising from mental disease or age they are incapable of managing their affairs (*p*).

SUB-SECT. 2.—*Idiots.*

"Idiot," a person born insane.

810. The word "idiot" may be taken to denote, at the present time, a person born insane (*q*). Various tests of idiocy have been suggested (*r*), but the question whether one is "idiot or not" is a question of fact triable by jury and sometimes by inspection (*s*).

Persons born deaf and dumb.

A person born deaf and dumb (*t*) is presumed to be an idiot; but

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vicissitudes when it is called lunacy; or as (1) more dangerous and pernicious, commonly called *furor*, *rabies*, *mania*; (2) less so, such as in deep *delirium* stupor: and (iii.) *dementia affectata*, namely, drunkenness (1 Hale, P. C. 29 *et seq.*).

(*l*) Drunkenness is not now generally regarded as a form of insanity (but see 1 Taylor, Principles and Practice of Medical Jurisprudence, 6th ed., 895), and it was never held to confer a privilege or excuse an act (Co. Litt. 247 a). As to contracts with drunkards, see title CONTRACTS, Vol. VII., p. 342; and as to crimes committed by drunkards, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 242.

(*m*) As to these three subdivisions, see pp. 395, 396, *post*.

(*n*) 53 & 54 Vict. c. 5, s. 98 (2); *Re Townshend* (*Lord*), *Townshend* v. *Robins*, [1908] 1 Ch. 201. The issues directed by the old writs and commissions in the nature of writs went to the kind of insanity, and also its commencement and other matters relating to the alleged lunatic (*Ex parte Cranmer* (1806), 12 Ves. 445, 449; *Ex parte Smith* (1818), 1 Swan. 4, 6). By the Lunacy Act, 1890 (53 & 54 Vict. c. 5, s. 98 (1)), the inquisition is confined to the question whether or not the alleged lunatic is at the time of the inquisition of unsound mind and incapable of managing himself or his affairs. But it may be specially certified that the alleged lunatic is capable of managing himself and not dangerous, though incapable of managing his affairs.

(*o*) 53 & 54 Vict. c. 5.

(*p*) 53 & 54 Vict. c. 5, s. 116 (1) (d); *Re Dewhirst's Trusts* (1886), 33 Ch. D. 416, C. A.; *Re Martin's Trusts*, *Re Martin* (*a Person of Unsound Mind*), *Land, Building, Investment, and Cottage Improvement Co.* v. *Martin* (1887), 34 Ch. D. 618, C. A.; *Re Barker* (1888), 39 Ch. D. 187, C. A.; *Re Campbell*, [1888] W. N. 176, C. A.; *Re M.*, [1899] 1 Ch. 79; and see p. 429, *post*.

(*q*) The word "idiot" is used in early English literature as signifying an unlearned or illiterate person (see Wyclif's Bible, 1 Cor. xiv. 16).

(*r*) Compare Fitz. Nat. Brev. 233; Staundford, Exposition of the King's Prerogative, 34; Swinburne on Wills, 42.

(*s*) 1 Hale, P. C. 29; and see *Ball* v. *Mannin* (1829), 1 Dow & Cl. 380, 392, H. L.; *Rochfort* v. *Ely* (*Lord*) (1774), 1 Ridg. Parl. Rep. 552; *Prodgers* v. *Frazier* (1684), 3 Mod. Rep. 43.

(*t*) 1 Hale, P. C. 34.

the presumption may be rebutted (*u*). The presumption that a person born deaf, dumb, and blind is an idiot is still stronger (*v*), but it is conceived that this presumption also can be rebutted (*w*).

Distinction between an idiot and a lunatic.

811. The distinction between an idiot and a lunatic was that the law presumed an idiot for ever to be incapable of attaining a complete degree of understanding to govern himself or his estate, and all his acts done to bind his estate were avoided (*a*), but a lunatic was presumed to be capable of recovering the reason which he had lost (*b*).

In the Idiots Act, 1886 (*c*), idiots and imbeciles are expressly distinguished from lunatics (*d*); but, except so far as is thereby provided, the legal distinction between idiots and lunatics is now practically abolished, and a person detained in an asylum under the Idiots Act, 1886 (*c*), is a person lawfully detained as a lunatic within the meaning of the Lunacy Act, 1890 (*e*), s. 116 (*f*).

SUB-SECT. 3.—*Lunatics.*

Definition of "lunatic."

812. From the explanation of "lunatic" given above (*g*), it is seen that the word denotes a person who has become insane as distinguished from a person who was born insane; and, further, that the word includes a person who is insane either with or without lucid intervals, and either with or without hope of recovery.

"Lucid interval."

813. The term "lucid interval" occurs in the Statute of Prerogatives (*h*) and commonly in verdicts of lunacy (*i*). To support an act done during a lucid interval it is not necessary to show that the mind has been restored in its integrity: it is enough to show that the party was sufficiently recovered to enable him to understand the nature of the act, and that any delusion from which he still suffers did not affect the act (*j*). The lucid interval is of importance because, with few exceptions, the acts of a lunatic during the lucid interval possess the validity and involve the responsibility of the acts of a sane man (*k*).

(*u*) *Elyot's Case* (1666), Cart. 53; *R.* v. *Ruston* (1786), 1 Leach, 455; *Dickenson* v. *Blisset* (1754), 1 Dick. 268.

(*v*) Co. Litt. 42 b.

(*w*) The principle of the decisions in *Elyot's Case, supra*, and *R.* v. *Ruston, supra*, support this view, having regard to the improved methods of educating the deaf, dumb, and blind in recent years.

(*a*) 1 Bl. Com. 302.

(*b*) *Re Fitzgerald, a Lunatic* (1805), 2 Sch. & Lef. 432; *Re Hinde, Ex parte Whitbread* (1816), 2 Mer. 99, 102.

(*c*) 49 & 50 Vict. c. 25.

(*d*) *Ibid.*, s. 17; see pp. 429, 526, *post.*

(*e*) 53 & 54 Vict. c. 5.

(*f*) *Re Whalley* (*Mark*) *and Re Whalley* (*W. R.*), [1906] 1 Ch. 565, C. A.

(*g*) See pp. 393, 394, *ante.*

(*h*) Stat. (*temp. incert.*), c. 12.

(*i*) *Ex parte Wragg* (1800), 5 Ves. 449; *Re Bruges* (1836), 1 My. & Cr. 278; and compare Co. Litt. 247 a; 1 Bl. Com. 274.

(*j*) *Ex parte Hoyland* (1805), 11 Ves. 10, dissenting from *A.-G.* v. *Parnther* (1792), 3 Bro. C. C. 441; and see *Creagh* v. *Blood* (1845), 8 I. Eq. R. 434; S. C. 2 Jo. & Lat. 509.

(*k*) Bract. 420; *Beverley's Case* (1603), 4 Co. Rep. 123 b. As to lucid intervals after a finding of lunacy, see note (*e*), p. 403, *post.*

SECT. 2. **Classification.**

Legal recognition of partial insanity.

814. The existence of partial insanity is recognised both in the criminal law (*l*) and, after strenuous denial, in the civil law (*m*). In order to invalidate a will or a deed on the ground that the person is under some delusion it must be shown that the disposition is the unqualified result of the delusion itself. Partial unsoundness of mind not affecting the general faculties, and not operating on the mind of a testator in regard to testamentary disposition, is not sufficient to render a person incapable of disposing of his property by will (*n*); and the same principle has been applied in the case of a contract (*o*).

Part II.—Civil Capacity.

SECT. 1.—*Contracts and Dispositions.*

SUB-SECT. 1.—*In General.*

General legal theory.

815. The general theory of the law in regard to acts done (*p*) and contracts made by parties affecting their rights and interests is that in all cases there must be a free and full consent to bind the parties (*a*). Consent is an act of reason accompanied by deliberation, and it is upon the ground that there is a want of rational and deliberate consent that the conveyances and contracts of idiots, lunatics, and other persons of unsound mind have been generally deemed to be invalid; or, in other words, there cannot be a contract by a lunatic (*b*). Thus (1) the feoffment or grant of a lunatic, whether personally or by attorney (*c*), (2) the deed of a lunatic (*d*), and (3) the simple contract of a lunatic other than in market overt, is, as a rule, void or voidable (*e*).

No contract by a lunatic.

(*l*) *McNaghten's Case* (1843), 10 Cl. & Fin. 200, 209—211, H. L.; title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 241; compare 2 Stephen, History of the Criminal Law of England, 92; *Ferrer's (Earl) Case* (1760), 19 State Tr. 886, 947.

(*m*) See, in particular, *Waring* v. *Waring* (1848), 6 Moo. P. C. C. 341; *Smith* v. *Tebbitt* (1867), L. R. 1 P. & D. 398; *Smee* v. *Smee* (1879), 5 P. D. 84; *Jenkins* v. *Morris* (1880), 14 Ch. D. 674, C. A.

(*n*) *Banks* v. *Goodfellow* (1870), L. R. 5 Q. B. 549; *Murfett* v. *Smith* (1887), 12 P. D. 116; *Jenkins* v. *Morris, supra*; *Smee* v. *Smee, supra*; see p. 403, *post.*

(*o*) *Birkin* v. *Wing* (1890), 63 L. T. 80.

(*p*) As to the criminal capacity of lunatics, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 241; and see *ibid.*, pp. 354, 436; *R.* v. *Ireland*, [1910] 1 K. B. 654, C. C. A.; *R.* v. *Smith* (1910), 26 T. L. R. 614, C. C. A. The Lunacy Act, 1890 (53 & 54 Vict. c. 5), does not, except as expressly provided, apply to criminal lunatics; see *ibid.*, s. 340 (1); *Re R.*, [1906] 1 Ch. 730, C. A.

(*a*) 1 Story, 13th ed., 237.

(*b*) *Re Rhodes, Rhodes* v. *Rhodes* (1890), 44 Ch. D. 94, 105, C. A.; and compare Just. Inst., Bk. III., tit. 19, s. 8; Bract., Bk. 3, c. 2, s. 8; Fleta, Bk. 2, c. 56, s. 19; *Beverley's Case* (1603), 4 Co. Rep. 123 b.

(*c*) *Beverley's Case, supra*; 2 Roll. Abr., tit. Feoffment B., pl. 3, 4; Shep. Touch. (ed. Preston) 204, 205.

(*d*) *Thompson* v. *Leach* (1690), 3 Mod. Rep. 301; *Evans* v. *Blood* (1747), 3 Bro. Parl. Cas. 632; *Zouch* d. *Abbot and Hallet* v. *Parsons* (1765), 3 Burr. 1794; *Saunderson* v. *Marr* (1788), 1 Hy. Bl. 75; *Yates* v. *Boen* (1738), 2 Stra. 1104; *Faulder* v. *Silk* (1811), 3 Camp. 126; *Snook* v. *Watts* (1848), 11 Beav. 105; *Jacobs* v. *Richards* (1854), 5 De G. M. & G. 55, C. A.; and see Sugden on Powers, 7th ed., 179; and *Daily Telegraph Newspaper Co., Ltd.* v. *McLaughlin*, [1904] A. C. 776, P. C.

(*e*) *Blackbeard* v. *Lindigren* (1786), 1 Cox, Eq. Cas. 205; and see as to the use

SECT. 1. **Contracts and Dispositions.**

816. The old absolute rule that the contracts of a lunatic are void or voidable, possibly because it was found inconvenient as trade and commerce developed (*f*), has been modified by grafting on the rule certain exceptions:—

Exceptions to general rule.

(1) One exception arose from the principle that no man should be heard to stultify himself by pleading his own insanity (*g*). This principle has been much criticised (*h*), and was frequently ignored, evaded or modified (*i*): but it is now settled law that it is a good defence to an action upon a contract if it can be shown that the defendant was not of capacity to contract and that the plaintiff knew it (*j*).

Pleading one's own insanity.

Every person dealing with a lunatic, with knowledge of his incapacity, is deemed to perpetrate upon him a fraud which avoids the contract (*k*). The knowledge must be brought home to the contracting party (*l*), the burden of proving knowledge being on the lunatic (*m*), and evidence of the general reputation of the insanity of the person in the parish in which he resided is not sufficient (*n*).

Party knowingly contracting with lunatic.

Persons claiming through or under a lunatic stand in no better position than the lunatic whose act they seek to avoid (*o*), but are entitled to avoid what the lunatic might have avoided (*p*).

Matters of record.

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of the word "void," *Matthews* v. *Baxter* (1873), L. R. 8 Exch. 132. It seems that a contract by a lunatic may be confirmed by the court so as to be valid as from its date (*Baldwyn* v. *Smith*, [1900] 1 Ch. 588); see p. 400, *post*. As to mortgages by a lunatic, see note (*b*), p. 398, *post*, and title MORTGAGE.

(*f*) See Bac. Abr., tit. Idiots and Lunatics (F.), and *Elliot* v. *Ince* (1857), 7 De G. M. & G. 475, *per* Lord CRANWORTH, L.C., at p. 487.

(*g*) *Anon.* (1331), Y. B. 5 Edw. 3, fo. 70; *Anon.* (1361), 35 Lib. Ass. pl. 10; *Stroud* v. *Marshall* (1595), Cro. Eliz. 398; *Cross* v. *Andrews* (1598), Cro. Eliz. 622. This rule is accepted without qualification by Coke (Co. Litt. 247 a); and see *Beverley's Case* (1603), 4 Co. Rep. 123 b, and Sugden on Powers, 7th ed., 179.

(*h*) See *per* Lord HOLT, C.J., in *Thompson* v. *Leach* (1690), 3 Mod. Rep. 301; 1 Story, 13th ed., 236.

(*i*) *Yates* v. *Boen* (1738), 2 Stra. 1104; *Faulder* v. *Silk* (1811), 3 Camp. 126; *Gore* v. *Gibson* (1845), 13 M. & W. 623; *Baxter* v. *Portsmouth* (*Earl*) (1826), 5 B. & C. 170; *Brown* v. *Jodrell* (1827), 3 C. & P. 30; *A.-G.* v. *Parkhurst* (1668), 1 Cas. in Ch. 112; *Ridler* v. *Ridler* (1729), 1 Eq. Cas. Abr. 279. The rule was never extended to privies of the lunatic, either by blood or by representation (*Beverley's Case, supra*), and *quære* to privies in estate and tenure (*Thompson* v. *Leach, supra*; S. C. as reported Carth. 211, 250, 435; and compare *Beverley's Case, supra*); nor to a person found idiot or *non compos mentis* by office at the King's suit (*Thompson* v. *Leach, supra; Beverley's Case, supra; Tourson's Case* (1610), 8 Co. Rep. 170 a; Co. Litt. 447 a).

(*j*) *Molton* v. *Camroux* (1848), 2 Exch. 487, 501; affirmed (1849), 4 Exch. 17, Ex. Ch.; *Yates* v. *Boen, supra; Drew* v. *Nunn* (1879), 4 Q. B. D. 661, C. A.; *Grove* v. *Johnston* (1890), 24 L. R. Ir. 352; *Imperial Loan Co.* v. *Stone*, [1892] 1 Q. B. 599, C. A. As to evidence to prove knowledge of insanity, see p. 409, *post*. As to breach of promise of marriage where supervening insanity is pleaded as a defence, see title HUSBAND AND WIFE, Vol. XVI., p. 276.

(*k*) *Wright* v. *Proud* (1806), 13 Ves. 136; *Lewis* v. *Thomas* (1843), 3 Hare, 26; compare *Manby* v. *Bewicke* (1857), 3 K. & J. 342, 368; *Price* v. *Berrington* (1849), 7 Hare, 394, 402; *Faulder* v. *Silk, supra; Baxter* v. *Portsmouth* (*Earl*), *supra; Hill* v. *Gray* (1816), 1 Stark. 434; *Browne* v. *Jodrell* (1827), Mood. & M. 105; *Howard* v. *Digby* (1834), 2 Cl. & Fin. 634, H. L.; *Nottidge* v. *Prince* (1860), 2 Giff. 246; *Yates* v. *Boen, supra; Drew* v. *Nunn, supra*.

(*l*) *Niell* v. *Morley* (1804), 9 Ves. 478.

(*m*) *Imperial Loan Co.* v. *Stone, supra*.

(*n*) *Greenslade* v. *Dare* (1855), 20 Beav. 284; but see *Beavan* v. *M'Donnell* (1854), 9 Exch. 309; and see p. 409, *post*.

(*o*) *Molton* v. *Camroux, supra; Price* v. *Barrington* (1851), 3 Mac. & G. 486.

(*p*) *Elliot* v. *Ince, supra*.

SECT. 1. **Contracts and Dispositions.**

Matters of record.

(2) Matters of record are not, as a rule, avoidable (*q*), even in the case of a lunatic so found (*r*). But this rule is frequently disregarded both at common law (*s*) and also in equity, where the court in the exercise of its ordinary jurisdiction will set aside any transaction which it deems inequitable (*t*).

Contract in market overt.

(3) The sale or purchase by a lunatic in market overt is not avoidable (*a*).

Contract where parties cannot be placed *in statu quo*.

(4) Where a person apparently of sound mind, and not known to be otherwise, enters into a contract which is fair and *bonâ fide*, and the parties cannot be put *in statu quo*, the obligation will be enforced against the lunatic (*b*); so where a lunatic enters into a contract to purchase an estate and pays a deposit, a claim for the return of the deposit will be refused (*c*).

Contract for necessaries.

(5) In the case of a contract for necessaries, a lunatic not so found may be under an obligation to pay for necessaries supplied to him (*d*), but only if the court is of opinion that the necessaries were provided with the intention on the part of the person making the provision of being paid for so doing (*e*). Necessaries include the common necessaries of life (*f*), having regard to the social

What are necessaries.

(*q*) *Beverley's Case* (1603), 4 Co. Rep. 123 b; 3 Bac. Abr., tit. Fines and Recoveries (C.).

(*r*) *E.g.*, a fine or recovery (Co. Litt. 247 a; *Lewing's Case* (1584), cited 10 Co. Rep. 42; *Mansfield's Case* (1614), 12 Co. Rep. 123, 124; *Murley* v. *Sherren* (1838), 8 Ad. & El. 754; *Hume* v. *Burton* (1875), 1 Ridg. Parl. Rep. 16, 276; *Needler* v. *Winchester* (*Bishop*) (1615), Hob. 220).

(*s*) *Wentworth* v. *Cholmley* (1744), cited 3 Atk. 313; *Beverley's Case, supra; Chamberlaine* v. *Thorpe* (1590), Cro. Eliz. 187; *Hume* v. *Burton, supra; Thompson* v. *Leach* (1690), 3 Mod. Rep. 301; *Stokes* v. *Oliver* (1696), 5 Mod. Rep. 209; *Ex parte Roberts* (1746), 3 Atk. 308; *Walcott, Vouchee* (1826), 3 Bing. 423.

(*t*) *Addison* v. *Dawson* (1712), 2 Vern. 678; compare also *Howard* v. *Digby* (1834), 2 Cl. & Fin. 634, 661, H. L.; *Ferres* v. *Ferres* (1708), 2 Eq. Cas. Abr. 695; *Coleby* v. *Smith* (1683), 1 Vern. 205; *Cartright* v. *Pultney* (1742), 2 Atk. 380; *Baker* v. *Pritchard* (1742), 2 Atk. 387; *Clerk* v. *Clerk* (1700), 2 Vern. 412; *Frank* v. *Mainwaring* (1839), 2 Beav. 115.

(*a*) 2 Co. Inst. 713.

(*b*) *Molton* v. *Camroux* (1848), 2 Exch. 487 (purchase of annuity); *Baxter* v. *Portsmouth* (*Earl*) (1826), 5 B. & C. 170 (goods supplied); *Browne* v. *Jodrell* (1827), Mood. & M. 105; *Price* v. *Barrington* (1851), 3 Mac. & G. 486 (conveyance); *Elliot* v. *Ince* (1857), 7 De G. M. & G. 475 (sale and purchase, see *per* Lord CRANWORTH, L.C., at p. 487); *Hassard* v. *Smith* (1872), 6 I. R. Eq. 429; *Beavan* v. *M'Donnell* (1854), 9 Exch. 309 (deposit on purchase of real estate); *Moss* v. *Tribe* (1862), 3 F. & F. 297; *Barrow* v. *Barrow* (1774), 2 Dick. 504 (marriage settlement); *Drew* v. *Nunn* (1879), 4 Q. B. D. 661, C. A. (goods supplied). There appears to have been some doubt at one time whether the proposition applied to mortgages by a lunatic (*Snook* v. *Watts* (1848), 11 Beav. 105; *Jacobs* v. *Richards, Jacobs* v. *Porter* (1854), 18 Beav. 300; 5 De G. M. & G. 55, C. A.) but it is conceived that it would (*Campbell* v. *Hooper* (1855), 1 Jur. (N. S.) 670; and see *Kirkwall* v. *Flight* (1840), 3 W. R. 529)

(*c*) *Beavan* v. *M'Donnell, supra.*

(*d*) *Wentworth* v. *Tubb* (1841), 1 Y. & C. Ch. Cas. 171; *Baxter* v. *Portsmouth* (*Earl*), *supra; Manby* v. *Scott* (1663), 1 Sid. 112, Ex. Ch.; *Dane* v. *Kirkwall* (*Viscountess*) (1838), 8 C. & P. 679; *Ex parte Hall* (1802), 7 Ves. 261; *Nelson* v. *Duncombe, Duncombe* v. *Nelson* (1846), 9 Beav. 211; *Howard* v. *Digby, supra; Carter* v. *Beard* (1839), 10 Sim. 7; *Chappell* v. *Nunn* (1879), 4 L. R. Ir. 316; *Re Weaver* (1882), 21 Ch. D. 615, C. A.; *Re Rhodes, Rhodes* v. *Rhodes* (1889), 44 Ch. D. 94, C. A.; *Winkle* v. *Bailey*, [1897] 1 Ch. 123.

(*e*) *Re Rhodes, Rhodes* v. *Rhodes, supra*, doubting *Carter* v. *Beard, supra.*

(*f*) *Peters* v. *Fleming* (1840), 6 M. & W. 42; *Wharton* v. *Mackenzie, Cripps*

status of the lunatic (*g*). The term has been extended so as to include costs incurred in obtaining a commission in lunacy (*h*), even when the alleged lunatic was found to be of sound mind (*i*), or in resisting a commission (*k*). It also includes necessaries supplied to the lunatic's wife (*l*), as well as moneys advanced to her for necessaries, though she had a separate income (*m*); but the authority of a wife to pledge her husband's credit is no greater in the case of a lunatic than in the ordinary case of husband and wife (*n*). Where a husband was confined in an asylum, but no committee was appointed, it was held that he could on his release recover moneys belonging to him, which had been expended in the maintenance of his children (*o*).

Supplies to wife and children.

(6) The acts, during a lucid interval, of a lunatic who has not yet been so found by inquisition, are valid, whether the person dealing with him has notice of his lunacy or not (*p*). Thus, deeds executed by a lunatic, though confined in an asylum at the time and even under restraint, may be valid (*q*), as, also, deeds executed before but in expectation of insanity (*r*).

Acts during lucid interval.

Where a person has been found lunatic by inquisition, so long as the inquisition has not been superseded, he cannot even during a lucid interval execute a valid deed dealing with or disposing of his property; such a deed is entirely null and void (*a*).

None valid by lunatic so found.

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v. *Hill* (1844), 5 Q. B. 606, 611; *Ryder* v. *Wombwell* (1868), L. R. 4 Exch. 32, Ex. Ch.

(*g*) *Re Rhodes, Rhodes* v. *Rhodes* (1889), 44 Ch. D. 94, C. A.; *Re J.* (*a Person of Unsound Mind*), [1909] 1 Ch. 574, C. A.

(*h*) *Williams* v. *Wentworth* (1842), 5 Beav. 325; *Re Cumming* (*a Lunatic*), *Deceased* (1854), 5 De G. M. & G. 30, C. A.; *Re Rutter, Chester* v. *Rolfe* (1853), 23 L. J. (CH.) 233, C. A.; *Stedman* v. *Hart* (1854), 23 L. J. (CH.) 908; *Brockwell* v. *Bullock* (1889), 22 Q. B. D. 567, C. A.

(*i*) *Nelson* v. *Duncombe, Duncombe* v. *Nelson* (1846), 9 Beav. 211; *Re Brooke, a Lunatic, Ex parte Hill* (1813), Coop. G. 54; *Wentworth* v. *Tubb* (1841) 1 Y. & C. Ch. Cas. 171.

(*k*) *Wentworth* v. *Tubb, supra.*

(*l*) *Read* v. *Legard* (1851), 6 Exch. 636.

(*m*) *Re Wood's Estate, Davidson* v. *Wood* (1863), 1 De G. J. & Sm. 465, C. A.; and see title HUSBAND AND WIFE, Vol. XVI., p. 423.

(*n*) *Richardson* v. *Du Bois* (1869), L. R. 5 Q. B. 51; *Chappell* v. *Nunn* (1879), 4 L. R. Ir. 316; *Drew* v. *Nunn* (1879), 4 Q. B. D. 661, C. A.; see also, as to criminal lunatics, *Re J.* (*a Person of Unsound Mind*), *supra.* As to the authority of a wife to bind her husband, see, generally, title HUSBAND AND WIFE, Vol. XVI., pp. 417 *et seq.*

(*o*) *Healing* v. *Healing* (1902), 51 W. R. 221.

(*p*) *Beverley's Case* (1603) 4 Co. Rep. 123 b, 125 a; *A.-G.* v. *Parnther* (1792), 3 Bro. C. C. 441; *Selby* v. *Jackson* (1843), 6 Beav. 192; and see *Birkin* v. *Wing* (1890), 63 L. T. 80.

(*q*) *Selby* v. *Jackson, supra.*

(*r*) *Faulder* v. *Silk* (1811), cited in *Towart* v. *Sellars* (1817), 5 Dow, 231, 236, H. L.

(*a*) *Re Walker* (*a Lunatic so Found*), [1905] 1 Ch. 160, C. A.; *Ex parte Wright* (*Sir Benjamin*) (1683), 1 Vern. 155. See also title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 359, 360. He can, however, make a will during a lucid interval (see p. 403, *post*). Where a person who has entered into a contract for the sale of property is subsequently found a lunatic with lucid intervals as from a date prior to the contract, the court will direct an issue whether the contract was executed during a lucid interval (*Hall* v. *Warren* (1804), 9 Ves. 605; see *Owen* v. *Davies* (1748), 1 Ves. Sen. 82; *Pegge* v. *Skynner and Richardson* (1784),

SECT. 1. **Contracts and Dispositions.**

Direction to committee to perform contract.

817. The judge in lunacy may direct the committee to perform any contract relating to the property of the lunatic entered into by the lunatic before his lunacy (*b*), and a covenant to execute a power by a person who subsequently becomes insane will be enforced (*c*).

Transactions must be fair and *bonâ fide*.

818. Every transaction with a lunatic, even where the person dealing with him has no notice of the lunacy, must, in order to be upheld, be fair and *bonâ fide* (*d*), and this rule extends to persons of weak understanding who can be easily or unduly influenced as well as to lunatics (*e*).

Voluntary dispositions.

819. Any disposition made by a lunatic without valuable consideration will be set aside, even against subsequent purchasers for valuable consideration without notice (*f*).

SUB-SECT. 2.—*Insurance.*

Disclosure of fact of lunacy.

820. On insuring the life of a lunatic the fact of his lunacy should be disclosed, especially if the lunacy is of such a kind as to affect his bodily health (*g*).

Effect of suicide upon life insurance.

821. It is settled law that where a person who has insured his life dies a *felo de se*, public policy avoids the contract in consequence of the death being occasioned by his own criminal act (*h*), but where the act of suicide takes place when the assured is insane, then, whether he be beneficially interested in the insurance or not, and in the absence of any special condition, the policy is not avoided (*i*). Similarly, while a condition supporting the insurance in the event of the suicide of the assured, he being at the date of the act beneficially interested in the policy and of sound mind,

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1 Cox, Eq. Cas. 23; and *Kirkwall* v. *Flight* (1842), 3 W. R. 529); where a purchaser is found lunatic, subsequently to the date of the contract, as from a date prior to the contract, the court will declare the contract null and void, and order the costs and expenses of the vendor to be taxed and deducted from the deposit made on the purchase, and the residue to be paid to the committee of the lunatic's estate (*Frost* v. *Beavan* (1853), 22 L. J. (CH.) 638).

(*b*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 120 (i); and compare *Re Pagani* (*a Person of Unsound Mind*), *Re Pagani's Trust*, [1892] 1 Ch. 236, C. A. (where a vesting order was made).

(*c*) *Affleck* v. *Affleck* (1857), 3 Sm. & G. 394.

(*d*) 1 Story, 13th ed., 242, 249; *Blachford* v. *Christian* (1829), 1 Knapp, 73, 77, P. C.; *Clarkson* v. *Hanway* (1723), 2 P. Wms. 203; *Gartside* v. *Isherwood* (1783), 1 Bro. C. C. 558, 561; *Hassard* v. *Smith* (1872), 6 I. R. Eq. 429.

(*e*) 1 Story, 13th ed., 258; *Osmond* v. *Fitzroy* (1731), 3 P. Wms. 129; *Fox* v. *Mackreth*, *Pitt* v. *Mackreth* (1791), 1 Bro. C. C. 400, 2 White & Tud. L. C., 7th ed., 709; *Huguenin* v. *Baseley* (1807), 14 Ves. 273; *Nottidge* v. *Prince* (1860), 2 Giff. 246; *Lyon* v. *Home* (1868), L. R. 6 Eq. 655; *Morley* v. *Loughnan*, [1893] 1 Ch. 736.

(*f*) *Clerk* v. *Clerk* (1700), 2 Vern. 412 (settlement); *Elliot* v. *Ince* (1857), 7 De G. M. & G. 475 (disentailing deed); *Sentance* v. *Poole* (1827), 3 C. & P. 1 (promissory note); *Manning* v. *Gill* (1872), L. R. 13 Eq. 485 (voluntary deed). See also title GIFTS, Vol. XV., p. 403. As to wills, see pp. 403 *et seq.*, *post*.

(*g*) *Lindenau* v. *Desborough* (1828), 3 Man. & Ry. (K. B.) 45. As to the duty to disclose material facts on making a proposal for life insurance, see title INSURANCE, Vol. XVII., pp. 550 *et seq.*

(*h*) *Amicable Society* v. *Bolland* (1830), 4 Bli. (N. S.) 194, H. L.

(*i*) *Horn* v. *Anglo-Australian and Universal Life Assurance Co.* (1861), 30 L. J. (CH.) 511.

is void (*k*), it is conceived that a condition supporting the insurance in the event of suicide while under the influence of insanity, and whether the assured was or was not beneficially interested in the policy, would not be void. Where a policy contains a condition avoiding the policy in the event of the assured committing suicide or dying by his own hand, the condition applies although the assured takes his life while in a state of insanity, the moral condition of mind not being material in such case (*l*).

Application of special conditions.

SUB-SECT. 3.—*Marriage.*

822. Marriage with a lunatic so found by inquisition is null and void to all intents and purposes whatsoever, even though celebrated during a lucid interval (*m*).

Of lunatic so found.

823. In the case of a lunatic not so found by inquisition, marriage, like other civil contracts, will be invalidated by want of consent of capable persons (*n*), and this disability of the party makes the contract void *ab initio* and not merely voidable (*o*), and therefore no sentence of avoidance is necessary (*p*).

Of lunatic not so found.

824. The fact of mental incapacity at the time of the marriage must be established by evidence, everything being presumed in favour of the marriage (*q*), and the validity of the marriage is decided by the capacity of the party at the actual time of marriage, and not by his state of mind before or after (*r*).

Evidence of incapacity.

825. In considering the question as to the degree of mental incapacity which will invalidate such a marriage it is necessary to distinguish between (1) incapacity arising from actual insanity, and (2) mere dullness of intellect (*s*).

(1) The incapacity arising from actual insanity must be such that the party was incapable of understanding the nature of the

Degree of incapacity.

(*k*) *Amicable Society* v. *Bolland* (1830), 4 Bli. (N. S.) 194, H. L.; see, further, title INSURANCE, Vol. XVII., p. 556.

(*l*) *Borradaile* v. *Hunter* (1843), 5 Man. & G. 639; *Clift* v. *Schwabe* (1846), 3 C. B. 437; *Dufaur* v. *Professional Life Assurance Co.* (1858), 25 Beav. 599.

(*m*) Marriage of Lunatics Act, 1811 (51 Geo. 3, c. 37); *Turner* v. *Meyers* (*falsely called Turner*) (1808), 1 Hag. Con. 414, 417; title HUSBAND AND WIFE, Vol. XVI., p. 282; as to the common law, see 1 Bl. Com. 438, and *Stiles* v. *West* (1605), 1 Roll. Abr. 357; Sheppard, Abridgment, tit. Idiot; Harg. Co. Litt. 80 a, n. (1), 30 b, n. (2); Bac. Abr., tit. Idiots and Lunatics (D.). As to contempt of court in marrying a lunatic so found, see title CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., p. 292.

(*n*) *Turner* v. *Meyers* (*falsely called Turner*), *supra*; *Portsmouth* (*Countess*) v. *Portsmouth* (*Earl*) (1828), 1 Hag. Ecc. 355, 359; *Browning* v. *Reane* (1812), 2 Phillim. 69; *Hancock* v. *Peaty* (1867), L. R. 1 P. & D. 335.

(*o*) *Harford* v. *Morris* (1776), 2 Hag. Con. 423, 425.

(*p*) *Elliott* v. *Gurr* (1812), 2 Phillim. 16, 19. As to proceedings for nullity on the ground of lunacy, see title HUSBAND AND WIFE, Vol. XVI., pp. 469 *et seq.*

(*q*) *Portsmouth* (*Countess*) v. *Portsmouth* (*Earl*), *supra*; *Harrod* v. *Harrod* (1854), 1 K. & J. 4.

(*r*) *Parker* v. *Parker* (1757), 2 Lee, 382; *Ex parte Ferne* (1801), 5 Ves. 832; *Ellis* v. *Bowman* (1851), 17 L. T. (O. S.) 10; *Legeyt* v. *O'Brien* (1834), Milw. 325, 334; *Hancock* v. *Peaty*, *supra*. Similarly, the fact that one of the parties was of unsound mind before promise made is no defence to an action for breach of promise of marriage (*Baker* v. *Cartwright* (1861), 30 L. J. (C. P.) 364).

(*s*) *Harrod* v. *Harrod*, *supra*.

SECT. 1. Contracts and Dispositions.

contract and the duties and responsibilities which it creates (*a*), or of taking care of his own person or property (*b*).

(2) Weakness of intellect, as distinguished from actual insanity, is not a sufficient ground for invalidating a marriage, unless fraud is also proved (*c*), and where fraud is clearly proved weakness of mind may be presumed from the tender years of the party (*d*).

Parties to proceedings to set aside marriage.

826. Proceedings to set aside a marriage on the ground of the insanity of one of the contracting parties may be brought (1) by the contracting party upon recovery; and if the contracting party, having recovered, take no steps to invalidate the marriage, no one can institute such proceedings on his behalf (*e*); (2) where the contracting party is a lunatic so found by inquisition, by his committee (*f*); (3) where the contracting party is a minor or a lunatic not so found by inquisition, by a guardian duly appointed for the purpose (*g*); (4) where the contracting party is dead, by any person having an interest in the matter (*h*).

Effect of insanity subsequent to marriage.

827. Where marriage has once been validly contracted, the usual incidents belonging to it attach and continue, notwithstanding the subsequent insanity of either party; nor will such insanity operate as a dissolution of the bond nor afford a ground for a decree of dissolution of the marriage or of judicial separation (*i*). Thus, the liability of a husband for the maintenance of his wife is not removed by his or her becoming lunatic (*k*).

As a defence to charges of misconduct.

Insanity arising during the marriage state will be an answer to many charges of misconduct (*l*), but the misconduct must be the consequence of the insanity (*m*), and in order to make insanity a good plea to a petition for a divorce the plea should state that the insanity is lasting and abiding and without hope of recovery (*n*).

(*a*) *Durham* v. *Durham* (1885), 10 P. D. 80; and see the judgment of HANNEN, J., in *Hancock* v. *Peaty* (1867), L. R. 1 P. & D. 335.

(*b*) *Browning* v. *Reane* (1812), 2 Phillim. 69; and compare *Turner* v. *Meyers* (*falsely called Turner*) (1808), 1 Hag. Con. 414, 417.

(*c*) *Portsmouth* (*Countess*) v. *Portsmouth* (*Earl*) (1828), 1 Hag. Ecc. 355, 359; *Harford* v. *Morris* (1776), 2 Hag. Con. 423, 425; and see *Fust* v. *Bowerman* (1790), 2 Hag. Con. 436, n.; *Hull* v. *Hull, falsely called M'Arthur* (1851), 15 Jur. 710.

(*d*) *Harford* v. *Morris*, *supra*.

(*e*) *Turner* v. *Meyers* (*falsely called Turner*), *supra*; and see *Hancock* v. *Peaty*, *supra*.

(*f*) *Portsmouth* (*Countess*) v. *Portsmouth* (*Earl*), *supra*; *Fust* v. *Bowerman*, *supra*; *Parnell* v. *Parnell* (1814), 2 Hag. Con. 169; *Woodgate* v. *Taylor* (1861), 30 L. J. (P. M. & A.) 197.

(*g*) *Mordaunt* v. *Moncreiffe* (1874), L. R. 2 Sc. & Div. 374; *Fust* v. *Bowerman*, *supra*; *Hancock* v. *Peaty*, *supra*; compare *Fry* v. *Fry* (1890), 15 P. D. 50, C. A., and *Giles* v. *Giles*, [1900] P. 17; and see title INFANTS AND CHILDREN, Vol. XVII., pp. 134 *et seq.*

(*h*) *Browning* v. *Reane*, *supra*; *Parker* v. *Parker* (1757), 2 Lee, 382; and see title HUSBAND AND WIFE, Vol. XVI., p. 470.

(*i*) *Hayward* v. *Hayward* (1858), 1 Sw. & Tr. 81; *Hall* v. *Hall* (1864), 3 Sw. & Tr. 347; compare title HUSBAND AND WIFE, Vol. XVI., pp. 476, 484.

(*k*) *Brodie* v. *Barry* (1813), 2 Ves. & B. 36.

(*l*) *Hall* v. *Hall*, *supra*; *Hanbury* v. *Hanbury*, [1892] P. 222; and see *Yarrow* v. *Yarrow*, [1892] P. 92.

(*m*) *White* v. *White* (1858), 1 Sw. & Tr. 592; *Curtis* v. *Curtis* (1858), 1 Sw. & Tr. 192, 213; *Marsh* v. *Marsh* (1858), 1 Sw. & Tr. 312.

(*n*) *Hanbury* v. *Hanbury*, *supra*; and see *Yarrow* v. *Yarrow*, *supra*; and title HUSBAND AND WIFE, Vol. XVI., p. 476.

SECT. 2.—*Torts.*

SECT. 2. Torts.

Lunacy as a defence to tort.

828. Though there is no reported instance of an action of tort ever being brought in this country against a lunatic (*o*), it would seem that, according to the old common law, lunacy was no defence to such an action (*p*), and it is clear that the doctrine that no man may stultify himself by pleading his own incapacity would apply as well to an action of tort as to an action of contract (*q*). But it is conceived that insanity would now be held to be a defence to an action of tort if it could be proved that the person committing the wrong was not competent by reason of mental infirmity to understand the nature and consequences of the act which he was doing (*r*).

SECT. 3.—*Wills.*

Requisites to validity.

Will of an idiot.

Will of a lunatic.

Will made during lucid interval.

829. In order that a will should be valid it is requisite that the testator should have at the time when he makes his will a reasonable memory and understanding to dispose of his estate (*s*). So the will of an idiot is void (*t*), as is the will of one deaf and dumb from his nativity, he being in presumption of law an idiot (*a*), though the presumption may be rebutted (*b*). The will of a lunatic made during his insanity is void (*c*), and where an insane person purports to make a will letters of administration will be granted as in the case of intestacy (*d*), but the will of a lunatic, whether so found or not, made during a lucid interval is valid (*e*). Mental imbecility arising from advanced age or produced by excessive drinking or any other cause may destroy testamentary power (*f*). Shortly, it is essential to the exercise of the testamentary power that a testator should understand the nature of the act and its effect, and that no insane delusions should dominate his mind so as to overmaster his judgment to such an extent as to

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(*o*) Clerk and Lindsell, Law of Torts, 5th ed., 48.

(*p*) *Weaver* v. *Ward* (1616), Hob. 134; Bac. Abr., tit. Trespass (G. I.); and see *Haycroft* v. *Creasy* (1801), 2 East, 92, *per* Lord KENYON, C.J., at p. 104.

(*q*) *Cross* v. *Andrews* (1598), Cro. Eliz. 622; see p. 397, *ante;* and see *Mordaunt* v. *Mordaunt* (1870), L. R. 2 P. & D. 103, *per* KELLY, C.B., at p. 142.

(*r*) *Hanbury* v. *Hanbury* (1892), 8 T. L. R. 559, C. A., *per* Lord ESHER, M.R., at p. 560; and see *Emmens* v. *Pottle* (1885), 16 Q. B. D. 354, 356, C. A.

(*s*) Shep. Touch. (ed. Preston) 403; *Winchester's* (*Marquis*) *Case* (1599), 6 Co. Rep. 23; *Banks* v. *Goodfellow* (1870), L. R. 5 Q. B. 549; *Jenkins* v. *Morris* (1880), 14 Ch. D. 674, C. A.; *Murfett* v. *Smith* (1887), 12 P. D. 116; *Hope* v. *Campbell*, [1899] A. C. 1.

(*t*) Bac. Abr., tits. Idiots and Lunatics (F.); Wills (B. 12).

(*a*) Swinburne on Wills, Part II., s. 4, pl. 2; s. 10, pl. 2; *In the Goods of Owston* (1862), 2 Sw. & Tr. 461; *In the Goods of Geale* (1864), 3 Sw. & Tr. 431.

(*b*) *Ibid.; Dickenson* v. *Blisset* (1754), 1 Dick. 268.

(*c*) Swinburne on Wills, Part II., s. 3.

(*d*) *In the Goods of Rich*, [1892] P. 143.

(*e*) Swinburne on Wills, Part II., s. 3, pl. 4; *Hall* v. *Warren* (1804), 9 Ves. 605, 610; *Rodd* v. *Lewis* (1755), 2 Lee, 176; *Cartwright* v. *Cartwright* (1793), 1 Phillim. 90, 100; *Bannatyne* v. *Bannatyne* (1852), 16 Jur. 864; *Re Walker* (*a Lunatic so Found*), [1905] 1 Ch. 160, 172, C. A.

(*f*) *Ex parte Cranmer* (1806), 12 Ves. 445, 452; *Sherwood* v. *Sanderson* (1815), 19 Ves. 280, 283; *Ridgeway* v. *Darwin* (1802), 8 Ves. 65; *Griffiths* v. *Robins* (1818), 3 Madd. 191; *Mackenzie* v. *Handasyde* (1829), 2 Hag. Ecc. 211; and see *Ayrey* v. *Hill* (1824), 2 Add. 206, 209, 210.

SECT. 3. Wills.

render him incapable of making a reasonable and proper disposition of his property or of taking a rational view of the matters to be considered in making a will (*g*).

Effect of subsequent recovery.

The sound and disposing mind and memory must exist at the actual moment of execution (*h*), and a will executed during insanity does not become valid by the subsequent recovery of the testator (*i*).

Partial validity.

Part of a will may be established and part held not entitled to probate if incapacity be shown at the time of execution of the latter part (*k*).

Admissibility of evidence to prove true expression of intent.

830. Where the sanity of a testator is in question, parol or documentary evidence will be admitted to show that the will expresses the deliberate intention of the testator. All statements, whether verbal or in writing, of a testator preparatory to making a will, and his conduct generally in relation thereto, are of importance to show whether in fact the testator was aware of the character of the act he was performing (*l*). A will of a testator being in his own handwriting, and affirmed and delivered by him, affords strong evidence of his capacity to make a will (*m*). The evidence of an attesting witness impeaching the will, inasmuch as he thereby impeaches his own act, though admissible, must be received with scrupulous jealousy (*n*), and is not to be relied on unless corroborated by other evidence (*o*).

Effect of existence of fiduciary relationship between testator and beneficiary;

831. The existence of certain intimate or confidential relations between a testator and a person benefited by his will renders it particularly necessary to prove that the testator was capable of making a will (*p*). Such are the relations of medical man and patient (*q*), parent and child (*r*), child and parent (*s*), husband and wife (*t*),

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(*g*) *Banks* v. *Goodfellow* (1870), L. R. 5 Q. B. 549; *Hope* v. *Campbell*, [1899] A. C. 1.

(*h*) *Billinghurst* v. *Vickers* (1810), 1 Phillim. 187; *Wood* v. *Wood* (1811), 1 Phillim. 357; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV. p. 178.

(*i*) *Arthur* v. *Bokenham* (1708), 11 Mod. Rep. 148, 157; Shep. Touch. (ed. Preston), 413.

(*k*) *Brouncker* v. *Brouncker* (1812), 2 Phillim. 57.

(*l*) *Hall* v. *Warren* (1804), 9 Ves. 605, 610; *Levy* v. *Lindo* (1817), 3 Mer. 81; *Filmer* v. *Gott* (1774), 4 Bro. Parl. Cas. 230; *Fane* v. *Devonshire* (*Duke*) (1719), 6 Bro. Parl. Cas. 137; *Wheeler* v. *Alderson* (1831), 3 Hag. Ecc. 574; *Butlin* v. *Barry* (1837), 1 Curt. 614, 629; *Durling* v. *Loveland* (1839), 2 Curt. 225.

(*m*) *Cartwright* v. *Cartwright* (1793), 1 Phillim. 90, 100; see also *Rutherford* v. *Maule* (1832), 4 Hag. Ecc. 213, 226; and *Clarke* v. *Lear* (1791), cited 1 Phillim. 119.

(*n*) *Bootle* v. *Blundell* (1815), 19 Ves. 494, 504; *Howard* v. *Braithwaite* (1812), 1 Ves. & B. 202.

(*o*) *Kinleside* v. *Harrison* (1818), 2 Phillim. 449, 499; compare *Burrowes* v. *Lock* (1805), 10 Ves. 470, 473; *Young* v. *Richards* (1839), 2 Curt. 371; *Pennant* v. *Kingscote* (1843), 3 Curt. 642; *Hudson's Case* (1682), Skin. 79; *Digg's Case* (undated), cited Skin. 79.

(*p*) *Segrave* v. *Kirwan* (1828), Beat. 157, 166; *Bulkley* v. *Wilford* (1834), 8 Bli. (N. S.) 111, H. L.; *Butlin* v. *Barry*, *supra*; *Durling* v. *Loveland*, *supra*, see also title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., p. 107.

(*q*) *Popham* v. *Brooke* (1828), 5 Russ. 9.

(*r*) *Wright* v. *Vanderplank* (1855), 2 K. & J. 1.

(*s*) *Mackenzie* v. *Handasyde* (1829), 2 Hag. Ecc. 211.

(*t*) *Mynn* v. *Robinson* (1828), 2 Hag. Ecc. 169, 179; *Moss* v. *Brander* (1811), 1

or of other circumstances raising presumption of impropriety.

wife and husband (*a*), spiritual adviser and penitent (*b*), and more especially legal adviser and client (*c*). Still stricter proof is required where there is some weakness in the testator which, though not amounting to incapacity, renders him liable to be made the instrument of those around him (*d*), or where the testator is of extreme age (*e*), or it is alleged that the will was prepared or obtained by or through a person benefited thereby (*f*), especially where that person was the legal, medical, or spiritual adviser of the testator or was in some other position of influence towards him (*g*); or where knowledge of the contents of the will was not brought home to him (*h*), or the will was prepared on verbal instructions only (*i*), or where there was any concealment or misrepresentation (*k*); or where the will is at variance with the known affections of the testator (*l*) or his previous declarations (*m*) or his dispositions in former wills (*n*), or a general sense of propriety (*o*), or has been clandestinely obtained; or where there is evidence that the will has been obtained by force (*p*), or by intimidation (*q*), or by importunity (*r*), or has been made by interrogatories (*s*), or has been prepared by (*t*) or on the instructions of a legatee (*u*).

Phillim. 254; *Baker* v. *Batt* (1838), 2 Moo. P. C. C. 317; *Marsh* v. *Tyrrell* (1828), 2 Hag. Ecc. 84.

(*a*) *Hacker* v. *Newborn* (1654), Sty. 427; *Williams* v. *Goude* (1828), 1 Hag. Ecc. 577; *Harwood* v. *Baker* (1840), 3 Moo. P. C. C. 282, 290.

(*b*) *Middleton* v. *Sherburne* (1841), 4 Y. & C. (EX.) 358; compare *Huguenin* v. *Baseley* (1807), 14 Ves. 273.

(*c*) *Segrave* v. *Kirwan* (1828), Beat. 157, 166; *Maccabe* v. *Hussey* (1831), 2 Dow & Cl. 440, H. L.; *Ingram* v. *Wyatt* (1828), 1 Hag. Ecc. 384; *Wyatt* v. *Ingram* (1832), 3 Hag. Ecc. 466; *Raworth* v. *Marriott* (1833), 1 My. & K. 643; *Dufaur* v. *Croft* (1840), 3 Moo. P. C. C. 136; *Powell* v. *Powell*, [1900] 1 Ch. 243; *Willis* v. *Barron*, [1902] A. C. 271; *Wright* v. *Carter*, [1903] 1 Ch. 27, C. A.

(*d*) *Ingram* v. *Wyatt*, *supra*; *Donegal's* (*Lord*) *Case* (1751), 2 Ves. Sen. 407; *Mountain* v. *Bennet* (1787), 1 Cox, Eq. Cas. 353.

(*e*) *Kinleside* v. *Harrison* (1818), 2 Phillim. 449, 499; *Griffiths* v. *Robins* (1818), 3 Madd. 191.

(*f*) *Billinghurst* v. *Vickers* (1810), 2 Phillim. 193; *Mackenzie* v. *Handasyde* (1829), 2 Hag. Ecc. 211.

(*g*) *Popham* v. *Brooke* (1828), 5 Russ. 9; *Middleton* v. *Sherburne*, *supra*; *Huguenin* v. *Baseley*, *supra*; *Segrave* v. *Kirwan*, *supra*; *Ingram* v. *Wyatt*, *supra*.

(*h*) *Paske* v. *Ollat* (1815), 2 Phillim. 323.

(*i*) *Middleton* v. *Forbes* (1778), cited 1 Hag. Ecc. 395, 398; *Mackenzie* v. *Handasyde*, *supra*.

(*k*) *Segrave* v. *Kirwan*, *supra*; *Allen* v. *M'Pherson* (1847), 1 H. L. Cas. 191, 207.

(*l*) *King* v. *Farley* (1828), 1 Hag. Ecc. 502; *Brydges* v. *King* (1828), 1 Hag. Ecc. 256; *Coghlan's Case* (undated), cited in *Bootle* v. *Blundell* (1815), 19 Ves. 494, 508.

(*m*) *Baker* v. *Batt*, *supra*; *Marsh* v. *Tyrrell*, *supra*; *Brydges* v. *King*, *supra*.

(*n*) *Mynn* v. *Robinson* (1828), 2 Hag. Ecc. 169, 179; *Brydges* v. *King*, *supra*.

(*o*) *Butlin* v. *Barry* (1837), 1 Curt. 614, 629; *Durling* v. *Loveland* (1839), 2 Curt. 225.

(*p*) *Mackenzie* v. *Handasyde*, *supra*; *Paske* v. *Ollat*, *supra*; *Wyatt* v. *Ingram*, *supra*; *Mountain* v. *Bennet*, *supra*.

(*q*) Swinburne on Wills, Part VII., s. 2; *Nelson* v. *Oldfield* (1688), 2 Vern. 76.

(*r*) *Constable* v. *Tufnell* (1833), 4 Hag. Ecc. 465, 477.

(*s*) *Green* v. *Skipworth* (1809), 1 Phillim. 53.

(*t*) *Paske* v. *Ollat*, *supra*.

(*u*) *Dodge* v. *Meech* (1828), 1 Hag. Ecc. 612.

SECT. 4. Miscellaneous.

Agency.

SECT. 4.—*Miscellaneous.*

832. A lunatic cannot effectively appoint an agent (*v*), and an agency created during sanity will be determined by the lunacy of the principal or agent (*w*).

833. Other instances of incapacity on the part of a lunatic are dealt with elsewhere (*x*).

Part III.—Evidence of Insanity.

SECT. 1.—*As to the Issues.*

On an inquisition.

834. On an inquisition the issue (*a*) to be tried is whether the alleged lunatic is of unsound mind so as to be incapable of managing himself or his affairs (*b*).

At common law and in Chancery.

835. In an action at common law or in Chancery, where the responsibility of an alleged lunatic is in question, the issue generally directed is, "Was the alleged lunatic at the date in question capable of understanding the nature of the act he was performing?" (*c*).

In a probate action.

In a probate action, where the sanity of a testator is in question, the issue is, "Was the testator of a sound and disposing mind?" (*d*); that is, was he able to understand the nature of the act and its effect, the extent of the property of which he was disposing, and the claims to which he ought to give effect (*e*).

In criminal proceedings.

In criminal proceedings the issue is, "Was the prisoner at the time of committing the act labouring under such a defect of reason from disease of the mind as not to know the quality of the act which he was doing; or, if he did know it, did he know that what he was doing was wrong?" (*f*).

(*v*) See title AGENCY, Vol. I., p. 150. In a proper case an inquiry may be ordered as to the competency of a plaintiff to retain a solicitor (*Pomery* v. *Pomery*, [1909] W. N. 158).

(*w*) See title AGENCY, Vol. I., pp. 233, 234; and see *Fore Street Warehouse Co.* v. *Durrant* (1883), 10 Q. B. D. 471, 474; *Yonge* v. *Toynbee*, [1910] 1 K. B. 215, C. A. (cases as to solicitor's retainer).

(*x*) As to change of domicil of a lunatic, see title CONFLICT OF LAWS, Vol. VI., p. 192; as to his incapacity to present to an advowson, see title ECCLESIASTICAL LAW, Vol. XI., p. 574; as to the effect of lunacy upon the holding of a benefice, see *ibid.*, p. 642; as to the lunacy of a dean or canon, see *ibid.*, p. 482; and as to the lunacy of a bishop, see *ibid.*, p. 407; as to the incapacity of a lunatic to vote at an election, see title ELECTIONS, Vol. XII., pp. 140, 164; as to his incapacity to sit in Parliament, see title PARLIAMENT.

(*a*) This part of the title is confined to evidence in connection with the proof of lunacy. As to the competency of lunatics and idiots themselves to give evidence, see title EVIDENCE, Vol. XIII., p. 569.

(*b*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 94, 98. As to confining the inquisition to this issue, see, further, p. 421, *post*.

(*c*) *Mannin* d. *Ball* v. *Ball* (1829), Sm. & Bat. 183, 454.

(*d*) See p. 403, *ante*.

(*e*) *Banks* v. *Goodfellow* (1870), L. R. 5 Q. B. 549; compare *Boughton* v. *Knight* (1873), L. R. 3 P. & D. 64; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 178.

(*f*) *Macnaughten's Case* (1843), 8 Scott (N. R.), 600—603; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 241.

SECT. 2.—*Presumptions.*

SECT. 2. Presumptions.

Presumption of sanity.

836. Every man is presumed to be sane until the contrary is proved, and this presumption holds as well in civil as in criminal cases (*g*). But in the case of a will it is the duty of the executors or any other person setting up the will to show that it is the act of a competent testator. Therefore, where any dispute or doubt exists as to the capacity of a testator, his sanity must be proved affirmatively (*h*). Similarly, where a duly executed will has been revoked, the competence of the testator to revoke it must be proved (*i*).

Burden of proof in probate action.

Presumption as to continuance of insanity.

Again, where a man has been proved or is admitted to have been insane, the law presumes such insanity to continue until it is proved to have ceased; and the burden of proving recovery or a lucid interval, as the case may be, lies on the person alleging the same (*k*). The evidence to prove a recovery or a lucid interval must be as strong and demonstrative of the fact as when the object is to prove insanity (*l*).

Idiocy and lunacy.

An idiot is presumed to be incurable; lunacy is always presumed to be curable (*m*).

Evidence as to inability to recover reason.

Although at common law a lunatic was always presumed to be capable of recovering his reason, nevertheless in cases where the evidence admitted has shown that there was no probability of recovery, the court has dealt with the lunatic's property for the benefit of persons other than the lunatic in a way which would not otherwise have been adopted (*n*), but the practice is rather to be narrowed than extended (*o*).

Lapse of time since occurrence of act.

Where a long time has elapsed since the occurrence of an act, which it is desired to impeach on the ground of insanity, the court will uphold the act in the absence of strong and cogent evidence

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(*g*) 1 Hale, P. C. 33; *A.-G.* v. *Parnther* (1792), 3 Bro. C. C. 441; *White* v. *Wilson* (1806), 13 Ves. 87, 88; *Steed* v. *Calley* (1836), 1 Keen, 620; *Snook* v. *Watts* (1848), 11 Beav. 105; *Creagh* v. *Blood* (1845), 8 I. Eq. R. 434; *Macnaughten's Case* (1843), 8 Scott (N. R.), 600—603.

(*h*) *Sutton* v. *Sadler* (1857), 3 C. B. (N. S.) 87; *Symes* v. *Green* (1859), 1 Sw. & Tr. 401; *Smee* v. *Smee* (1879), 5 P. D. 84; and see *Harris* v. *Ingledew* (1731), 3 P. Wms. 91, 93; *Wallis* v. *Hodgson* (1740), 2 Atk. 56; *Ogle* v. *Cooke* (1748), 1 Ves. Sen. 178; *Townsend* v. *Ives* (1748), 1 Wils. 216; *Bootle* v. *Blundell* (1815), 19 Ves. 494, 500; *Tatham* v. *Wright* (1831), 2 Russ. & M. 1, 13, 14, 15.

(*i*) *Harris* v. *Berrall* (1858), 1 Sw. & Tr. 153; *Sprigge* v. *Sprigge* (1868), L. R. 1 P. & D. 608; *Benson* v. *Benson* (1870), L. R. 2 P. & D. 172, 176.

(*k*) *A.-G.* v. *Parnther, supra; White* v. *Wilson, supra; Frank* v. *Mainwaring* (1839), 2 Beav. 115; *Snook* v. *Watts, supra; Hassard* v. *Smith* (1872), 6 I. R. Eq. 429; *Prinsep and East India Co.* v. *Dyce Sombre* (1856), 10 Moo. P. C. C. 232, 239, 244; *Cartwright* v. *Cartwright* (1793), 1 Phillim. 90, 100; *White* v. *Driver* (1809), 1 Phillim. 84, 88; *Groom* v. *Thomas* (1829), 2 Hag. Ecc. 433; *Waring* v. *Waring* (1848), 6 Moo. P. C. C. 341; *Grimani* v. *Draper* (1848), 6 Notes of Cases, 418; *Johnson* v. *Blane* (1848), 6 Notes of Cases, 442; *Fowlis* v. *Davidson* (1848), 6 Notes of Cases, 461, 474.

(*l*) *A.-G.* v. *Parnther, supra.*

(*m*) 1 Bl. Com. 302; and see *Re Fitzgerald, a Lunatic* (1805), 2 Sch. & Lef. 432, 438; *Re Hinde, Ex parte Whitbread* (1816), 2 Mer. 99, 102. As to the distinction between lunatics and idiots, see, further, p. 395, *ante.*

(*n*) *Re Hinde, Ex parte Whitbread, supra; Re Blair, a Lunatic* (1836), 1 My. & Cr. 300; *Re Clarke, a Lunatic* (1847), 2 Ph. 282; *Re Croft* (1862), 32 L. J. (CH.) 481, C. A.; *Re Frost* (1870), 5 Ch. App. 699.

(*o*) *Re Evans* (*a Person of Unsound Mind*) (1882), 21 Ch. D. 297, C. A.

SECT. 2. Presumptions.

to the contrary (*p*). Similarly, in the absence of evidence to the contrary, it will be presumed that a person who has prepared or attested the deed of an alleged lunatic and has since died would, if available as a witness, have sworn that the alleged lunatic was of sound mind at the date of the execution of the deed (*q*).

SECT. 3.—*Admissibility of Evidence.*

SUB-SECT. 1.—*In General.*

Evidence of conduct before and after critical time.

837. Evidence as to the conduct of the alleged lunatic at the time when the state of his mind is in dispute is most important and material, but evidence of his conduct before and after that time is admissible (*r*), though it carries but little weight against satisfactory evidence of his state of mind at the critical time (*a*).

Where, in civil proceedings, an act is alleged to be the act of a lunatic, the fact that the act and the manner of doing it is rational is strong presumptive evidence of the sanity of the doer at the time of the act, even where he is under confinement as a lunatic (*b*), and in this connection the spontaneity of the act, and its accord with natural affection and moral duty and its conformity to past and subsequent declarations of intention, are of importance (*c*).

Where the chief or only evidence of insanity is to be derived from the nature of the act in question, such act must bear strong internal indications of irrationality to afford any presumption of the insanity of the doer (*d*).

Effect of nature of disease.

The value of the evidence relating to the alleged lunatic's conduct before and after the critical time varies materially in accordance with the nature of the mental disease from which he is or is alleged

(*p*) *Towart* v. *Sellars* (1817), 5 Dow, 231, 236, 237, H. L.; compare *Price* v. *Berrington* (1851), 3 Mac. & G. 486, 495.

(*q*) *Towart* v. *Sellars, supra;* compare *Harris* v. *Ingledew* (1731), 3 P. Wms. 91, 93; *Freshfield* v. *Reed* (1842), 9 M. & W. 404. As to presumptions generally, see title EVIDENCE, Vol. XIII., pp. 440, 497 *et seq.*

(*r*) *Beavan* v. *M'Donnell* (1854), 10 Exch. 184; compare *Lovatt* v. *Tribe* (1862), 3 F. & F. 9. As to the limitation of the evidence admissible on an inquisition, see p. 406, *ante.*

(*a*) *Ferguson* v. *Borrett* (1859), 1 F. & F. 613; compare *East India Company and Prinseps* v. *Dyce Sombre* (1856), 4 W. R. 714, 718, P. C.

(*b*) *Snook* v. *Watts* (1848), 11 Beav 105; *Banks* v. *Goodfellow* (1870), L. R. 5 Q. B. 549; *Cartwright* v. *Cartwright* (1793), 1 Phillim. 90, 100; *Scruby and Finch* v. *Fordham* (1822), 1 Add. 74, 90; *In the Goods of Watts* (1837), 1 Curt. 594; *Montefiore* v. *Montefiore* (1824), 2 Add. 354, 361, 362; *Chambers and Yatman* v. *Queen's Proctor* (1840), 2 Curt. 415, 451; *Nicholls and Freeman* v. *Binns* (1858), 1 Sw. & Tr. 239; *M'Adam* v. *Walker* (1813), 1 Dow, 148, 178, H. L.; but see *Clark* v. *Lear and Scarwell* (1791), cited 1 Phillim. 119; *Evans* v. *Knight and Moore* (1822), 1 Add. 229, 237, 238; *Bannatyne* v. *Bannatyne* (1852), 2 Rob. Eccl. 472, 501; *Creagh* v. *Blood* (1845), 8 I. Eq. R. 434; *A.-G.* v. *Parnther* (1792), 3 Bro. C. C. 441; *Waring* v. *Waring* (1848), 6 Moo. P. C. C. 341; *Jenkins* v. *Morris* (1880), 14 Ch. D. 674, C. A.; *Smee* v. *Smee* (1879), 5 P. D. 84; *Murfett* v. *Smith* (1887), 12 P. D. 116.

(*c*) *White* v. *Driver* (1809), 1 Phillim. 84, 88; *Cartwright* v. *Cartwright, supra; Evans* v. *Knight and Moore, supra; M'Adam* v. *Walker, supra; Anon.*, cited in *M'Adam* v. *Walker, supra*, at pp. 178, 179; *Coghlan* v. *Coghlan* (undated), cited 1 Phillim. 120; *Clarke* v. *Lear, supra; Bannatyne* v. *Bannatyne, supra.* In a criminal act these qualities, or some of them, are necessarily absent; hence the difficulty of establishing a lucid interval against a lunatic accused of a crime (see *Hadfield's Case* (1800), 27 State Tr. 1281).

(*d*) *Wrench* v. *Murray* (1843), 3 Curt. 623; *Boughton* v. *Knight* (1873), L. R. 3 P. & D. 64; *Arbery* v. *Ashe* (1828), 1 Hag. Ecc. 214.

to be suffering (*e*). As a rule, the general habits and course of life of an alleged lunatic are of greater weight in considering the question of his sanity than are particular acts done by him, though very strange in themselves (*f*), as these may be the result of eccentricity or delirium and consistent with general sanity (*g*).

Writings of alleged lunatic.

838. Writings of the alleged lunatic are admissible in evidence on the issue, whether he be sane or not (*h*); and even his handwriting may be of some value as evidence for or against his sanity (*i*).

Family weakness.

839. The fact that insanity exists or has existed in the family of an alleged lunatic is certainly admissible in evidence against his sanity in a criminal case (*k*); and, probably, also in civil proceedings (*l*).

Treatment by friends.

840. The treatment of an alleged lunatic by his friends or relations is admissible in evidence on the question of his sanity as between them and the alleged lunatic, but not as against third parties (*m*). Such treatment is also admissible to introduce evidence of what the alleged lunatic himself did with regard to it, but not otherwise. Thus, letters written to an alleged lunatic are admissible if, and only if, it is shown that they were read or acted upon by the alleged lunatic (*n*).

Evidence of alleged lunatic.

841. The evidence of the alleged lunatic himself is insufficient either to establish his disability (*o*) or his sanity (*p*).

General reputation.

842. General reputation of insanity is not admissible in evidence either to prove the fact of insanity or to fix some person with notice of it (*q*).

Medical evidence.

843. The opinions of medical witnesses who have examined an alleged lunatic are admissible in evidence on the question whether the patient is or is not of unsound mind (*r*); but the opinion of a medical witness as to the existence of facts which he has not himself perceived is not admissible (*s*). In general, the question of

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(*e*) See 1 Taylor, Principles and Practice of Medical Jurisprudence, 6th ed., 848 *et seq.*

(*f*) *Snook* v. *Watts* (1848), 11 Beav. 105.

(*g*) See *Boughton* v. *Knight* (1873), L. R. 3 P. & D. 64, *per* HANNEN, J., at p. 75.

(*h*) *Bootle* v. *Blundell* (1815), 19 Ves. 494, 506.

(*i*) *Cartwright* v. *Cartwright* (1793), 1 Phillim. 90, 100; and see 1 Taylor, Principles and Practice of Medical Jurisprudence, 6th ed., 852, 910.

(*k*) *R.* v. *Oxford* (1840), 9 C. & P. 525.

(*l*) *M'Adam* v. *Walker* (1813), 1 Dow, 148, 178, H. L.; but see *Doe* d. *Mather* v. *Whitefoot* (1838), 8 C. &. P. 272.

(*m*) *Re Windham, Windham* v. *Giubilei* (1862), 31 L. J. (CH.) 721, C. A.; and see *Groom* v. *Thomas* (1829), 2 Hag. Ecc. 433.

(*n*) *Wright* v. *Doe* d. *Tatham* (1834), 1 Ad. & El. 3, Ex. Ch.; *Wright* v. *Doe* d. *Tatham* (1837), 7 Ad. & El. 313; (1838), 4 Bing. (N. C.) 489, H. L.; and see title EVIDENCE, Vol. XIII., pp. 445, 446, and p. 448, note (*i*); and compare *Wheeler and Batsford* v. *Alderson* (1831), 3 Hag. Ecc. 574, 609.

(*o*) *Knight* v. *Young* (1813), 2 Ves. & B. 184.

(*p*) *Bootle* v. *Blundell, supra.*

(*q*) *Greenslade* v. *Dare* (1855), 20 Beav. 284.

(*r*) *R.* v. *Layton* (1849), 4 Cox, C. C. 149; *R.* v. *Richards* (1858), 1 F. & F. 87; *Martin* v. *Johnston* (1858), 1 F. & F. 122; *Lovatt* v. *Tribe* (1862), 3 F. & F. 9. As to the opinion of a medical witness who has not examined the alleged lunatic, see *R.* v. *Frances* (1849), 4 Cox, C. C. 57; *Doe* d. *Bainbrigge* v. *Bainbrigge* (1850), 4 Cox, C. C. 454; *R.* v. *Searle* (1831), Mood. & R. 75; *McNaghten's Case* (1843), 10 Cl. & Fin. 200, H. L.

(*s*) Stephen, Digest of the Law of Evidence, art. 49.

SECT. 3. Admissibility of Evidence.

insanity and, therefore, the question whether the opinions of the medical witness have been formed on sufficient grounds, is for the jury to decide (*t*).

Contradictory evidence.

844. Where the evidence is contradictory, the proper inference to be drawn is that which arises from the general effect and tendency of the whole body of proof on each side of the question (*a*). On an inquisition of lunacy, the actual inspection of the person of the alleged lunatic is of great importance (*b*).

SUB-SECT. 2.—*Findings of other Authorities having Jurisdiction.*

Judicial inquisition.

845. The finding of a jury on an inquisition of lunacy is admissible as evidence of insanity or otherwise, both in criminal (*c*) and in civil proceedings (*d*). Where such a finding is one of insanity it creates a presumption in favour of that fact, and throws the onus of proof on those who contend the contrary (*e*). But the finding is not conclusive of the fact of insanity, still less of the period when the insanity commenced (*f*), and the presumption may be rebutted (*g*). The fact that a person seeking to rebut the finding on an inquisition of lunacy attended the execution of the commission is, it is conceived, immaterial (*h*).

Master in lunacy.

Similarly, the order of a master in lunacy under the Lunacy Act, 1890 (*i*), s. 116, reciting that a person was in the opinion of the master of unsound mind, is admissible as *primâ facie* evidence of the fact of his insanity (*k*). But the report of a Chancery visitor in lunacy is not admissible (*l*).

Chancery visitor.

Coroner's jury.

It is doubtful whether the finding of a jury in a coroner's inquest is admissible as evidence of the fact of insanity in civil proceedings (*m*), but it is conceived it would be admissible (*n*).

(*t*) *Lovatt* v. *Tribe* (1862), 3 F. & F. 9; and see *Martin* v. *Johnston* (1858), 1 F. & F. 122. The evidence of medical witnesses in lunacy cases is criticised by Lord COTTENHAM, L.C., in *Re Dyce Sombre* (1849), 1 Mac. & G. 116, 128.

(*a*) See *Tatham* v. *Wright* (1831), 2 Russ. & M. 1, *per* TINDAL, C.J., at p. 20; and compare *Towart* v. *Sellars* (1817), 5 Dow, 231, H. L.

(*b*) Pope, Law and Practice of Lunacy, 2nd ed., 418. As to admissibility of evidence, see, further, title EVIDENCE, Vol. XIII., pp. 421, 428.

(*c*) *R.* v. *Bowler* (1812), cited in Shelford on Lunatics etc., 590.

(*d*) *Sergeson* v. *Sealey* (1742), 2 Atk. 412; *Faulder* v. *Silk* (1811), 3 Camp 126; *Dane* v. *Kirkwall* (*Viscountess*) (1838), 8 C. & P. 679; *Hall* v. *Warren* (1804), 9 Ves. 605, 609; *Browning* v. *Reane* (1812), 2 Phillim. 69; *Hume* v. *Burton* (1785), 1 Ridg. Parl. Rep. 204; *Re Nesbitt, an Alleged Lunatic* (1847), 2 Ph. 245.

(*e*) *Hall* v. *Warren, supra; Snook* v. *Watts* (1848), 11 Beav. 105; and see *Van Grutten* v. *Foxwell, Foxwell* v. *Van Grutten*, [1897] A. C. 658, quoted in the judgment of COZENS-HARDY, M.R., in *Hill* v. *Clifford, Clifford* v. *Timms, Clifford* v. *Phillips*, [1907] 2 Ch. 236, 244, C. A.

(*f*) *Re Walden, Ex parte Bradbury* (1839), 3 Jur. 1108.

(*g*) *Sergeson* v. *Sealey, supra; Clement* v. *Rhodes* (1825), 3 Add. 37; *Hall* v. *Warren, supra; Rodd* v. *Lewis* (1755), 2 Lee, 176; *Portsmouth* (*Countess*) v. *Portsmouth* (*Earl*) (1828), 1 Hag. Ecc. 355, 356; *In the Goods of Watts* (1837), 1 Curt. 594; *Bannatyne* v. *Bannatyne* (1852), 2 Rob. Eccl. 472, 501; *Elliott* v. *Ince* (1857), 5 W. R. 482; *Hume* v. *Burton, supra.*

(*h*) *Re Nesbitt, an Alleged Lunatic, supra.*

(*i*) 53 & 54 Vict. c. 5.

(*k*) *Harvey* v. *R.*, [1901] A. C. 601, P. C. As to the inspection of lunacy records, see p. 427, *post.*

(*l*) *Roe* v. *Nix*, [1893] P. 55; see *Re B., an Alleged Lunatic*, [1892] 3 Ch. 194, C. A.

(*m*) *Jones* v. *White* (1717), 1 Stra. 68.

(*n*) Pope, Law and Practice of Lunacy, 2nd ed., 429.

Part IV.—The Jurisdiction of the Chancery Division of the High Court of Justice.

SECT. 1.—*As to Person.*

SECT. 1. As to Person.

As to person.

846. The Chancery Division has no jurisdiction to appoint a guardian of a lunatic's person (*a*), though where an infant ward of court becomes insane the jurisdiction to give directions as to his treatment is unaffected by the lunacy (*b*).

SECT. 2.—*As to Property.*

As to property.

847. The Chancery Division has a discretion to authorise the property of a lunatic, either capital (*c*), or income (*d*), or both (*c*), to be applied for his maintenance so long as he lives under the care of a particular person who has charge of him (*d*), provided (1) no proceedings in lunacy have been taken or are in contemplation (*e*), (2) the property is under the control of, or is being administered by, the Chancery Division (*f*), and (3) such property is small in amount (*g*). The jurisdiction arises not because, but in spite of, unsoundness of mind (*h*), and is exercised under colour of administering a trust (*i*). On the same principle, where an infant trustee is a lunatic, the jurisdiction to convey the trust estate may be exercised because of the infancy and notwithstanding the lunacy (*k*).

(*a*) *Re Bligh* (1879), 12 Ch. D. 364, C. A.; *Re Brandon's Trusts* (1879), 13 Ch. D. 773.

(*b*) *Re Edwards* (1879), 10 Ch. D. 605, C. A. As to the jurisdiction over wards of court, see title INFANTS AND CHILDREN, Vol. XVII., pp. 146 *et seq.*

(*c*) *Re Tuer's Will Trusts* (1886), 32 Ch. D. 39, C. A.

(*d*) *Re Bligh, supra; Re Silva's Trusts* (1888), 36 W. R. 366; *Re Brandon's Trusts, supra; Re T.* (1880), 15 Ch. D. 78; *Re Carr's Trusts, Carr* v. *Carr*, [1904] 1 Ch. 792, C. A. See, however, *Re Barker's Trusts*, [1904] W. N. 13. As to payment or transfer to a foreign tuteur or curator, see p. 453, *post.*

(*e*) *Re Bligh, supra; Vane* v. *Vane, Vane* v. *Vane* (1876), 2 Ch. D. 124.

(*f*) *Re Grimmett's Trusts* (1887), 56 L. J. (CH.) 419; compare *Re Silva's Trusts, supra.*

(*g*) *Vane* v. *Vane, Vane* v. *Vane, supra.* When a small estate consists of a fund in court to a Chancery credit, an order in lunacy appointing a *quasi*-committee is usually refused, since the lunacy order would have to be followed by a Chancery order transferring the fund to the lunacy credit: the desired relief can be obtained by means of an order in the Chancery Division alone if the application be made to that division direct.

(*h*) *Beall* v. *Smith* (1874), 9 Ch. App. 85, *per* JAMES, L.J., at p. 92.

(*i*) *Re Bligh, supra.*

(*k*) *Re Arrowsmith's Trusts, Re Thompson* (*a Person of Unsound Mind*) (1858), 6 W. R. 642. See, further, title TRUSTS AND TRUSTEES.

Part V.—The Jurisdiction in Lunacy.

SECT. 1.

The Judge in Lunacy.

SECT. 1.—*The Judge in Lunacy.*

Judicial authorities.

The judges in lunacy.

848. The jurisdiction in lunacy (referred to in the Lunacy Acts, 1890—1908 (*l*), as the jurisdiction of the judge in lunacy) is exercisable by the Lord Chancellor and by the Lords Justices of the Court of Appeal (*a*). To enable the concurrent exercise of Chancery jurisdiction where necessary, the Lord Chancellor, acting under statutory powers in that behalf (*b*), requests each of the Lords Justices to act as an additional judge of the Chancery Division of the High Court of Justice for the purpose of making lunacy orders (*c*).

What petitions and applications are made to judge in lunacy or to master in lunacy.

849. Petitions for an inquisition, for a traverse, and for a *supersedeas*, are in each case, together with the evidence in support, forwarded to the judge in lunacy direct by the lunacy officials (*d*) without being considered by the masters in lunacy (*e*). All other applications are made in the first instance by summons at chambers before a master in lunacy (*f*). If the application does not relate to administration and management, the master prepares minutes of such order as he thinks should be made and brings the application, the evidence, and the minutes before the judge, who may himself make an order, with or without the attendance of parties, or may adjourn the matter into court, or may refer the same to the master

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(*l*) Lunacy Act, 1890 (53 & 54 Vict. c. 5); Lunacy Act, 1891 (54 & 55 Vict. c. 65); Lunacy Act, 1908 (8 Edw. 7, c. 47) (frequently referred to in this title as "the Lunacy Acts").

(*a*) See Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 108 (1); and title COURTS, Vol. IX., pp. 94, 95. In practice, lunacy orders are made by one of the Lords Justices (in this title frequently called "the judge in lunacy") sitting in chambers, matters being referred to the Lords Justices in rotation by the lunacy officials. As to appeals from the Lord Chancellor or the Lords Justices sitting in lunacy to the Court of Appeal, see title COURTS, Vol. IX., pp. 95, 96; *Re Cathcart*, [1893] 1 Ch. 466, C. A. As to the jurisdiction of the masters in lunacy, see p. 414, *post*.

(*b*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 51.

(*c*) This request is not limited to petitions under the Trustee Acts, but applies to all applications in lunacy which also require an exercise of Chancery jurisdiction (*Re Platt* (*a Person of Unsound Mind*) (1887), 36 Ch. D. 410, C. A.), such as the making of a vesting order of real estate in Ireland (*Re Lamotte* (1876), 25 W. R. 149, C. A.; *Re Smyth* (1886), 34 W. R. 493); or directing the payment of costs incurred in opposing a Bill in Parliament which affected a lunatic's real estate (*Re Blake, a Lunatic* (1895), 72 L. T. 280, C. A.). But the Chancery jurisdiction can only be exercised in aid of the jurisdiction in lunacy (*Re Barber* (1888), 39 Ch. D. 187, C. A.), and does not enable a Lord Justice acting in lunacy matters, except when sitting in court, to order the transfer of funds from a Chancery to a lunacy account (*Re Armfield* (1889), 88 L. T. Jo. 97, C. A.); see *Re Tate* (1882), 20 Ch. D. 135, C. A. (where such an order was made in court after the petition had been intituled in Chancery).

(*d*) As to these officials and the Lunacy Office, see title COURTS, Vol. IX., p. 96.

(*e*) Rules in Lunacy, 1892, rr. 16—18; Stat. R. & O. Rev., Vol. VIII., Lunatic, England, pp. 1 *et seq.* As to the nature of these proceedings, see p. 415, *post*.

(*f*) Rules in Lunacy, 1892, r. 19.

for further inquiry (*g*). The above practice applies in the case of summonses for vesting orders under the Lunacy Act, 1890 (*h*), ss. 135, 136, and for the appointment of new trustees under the Lunacy Act, 1890 (*i*), s. 141; also in cases in which, as regards a lunatic so found, the judge has under the Lands Clauses Acts (*j*), the Settled Estates Act, 1877 (*k*), the Settled Land Acts, 1882—1890 (*l*), or any other enactment, jurisdiction to make an order affecting his property (*m*).

Appeal from order of master.

850. The judge in lunacy has an appellate jurisdiction in the case of any person who is affected by any order, decision, or certificate of a master. The appellant can appeal to the judge without a fresh summons on giving notice of appeal signed by his solicitors within eight days to the person (if any) interested in supporting the order, decision, or certificate appealed from, and lodging a copy of his notice at the Lunacy Office (*n*). Should the judge deem the matter of sufficient importance he will adjourn the same into court for argument before the Lords Justices as judges in lunacy.

Paramount principle in exercising jurisdiction.

851. In exercising all powers (which powers extend to property within any British possession (*o*)) under the Lunacy Acts (*p*), or under any other Act, the paramount consideration for the judge in lunacy is the interest of the lunatic (*q*). The powers are exercisable for the benefit of him and his family, and, where it appears expedient, in duly managing his property (*r*).

(*g*) Rules in Lunacy, 1892, rr. 22, 23.

(*h*) 53 & 54 Vict. c. 5.

(*i*) *Ibid.* In these cases, it seems, the order cannot be made by a master; see *Re Langdale* (*a Lunatic*), [1901] 1 Ch. 3, C. A.

(*j*) For which see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 56 *et seq.*

(*k*) 40 & 41 Vict. c. 18.

(*l*) See p. 444, *post*, and title SETTLEMENTS.

(*m*) Rules in Lunacy, 1892, r. 20. In the case of a lunatic not so found by inquisition, it seems the order can be made by a master, provided the aid of the Chancery Division is not required (Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1).

(*n*) Rules in Lunacy, 1892, r. 11, and Forms 2 and 3 in schedule thereto. The notice of appeal, together with the evidence thereon, is forwarded by the lunacy officials to one of the Lords Justices, who will hear the matter in his private room. No fee is payable on the setting down of an appeal.

(*o*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 110. For the definition of "British possession," see title DEPENDENCIES AND COLONIES, Vol. X., p. 503.

(*p*) As to these Acts, see note (*l*), p. 412, *ante*.

(*q*) *A.-G.* v. *Ailesbury* (*Marquis*) (1887), 12 App. Cas. 672, *per* Lord MACNAGHTEN, at p. 688; *Awdley* v. *Awdley* (1690), 2 Vern. 192; *Ex parte Annandale* (*Marchioness*) (1749), Amb. 80; *Ex parte Grimstone* (1772), 4 Bro. C. C. 235, n.; *Oxenden* v. *Compton* (*Lord*) (1793), 2 Ves. 69, 72, 73; *Re Badcock, a Lunatic* (1840), 4 My. & Cr. 440; *Re Gist* (*a Person of Unsound Mind*), [1904] 1 Ch. 398, C. A., *per* STIRLING, L.J., at p. 411; and *Re Tye* (*a Person of Unsound Mind not so Found*), [1900] 1 Ch. 249, C. A.

(*r*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116 (4).

SECT. 2.

The Masters in Lunacy.

Powers and duties.

SECT. 2.—*The Masters in Lunacy.*

852. The masters in lunacy (*s*) have the same powers and duties as the masters in lunacy had before the Act of 1890 (*t*), and, further, may exercise the jurisdiction of the judge in lunacy as regards "administration and management" (*u*). Many of the powers included in the latter words are set forth in the Lunacy Act, 1890 (*v*), ss. 116—130, but the words are not limited to the matters dealt with in those sections (*w*). Thus a master may under the Lunacy Act, 1890 (*v*), s. 108, appoint a receiver of the dividends of a person within s. 116 (1) (b) of that Act (*x*); and he may under ss. 128, 129 of that Act appoint the *quasi*-committee of a person within s. 116 (1) (c) of that Act to exercise such person's power of appointing new trustees, and in such case may in effect make orders vesting the trust stock or the trust land (*y*); and he may under the Lunacy Act, 1890 (*v*), s. 133, make an order vesting stock standing in the name of a lunatic beneficially entitled thereto (*a*). But a master cannot under s. 136 of that Act (*v*) make an order vesting stock held by a lunatic as trustee (*b*). The last-mentioned powers include those cases in which, under special Acts (*c*), the judge can make orders affecting the property of a lunatic so found (*d*).

In addition, a master may hold an inquiry (*e*), and must perform all other duties for the benefit of lunatics and their estates which the Lord Chancellor may direct (*f*). In the case of lunatics so found the master deals with many questions relating to the lunatic's person (*g*). But in the case of lunatics not so found his jurisdiction extends only to the estate (*h*).

Powers as to procedure.

Masters have power to administer oaths and to summon witnesses before them (*i*), and also to order the attendance of the

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(*s*) As to these officers and their qualifications, see titles BARRISTERS, Vol. II., p. 381; COURTS, Vol. IX., p. 96.

(*t*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 111 (1).

(*u*) Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 27 (1); Rules in Lunacy, 1892, r. 10; Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1. As to these powers, see, generally, pp. 428 *et seq.*, *post*. As to forgery of the signature or seal of the masters, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 739.

(*v*) 53 & 54 Vict. c. 5.

(*w*) *Re Langdale* (*a Lunatic*), [1901] 1 Ch. 3, C. A.; *Re Browne*, [1894] 3 Ch 412, 417, C. A.

(*x*) *Re Browne, supra*; see p. 452, *post*.

(*y*) *Re Shortridge* (*a Person of Unsound Mind*), [1895] 1 Ch. 278, C. A.; *Re Fuller* (*A Person of Unsound Mind not so Found*), [1900] 2 Ch. 551, C. A.; see p. 455, *post*.

(*a*) *Re Browne, supra*; see p. 452, *post*.

(*b*) *Re Langdale* (*a Lunatic*), *supra*; see p. 452, and note (*l*), p. 456, *post*.

(*c*) As to such Acts, see p. 413, *ante*.

(*d*) See *Re S. S. B.* (*a Person of Unsound Mind not so Found by Inquisition*), [1906] 1 Ch. 712, 725, C. A.

(*e*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 112.

(*f*) *Ibid.*, s. 111 (1).

(*g*) Pope, Law and Practice of Lunacy, 2nd ed., 109; Elmer, Practice in Lunacy, 7th ed., 180 *et seq.*

(*h*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116 (2).

(*i*) *Ibid.*, s. 114.

alleged lunatic at any time or place specified by them, and these orders can be enforced in the same way as orders of a judge of the High Court (*k*).

SECT. 2. The Masters in Lunacy.

SECT. 3.—*The County Court.*

853. A county court judge has power to deal with property of small value belonging to a lunatic in respect of whom a reception order has been made (*l*), but cannot make a vesting order of stock standing in the name of a lunatic (*m*).

Power of judge.

Part. VI.—Judicial Inquisition as to Lunacy.

SECT. 1.—*When required.*

854. Proceedings in lunacy can be originated in one of two ways, either by petition for an inquiry (*n*) or by summons for the appointment of a person to exercise the powers of a committee of the estate (*o*), hereinafter referred to as a "*quasi*-committee" (*p*). In the former case the patient being found by inquisition to be of unsound mind (*q*), the custody of both his estate and person are under the jurisdiction of the judge in lunacy (*r*). In the latter case the lunacy jurisdiction only extends to the patient's estate (*s*). But inasmuch as any powers which could be exercised by a committee of the estate may by order be exercised

Origination.

(*k*) Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 26 (2); *Re B.* (*an Alleged Lunatic*), [1892] 1 Ch. 459, C. A.; Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 3. As to the power of a master to make an order for attachment, see title CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., p. 315.

(*l*) See title COUNTY COURTS, Vol. VIII., p. 669. As to reception orders, see p. 499, *post*.

(*m*) *Re Noyce*, [1892] 1 Q. B. 642, C. A.

(*n*) Rules in Lunacy, 1892, r. 16. As to the presentation of petition, see p. 412, *ante*, and p. 416, *post*. The terms commission of lunacy or the inquisition thereon, when used in any Act of Parliament, order, or rule, includes the general commission and the inquisition (or certificate) and the issue and verdict (see Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 334).

(*o*) Rules in Lunacy, 1892, r. 19; see p. 428, *post*.

(*p*) The person so appointed is described in the marginal note to the Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1, as a "*quasi*-committee," and the same expression is for the most part applied to him in the judgments of the Court of Appeal in *Re S. S. B.* (*a Person of Unsound Mind not so Found by Inquisition*), [1906] 1 Ch. 712, C. A. It is believed that in practice he is sometimes described as a "receiver"; but having regard to the marginal note and the judgments above referred to, and in view also of the different powers and duties of a receiver appointed in a Chancery action (for which see title RECEIVERS), it seems preferable to use the expression "*quasi*-committee," which is accordingly retained throughout this title.

(*q*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 94, 95.

(*r*) *Ibid.*, s. 108 (2).

(*s*) *Ibid.*, s. 116 (2); see p. 430, *post*.

SECT. 1.
When required.

by a duly constituted *quasi*-committee (*t*), there is, so far as the custody and management of the patient's estate is concerned, little or no object in ordinary cases in presenting a petition for an inquiry, especially as such procedure is more costly and more lengthy than an application by summons for the appointment of a *quasi*-committee.

Need for application by petition.

An application by petition will, however, be necessary to obtain the control of the lunatic's person (*u*), and may also be required when an alleged lunatic files a notice of objection to an application by summons for the appointment of a *quasi*-committee (*v*).

When ordered on report of Commissioners in Lunacy.

An inquisition may also be ordered (*w*) on a report of the Commissioners in Lunacy (*x*) that the property of any person detained or taken charge of as a lunatic, but not so found by inquisition, is not duly protected, or that the income thereof is not duly applied for his benefit (*y*). Such report is deemed to be an application for an inquisition supported by evidence (*z*).

Jurisdiction over aliens.

855. There is jurisdiction to order an inquisition (*a*) in the case of an alien domiciled abroad but temporarily resident in this country and with property here (*b*), even though the property in England consists only of a few personal chattels and some cash (*c*). But apparently there is no jurisdiction to order an inquisition in the case of an alien both domiciled and resident abroad although entitled to property in England (*d*).

SECT. 2.—*The Inquisition.*

SUB-SECT. 1.—*Proceedings before Inquiry.*

Who should be petitioner.

856. The petitioner should be the alleged lunatic's nearest relation (*e*), and if the patient is married and the application is not made by the husband or wife, such husband or wife should be

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(*t*) Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1.

(*u*) There is no provision in the Lunacy Act, 1890 (53 & 54 Vict. c. 5), or in its amending Acts, which enables the court to authorise the exercise by a *quasi*-committee of any powers over the person of his patient.

(*v*) Rules in Lunacy, 1892, r. 50; Rules in Lunacy, 1893, r. 1; and see p. 430, *post.*

(*w*) For the authority by whom an inquisition may be ordered, see p. 412, *ante.*

(*x*) As to the Commissioners in Lunacy, see p. 466, *post.*

(*y*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 100.

(*z*) *Ibid.* The report is usually referred to the official solicitor (see title COURTS, Vol. IX., p. 71), to take such steps as he may consider expedient thereunder.

(*a*) For the authority by whom an inquisition may be ordered, see p. 412, *ante.*

(*b*) *Re Bariatinski (Princess)* (1843), 1 Ph. 375; *Re Sottomaior (a Lunatic)* (1874), 9 Ch. App. 677; *Re Burbidge*, [1902] 1 Ch. 426, C. A.

(*c*) *Re Burbidge, supra.*

(*d*) It is true that the *ratio decidendi* in *Re Bariatinski (Princess), supra*, was the necessity of taking charge of the lunatic's property for her without regard to her residence at the time. None the less the Lords Justices have on several occasions expressed some doubt as to whether they had jurisdiction in such a case (see *Re Soltykoff (Princess)*, [1898] W. N. 77, C. A.).

(*e*) *Ex parte Persse* (1828), 1 Mol. 220.

served (*f*). On the other hand, lunatics may require protection against their relatives quite as much as against other persons (*g*), and an inquiry may therefore be granted on the application of even a stranger in blood without regard to his motive (*h*). The stranger may even be given the conduct of the inquiry (*h*). On a contest for the conduct that party is selected who is most likely to bring out the whole truth: subject to which a preference is given to the nearest of kin (*i*); and, other things being equal, to the petitioner who is first in point of time (*j*). A wife is not entitled as of right to the conduct as against children whose petition was the earlier in date (*j*). No person can himself present a petition for inquiry into his own state of mind. On the death of a petitioner after the petition is answered, but before the inquiry is held, a new petition for a supplemental order must be presented, but no further evidence need be filed (*k*).

Conduct of proceedings.

Death of petitioner.

857. The petition must be signed by the petitioner, attested by a solicitor (*l*), and filed in the master's office (*m*), together with two medical affidavits proving the insanity of the patient and an affidavit of his kindred and property.

Signature and filing.

858. No order can be made upon any petition or report until seven days after service of notice of the petition or report upon the alleged lunatic (*n*) either personally, or, where personal service cannot be effected or is inexpedient, by being delivered to some adult inmate at the usual or last known place of abode of the alleged lunatic (*o*). Where the alleged lunatic is not within the jurisdiction it will not be necessary to give him notice of the application for inquisition (*p*).

Service.

859. In all cases the court has to consider what, in all the circumstances of the case, is most for the benefit of the patient and for his protection (*q*).

General principle.

(*f*) *Re Rean* (1809), 2 Coop. *temp.* Cott. 163. When the petition is not presented by the nearest relation, it is usual and desirable to explain the circumstances either in the petition or in the evidence in support.

(*g*) *Re E. S.* (*a Supposed Lunatic*) (1876), 4 Ch. D. 301, C. A., *per* JAMES, L.J., at p. 304.

(*h*) *Ex parte Ogle* (1808), 15 Ves. 112.

(*i*) *Re Nesbitt, an Alleged Lunatic* (1847), 2 Ph. 245; *Re Webb* (1846), 2 Ph. 10; *Re Green* (1831), 2 Coop. *temp.* Cott. 163.

(*j*) *Re Wood* (1860), 29 L. J. (CH.) 54, C. A.

(*k*) *Re Martin* (1897), Registrars' Library, Lunacy Office.

(*l*) Rules in Lunacy, 1892, r. 16. For form of petition and other forms in connection with lunacy proceedings, see Heywood and Massey's Lunacy Practice, 4th ed.

(*m*) Rules in Lunacy, 1892, r. 18. The petition should be lodged in duplicate. The original is then sealed with the lunacy seal and handed back to the petitioner's solicitor to enable him to effect service.

(*n*) Rules in Lunacy, 1892, r. 28.

(*o*) *Ibid.*, r. 29. An affidavit of service must be filed with the masters (*ibid.*).

(*p*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 96. In practice, however, it is usually found more expedient to give notice by registered letter; and this course is approved by the judge.

(*q*) *Re McLaughlin*, [1905] A. C., 343, P. C., *per* Lord DAVEY, at p. 347. If service on the alleged lunatic is medically undesirable, the doctor's affidavits, filed in support of the petition, should state this.

SECT. 2. The Inquisition.

Where medical access difficult.

860. Should the petitioner experience difficulty in obtaining medical access to the alleged lunatic before presentation of the petition, he must file the best evidence obtainable in support of his case, and ask in the prayer of the petition that a visitor in lunacy may be sent to see the patient and report to the court (*r*). Should the petitioner require medical access after the order for an inquiry is made, in order to prove his case, a summons must be issued (*s*).

Interlocutory orders.

Protection of property and person.

861. Any interlocutory order necessary or desirable for the protection of the alleged lunatic or his estate pending the inquisition may be made. An interim receiver may be appointed (*t*). An allowance may be authorised for household expenses and for the expenses of opposing the inquiry (*a*). The wife of the alleged lunatic and all other persons in whose custody or power his personal estate and effects are may be restrained from converting them to their own use or parting with them (*b*); and protection of the person of the alleged lunatic may be granted (*c*).

Access.

Access may be granted to the alleged lunatic for the purpose of enabling him and his friends to oppose the inquiry; and the persons having his custody may be restrained from interfering or interrupting the friends, their solicitors, or medical advisers in such visits, and from removing or concealing him from his friends or their solicitors or medical advisers (*d*). The patient's removal abroad pending the inquiry may also be restrained (*e*). When the alleged lunatic is confined in prison his production at the inquiry may be obtained on *habeas corpus;* as also when he has been committed for trial by magistrates (*f*). If from the residence of the alleged lunatic out of the jurisdiction it is important to procure the evidence of witnesses abroad, a commission to take such evidence may, on proof of its necessity, be obtained on an applicion to the court for the purpose. An application of this kind would seem to form part of the original application for an inquiry (*g*).

Evidence by commission.

(*r*) *Re* ——, *an Alleged Lunatic* (1881), 18 Ch. D. 26, C. A. At this stage of the proceedings it is only necessary to establish a *primâ facie* case of insanity sufficient to justify an investigation; and, on the footing that such investigation may be for the benefit of the alleged lunatic, the judge will assist the petitioner.

(*s*) Rules in Lunacy, 1892, r. 19. Compare *Re Fletcher* (1832), Shelford on Lunatics etc., 2nd ed., 125, 126; and see *Re X. Y. Z.* (1881), 45 L. T. 97, C. A. If the medical witnesses for the alleged lunatic have seen him alone, they are not entitled to be present when the medical witnesses for the petitioner see him (*Re* ——, *an Alleged Lunatic, supra*).

(*t*) *Re Heli, a Lunatick* (1748), 3 Atk. 635; *Re Pountain* (1888), 37 Ch. D 609, C. A. For a case where a receiver and manager was appointed, the term "interim receiver" being considered inappropriate, see *Re A. G.* (1909), 53 Sol. Jo. 615.

(*a*) *Re Bullock* (1886), 35 W. R. 109, C. A.; *Re Naylor* (1862), 1 New Rep. 173, C. A.; *Re Baker* (1815), Shelford on Lunatics etc., 2nd ed., 159, 160.

(*b*) *Re King* (1827), Shelford on Lunatics etc., 2nd ed., 159.

(*c*) *Re Naylor* (1862), 1 New Rep. 173, C. A.

(*d*) *Re Fletcher* (1832), Shelford on Lunatics etc., 2nd ed., 125, 126.

(*e*) *Re Frank* (1825), Shelford on Lunatics etc., 2nd ed., 129.

(*f*) *R.* v. *Peacock* (1870), 12 Cox, C. C. 21; see title CROWN PRACTICE, Vol. X., p. 54.

(*g*) See title EVIDENCE, Vol. XIII., pp. 609 *et seq.*; Elmer, Practice in Lunacy, 7th ed., 28; *Re Soltykoff* (*Princess*), [1898] W. N. 77, C. A.

SUB-SECT. 2.—*The Inquiry.*

SECT 2. The Inquisition.

Form of order.

862. The order directing the inquisition (*h*) should state the place where the same is to be held, usually at the alleged lunatic's residence, or as near thereto as circumstances will permit. If he is out of the country, it is usually at the place where his mansion-house and estate lie (*i*), or if he has neither property nor residence in England, then in the county of Middlesex (*k*). Where there is a strong local feeling the inquiry may be held in London (*l*), and the venue may also be changed to save expense or for the convenience of witnesses (*m*).

Powers of person executing commission.

863. The person executing an inquisition, while so employed, has all the powers, authorities, and discretion of a judge of the High Court (*n*).

Parties who may attend.

864. No one but the petitioner and the alleged lunatic and their respective advisers can take part in an inquiry without the special permission of the court (*o*), to be obtained on application to the master by summons (*p*). Whether leave will be granted is a matter of practice in the master's discretion (*q*). Mere relations (*r*), or persons benefiting under the alleged lunatic's will (*s*), are not for those reasons entitled to attend. But a *cestui que trust* under a settlement executed by the alleged lunatic (*t*) and a wife interested under a will (*u*) may be allowed to attend on

(*h*) This order is drawn up by the lunacy officials, stamped by the petitioner's solicitor with a £2 stamp, and retained by the lunacy officials. No office copy thereof is issued. A precept is then issued by the lunacy stationers stating the time and place of inquiry and addressed (if no jury) to the petitioner's solicitor, and (if a jury) to the sheriff. At the same time subpœnas should be obtained from the lunacy stationers for service on the witnesses.

(*i*) *Ex parte Southcot* (1751), 2 Ves. Sen. 401; and see note (*m*), *infra*.

(*k*) *Re Webb, a Supposed Lunatic* (1846), 2 Coop. *temp.* Cott. 145; *Re Scott, an Alleged Lunatic* (1874), 22 W. R. 748, C. A.

(*l*) *Re* ——, *an Alleged Lunatic* (1881), 18 Ch. D. 26, C. A.

(*m*) In *Ex parte Baker* (1815), 19 Ves. 340, Lord ELDON, L.C., stated that inquisitions were uniformly executed at the residence of the party, which for that purpose was his mansion-house; and if there was no mansion-house, then at his last place of abode. The Lord Chancellor intimated that there was no instance of any exception, and that the convenience of witnesses or of counsel was immaterial. In *Re Mills* (1830), 2 My. & Cr. 39, n. (a), the alleged lunatic was staying at Stamford and the inquisition was held in Middlesex, where the principal witness resided. Similar changes of venue to save expense, and for the convenience of witnesses, also took place in *Re Green* (1831), Shelford on Lunatics etc. 2nd ed., 123, and in *Re Waters* (1836), 2 My. & Cr. 38; and it is now settled practice that, on a proper case being made out, the trial may take place elsewhere than at the lunatic's residence. In every case in which an alteration of venue is desired such alteration should be asked for in the petition, and should be dealt with by the evidence filed in support.

(*n*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 99; Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 26. As to the power to commit for disobedience to orders or for contempt of court, see p. 415, *ante*, and note (*r*), p. 421, *post*.

(*o*) *Re Clements* (1831), 2 Coop. *temp.* Cott. 166.

(*p*) Rules in Lunacy, 1892, r. 19.

(*q*) *Re Lanwarne* (1882), 46 L. T. 668, C. A.

(*r*) *Re Nesbitt, an Alleged Lunatic* (1847), 2 Ph. 245.

(*s*) *Re Scarlett* (1873), 8 Ch. App. 739.

(*t*) *Re Richards, an Alleged Lunatic* (1852), 1 De G. M. & G. 719, C. A.

(*u*) *Re Parkinson* (1841), 5 Jur. 547. Since the only question to be determined

SECT. 2. The Inquisition.

terms as to costs. The material point is that the truth should be ascertained (*a*).

Inquisition before jury.

865. An alleged lunatic may, either by notice filed before the consideration of the petition or report (*b*), or upon such consideration, demand an inquisition before a jury (*c*). If he does, the judge must direct the return of a jury, unless he is satisfied by personal examination of the alleged lunatic that he is not mentally competent to form and express a wish for an inquisition before a jury (*d*). The inquisition must also take place before a jury where the alleged lunatic is not within the jurisdiction (*e*); and also where the master upon consideration of the evidence certifies that in his opinion an inquisition before a jury is expedient (*f*).

Number of jurors.

The number of jurors on an inquisition must not exceed twenty-four, nor be less than twelve. They need not be unanimous, but twelve at least must be agreed on their verdict (*g*).

Trial of issue in High Court.

866. When the judge has directed an inquisition before a jury he may order an issue to be tried in the High Court whether the alleged lunatic is of unsound mind and incapable of managing himself and his affairs or whether he is a person of unsound mind and incapable of managing his affairs but capable of managing himself and is not dangerous to himself or others (*h*). The trial of such issue will be regulated in the first place by the provisions of the Lunacy Act, 1890 (*i*), as to inquisitions, the trial of inquisitions, and the constitution of the jury, and subject thereto by the Rules of the Supreme Court; and a verdict will have the same effect as a verdict on an inquisition (*i*).

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on the inquiry is whether the alleged lunatic is of unsound mind at the date of the inquiry (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 98), it is now impossible to attempt to carry back the insanity to the time when a particular document was executed or transaction took place, or to attempt to prove that at some antecedent date insanity had not supervened. It follows that the question of attending the proceedings on the ground that an interest is at stake dependent on the date to which insanity is carried back by the verdict of the jury can never arise at the present day, and liberty to attend is therefore more frequently refused than formerly.

(*a*) *Re Nesbitt, an Alleged Lunatic* (1847), 2 Ph. 245.

(*b*) The petition or report is forwarded to the judge for consideration seven days after service thereof and of the notice indorsed thereon on the alleged lunatic; compare Rules in Lunacy, 1892, r. 28.

(*c*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 90 (2); Rules in Lunacy, 1892, r. 30. The right of the alleged lunatic to demand a jury is confined to the original inquiry (*Re Talbot* (*an Alleged Lunatic*) (1882), 20 Ch. D. 269, C. A.), and the withdrawal of such demand must be by the alleged lunatic, his counsel, or solicitor, orally (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 90 (3); *Re Crompe* (1869), 4 Ch. App. 653). A notice demanding a jury must be signed by the alleged lunatic and attested by a solicitor (Rules in Lunacy, 1892, r. 30). As to juries in general, see title JURIES, Vol. XVIII., pp. 225 *et seq.*

(*d*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 91.

(*e*) *Ibid.*, s. 96.

(*f*) *Ibid.*, s. 93.

(*g*) Compare Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 97; and see *Re Windham, Windham* v. *Giubilei* (1862), 6 L. T. 479, C. A. The practice is always to summon twenty-three special jurors; and compare title JURIES, Vol. XVIII., p. 244.

(*h*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 94. No writ need be issued when an issue is directed to be tried (*Re Scott* (1884), 27 Ch. D. 116, C. A.).

(*i*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 94.

When inquiry executed without a jury.

867. Where the alleged lunatic does not demand a jury, or the judge in lunacy (*j*) is satisfied by a personal examination that he is not mentally competent to form and express a wish in that behalf, and it appears to a judge upon consideration of the evidence and of the circumstances of the case to be unnecessary or inexpedient that the inquisition should be before a jury, then the master executes the inquiry without a jury (*k*), and the master's certificate of sanity or insanity will have the same effect as the finding of a jury (*l*).

Limit of inquisition.

868. The inquisition will be confined to the question whether or not the alleged lunatic is at the time of the inquisition of unsound mind and incapable of managing himself or his affairs. No evidence as to anything done or said by the alleged lunatic or as to his demeanour or state of mind at any time, more than two years before the time of the inquisition, is receivable in proof of insanity, or on the trial of any traverse of an inquisition, unless the person executing the inquisition otherwise directs (*m*).

Examination of alleged lunatic.

869. Either on the trial of an issue or on an inquisition the alleged lunatic must, if within the jurisdiction, be examined both before any evidence is taken and again before the jury consult as to their verdict (*n*), or if the inquisition is without a jury, before the master signs his certificate of sanity or insanity (*o*). The judge or master may, however, dispense with this double examination (*p*), but one examination there must be (*q*) either in open court or in private, as the judge or master may direct (*p*). Orders may be made on an alleged lunatic to attend and submit to examination at the time and place specified in the order (*r*). Where the alleged

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(*j*) See p. 412, *ante*.

(*k*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 92.

(*l*) *Ibid.*, s. 95.

(*m*) *Re Sottomaior* (*a Lunatic*) (1874), 9 Ch. App. 677; Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 98 (1); and compare *Re Danby, an Alleged Lunatic* (1885), 30 Ch. D. 320, C. A. Formerly the jury on an inquisition might be asked to state at what date the patient's insanity commenced, and the inquiry might rove over the greater part of his life. As an instance of such an inquiry, see *Re Windham* (1862), 10 W. R. 499.

(*n*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 94 (2); Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 26.

(*o*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 92.

(*p*) *Ibid.*, s. 94 (2). The object of the first examination is to avoid the expense of a lengthy trial, as such preliminary examination might perhaps by itself in certain cases convince the jury of the patient's insanity. The object of the second examination is that the jury may see the patient after hearing the evidence. Regard will be had to the alleged lunatic's health and convenience in deciding whether the examination shall take place in private or in open court. In order to cause the alleged lunatic as little inconvenience as possible, sometimes one or two of the jury see him and report to the rest (*Ex parte Smith* (1818), 1 Swan. 4, 7), but in strictness the supposed lunatic is entitled to the judgment of all the jurors. However, orders for the examination of the supposed lunatic by some only of the jury have been made, and Lord ELDON said this was not uncommon in his time (*Re B.* (*an Alleged Lunatic*), [1891] 3 Ch. 274, C. A., *per* LINDLEY, L.J., at p. 275).

(*q*) *Re J. B., a Supposed Lunatic* (1836), 1 My. & Cr. 538.

(*r*) Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 26. In case of disobedience to his order, the master himself has jurisdiction to order an attachment; see p. 415, *ante*. As a matter of convenience and discretion, however, it

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SECT. 2. The Inquisition.

lunatic is not within the jurisdiction his presence on the trial of the inquisition may be dispensed with, the order directing the inquisition having been previously served on him by registered post (*s*).

SUB-SECT. 3.—*Special Finding.*

Special finding.

870. If it appears that an alleged lunatic is of unsound mind so as to be incapable of managing his affairs, but that he is capable of managing himself and is not dangerous to himself or others, it may be so specially found and certified (*t*). Such a finding constitutes the patient "a lunatic so found by inquisition" for all purposes connected with the management or administration of his estate (*u*).

SUB-SECT. 4.—*Quashing.*

For uncertainty or irregularity.

871. The finding on an inquisition is *primâ facie* evidence of insanity, and may be read in proof of it; but it is not conclusive as to the fact, and may be quashed for uncertainty or irregularity (*a*). Thus, any verdict departing substantially from the issue (*b*), or which is not an absolute finding but an inference, may be quashed and a new inquiry made (*c*). The court may also quash the inquisition and direct a new one where there has been any misbehaviour on the part of the jury (*d*), or if the inquisition be not executed at the place named in the order (*e*), or if an order that the lunatic should have due notice has been disobeyed (*f*). But an error in the name of the lunatic may be corrected by an order (*g*).

Procedure.

The application to quash should be made by motion to the Lords Justices in court (*h*).

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is desirable that the master should refer such applications to the Lords Justices in order that a matter involving the liberty of the subject may be dealt with judicially in open court (*Re B.* (*an Alleged Lunatic*), [1891] 3 Ch. 274, C. A., *per* LINDLEY, L.J., at p. 276).

(*s*) *Re Lanwarne* (1882), 46 L. T. 668, C. A.; Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 96.

(*t*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 98 (2). As to the powers of the judge in such a case, see p. 420, *ante*.

(*u*) *Re Townshend's* (*Lord*) *Settlement, Townshend* (*Lord*) v. *Robins*, [1908] 1 Ch. 201.

(*a*) Elmer, Practice in Lunacy, 7th ed., 30.

(*b*) See p. 421, *ante*.

(*c*) *Ex parte Cranmer* (1806), 12 Ves. 445; *Ex parte Read* (1654), cited in 3 Atk. 169. The following returns have all been held to be bad, namely: "that the party is not a lunatic but that partly from paralysis and partly from old age his memory is so much impaired as to render him incompetent to the management of his affairs and consequently of unsound mind and that he has been so for the term of two years last past" (*Re Holmes* (1827), 4 Russ. 182); "incapable of governing himself or his lands" (*Ex parte Barnsley* (1744), 3 Atk. 168); "that by his appearance he was not always in his senses as other men be" (*Ex parte Freak* (1733), cited 3 Atk. 168); "that she is not of sufficient understanding to manage her own affairs" (*Ex parte Harvey* (1734), cited 3 Atk. 163); and "found not a lunatic but incapable" (*Ex parte Ashton* (1733), cited 3 Atk. 163).

(*d*) *Ex parte Roberts* (1743), 3 Atk. 5.

(*e*) See p. 419, *ante*.

(*f*) *Ex parte Hall* (1802), 7 Ves. 261.

(*g*) *Re Crawford, a Lunatic* (1836), 1 My. & Cr. 240.

(*h*) Compare R. S. C., Ord. 39, r. 1A; and see p. 412, *ante*.

SECT. 3.—*Proceedings subsequent to a Finding of Lunacy on Inquisition.*

SECT. 3. Proceedings subsequent to a Finding of Lunacy on Inquisition.

SUB-SECT. 1.—*Inquiries as to Lunatic's Position.*

Summons for inquiries.

872. Immediately after the finding of lunacy, the party having conduct of the proceedings must take out a summons to inquire into (1) the lunatic's age, position in life, and residence; (2) the nature of his lunacy; (3) who are his next of kin and heir-at-law; (4) who ought to be appointed committee of his person and of his estate; (5) of what his property consists and particulars thereof; (6) the amount of his income; and (7) as to his past and future maintenance (*i*). The inquiry is held before the master, who may make such order on the summons as he thinks expedient (*j*). In particular he may defer the inquiries respecting the lunatic's next of kin and heir-at-law (*k*), and may also inquire as to the lunatic's debts, the dealings with his estate prior to inquisition, and as to the nature of the property out of the jurisdiction (*l*).

Parties who may attend.

873. The master usually also determines who shall attend future proceedings. Strangers in blood may sometimes be allowed to attend (*m*), but the mere fact that a stranger is interested under the will of the lunatic is not sufficient reason (*n*). If the lunatic is illegitimate the Attorney-General attends (*o*), but not the Attorney-General for the Duchy of Lancaster (*p*).

SUB-SECT. 2.—*Appointment of Committee.*

Principles followed in appointing committee.

874. In appointing a committee the court will be guided by the following considerations: the husband or wife (if any) will have the first claim to the position, although not a paramount one (*q*); where applicable the principle will be applied of appointing the heir-at-law as committee of the estate (*a*), and the next of kin as committee of the person (*b*); relations will be preferred to strangers (*c*); the proposed committee should reside within the jurisdiction (*d*), although this is not always insisted upon (*e*); accounting parties and solicitors in the matter will not as a rule be appointed (*f*).

Separate committees.

Where separate appointments of committees of the person and of the estate are made, it is usual to appoint a person of the same

(*i*) Rules in Lunacy, 1892, r. 31.
(*j*) *Ibid.*, r. 32.
(*k*) *Ibid.*, rr. 32, 36—38.
(*l*) *Ibid.*, rr. 33—35.
(*m*) *Re Webb* (1846), 2 Ph. 10, 116.
(*n*) *Re Scarlett* (1873), 8 Ch. App. 739.
(*o*) *Re Early* (1837), 2 Coop. *temp.* Cott. 107, 108; *Ex parte Watson* (1821), Jac. 161.
(*p*) *Re Kershaw* (1882), 21 Ch. D. 613, C. A.
(*q*) *Re Davy (a Lunatic)*, [1892] 3 Ch. 38, C. A.
(*a*) *Re Bangor (Lord), a Lunatic* (1818), 2 Mol. 518.
(*b*) *Ex parte Cockayne* (1802), 7 Ves. 591.
(*c*) *Re Le Heup* (1811), 18 Ves. 221.
(*d*) *Re Shields, a Lunatic, Ex parte Ord* (1821), Jac. 94.
(*e*) *Re Bruère (a Person of Unsound Mind)* (1881), 17 Ch. D. 775, C. A.; *Re Hopper* (1897), 66 L. J. (CH.) 569, C. A.
(*f*) Compare *Ex parte Pincke* (1817), 2 Mer. 452; and *Re Millington* (1854), 2 Eq. Rep. 158, C. A.; and see p. 432, *post*.

SECT. 3. Proceedings subsequent to a Finding of Lunacy on Inquisition.

sex as the lunatic to be committee of the person (*g*), and regard will be had to any expressions or wishes of the lunatic on the subject (*h*). A grant of the custody of the lunatic to two persons jointly is unusual and inconvenient (*i*).

When appointment takes effect.

875. Every appointment of a committee of the person takes effect immediately on the making thereof (*k*), and of a committee of the estate on completion of security (*l*). Where several committees are appointed, the order may direct the custody of the estate or person to continue to the survivor or survivors (*m*).

Circumstances giving rise to new appointment.

876. If a committee makes default in perfecting his security or if a receiving order in bankruptcy is made against him, or he compounds with his creditors, or absconds or goes to reside permanently abroad, or on the death or discharge of a committee or one of several committees when the custody does not survive, the master will inquire whether or not it is expedient to appoint a new committee in his place (*n*), and may if he thinks fit appoint a new committee (*o*).

SECT. 4.—*Traverse of Inquisition.*

Definition.

877. A traverse is the mode in which a decision or verdict finding a person to be a lunatic may be set aside.

Application by petition.

878. Any person desiring to traverse an inquisition may, within three months next after the day of the return of the inquisition, present a petition for that purpose. The judge in lunacy will hear and determine the application, and, if the prayer of the petition is granted, the order for a traverse will limit a time, not exceeding six months, within which the petitioner and all other proper parties (*p*) must proceed to the trial of the traverse (*q*). A petitioner who is not the object of the inquisition may be ordered within three weeks of the judge's order to give security to, and to the satisfaction of, the master to proceed to trial within the time limited (*a*).

Lunatic has right to leave to traverse.

879. Leave to traverse an inquisition is, so far as the lunatic himself is concerned, a matter of right (*b*); and the only discretion the court has, before granting his application, is to satisfy itself

(*g*) *Ex parte Ludlow* (1731), 2 P. Wms. 635.
(*h*) *Re Leacocke, a Lunatic* (1838), L. & G. *temp.* Plunk. 498.
(*i*) *Ex parte Ludlow, supra.*
(*k*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 108 (2).
(*l*) *Ibid.*; see p. 433, *post.*
(*m*) Rules in Lunacy, 1892, r. 69.
(*n*) *Ibid.*, r. 79.
(*o*) *Ibid.*, r. 80.
(*p*) It is the practice to serve the heir-at-law and next of kin with the petition for a traverse (*Re Gilchrist*, [1907] 1 Ch. 1, C. A.).
(*q*) If the judge in lunacy makes an order on the petition for a traverse, the Attorney-General is served with the order, pleadings are delivered and an issue is taken in the King's Bench Division before a judge and jury either in Middlesex or at the assizes.
(*a*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 101. It should be noted that a finding of sanity is peremptory in the first instance (*Hume* v. *Burton* (1785), 1 Ridg. Parl. Rep. 204, 213).
(*b*) There must of course be some evidence (even though it be of a very weak nature) in support of the petitioner's case.

SECT. 4. Traverse of Inquisition.

that the application is made *bonâ fide*, that the petitioner is competent to exercise volition, and that he understands what he is doing. These facts are usually ascertained by a personal interview between the judge in lunacy (*c*) and the petitioner (*d*). Leave to traverse is apparently also a matter of right in the case of any person other than the lunatic who has an interest (*e*), such as the lunatic's heir-at-law (*f*), an alienee from him (*g*), or a person who has entered into a contract with him (*h*). But there is a discretion to refuse an application for a traverse by an entire stranger without any interest (*i*), or by a husband whose marriage it might be desirable to impugn in the interests of his lunatic wife (*k*).

Rights of other parties.

880. Any person who does not apply for a traverse within three months next after the day of the return of the inquisition, or who refuses or neglects for three weeks after the date of the judge's order to give security (if ordered), or who does not proceed to trial within six months from the date of the said order, will be absolutely barred of the right of traverse: provided that the judge may in the special circumstances of any particular case extend the time upon such terms as he thinks just (*l*).

Circumstances barring right to apply.

881. If the judge in lunacy (*c*) is dissatisfied with the verdict returned upon a traverse, he may order one or more new trial or trials thereon, as he thinks fit; but no person will be admitted to traverse more than once (*m*).

New trial.

882. A traverse of a verdict upon an issue tried in the High Court will not be allowed; but the judge in lunacy may, if he thinks fit, upon application within three months next after the trial of such issue, order a new trial of the issue or a new inquisition as to the insanity of the alleged lunatic, subject to such directions and upon such conditions as to the judge may seem proper (*a*).

No traverse of High Court verdict.

SECT. 5.—*Superseding Inquisition.*

883. When a person of unsound mind so found by inquisition recovers his sanity, he should apply by petition (*b*) for a

Application by petition.

(*c*) As to the judge in lunacy, see p. 412, *ante*.

(*d*) *Re Gilchrist*, [1907] 1 Ch. 1, C. A.; *Re Cumming, a Person of Unsound Mind* (1852), 1 De G. M. & G. 537, C. A.; *Re Bridge, a Person of Unsound Mind* (1841), Cr. & Ph. 338; *Sherwood* v. *Sanderson* (1815), 19 Ves. 280.

(*e*) *Re Cumming, a Person of Unsound Mind, supra.*

(*f*) *Re Roberts* (1746), 3 Atk. 308.

(*g*) *Sherwood* v. *Sanderson, supra.*

(*h*) *Ex parte Hall* (1802), 7 Ves. 261.

(*i*) *Ex parte Ward* (1801), 6 Ves. 579.

(*k*) *Re Fust* (1787), 1 Cox, Eq. Cas. 418.

(*l*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 101, 102. Orders for the custody of lunatics and the management of their estates may be made and will take effect notwithstanding that proceedings for a traverse are pending (*ibid.*, s. 108 (4)).

(*m*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 103. The method of making an application for a new trial is not prescribed by the Rules in Lunacy. It would therefore seem that the application should be by motion pursuant to R. S. C., Ord. 39.

(*a*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 104.

(*b*) A petition for a *supersedeas* should always be in the name of the person who has recovered a sound mind (*Ex parte Stanley* (1750), 2 Ves. Sen. 25).

SECT. 5. Superseding Inquisition.

supersedeas (*c*). This petition, which will be filed with affidavits of two medical men in support, will be brought before the judge in lunacy without previous consideration by the master (*d*). An order for a *supersedeas* will not be made until the judge has personally seen the patient and received a report on his case from a Chancery visitor (*e*).

Degree of recovery required.

884. In order that an inquisition may be superseded, it is not necessary that the mind should be restored to its original state; competence for common purposes, such as the capacity to make a will of personal estate, is sufficient. But the absence of the disorder, especially if of a dangerous tendency, must be satisfactorily proved by the evidence of persons having competent knowledge of the whole subject, not only as to the present state of the party, but with reference to all the former evidence (*f*).

Supersedeas upon terms.

885. If it appears to the judge that it is not expedient nor for the benefit of the lunatic that the commission should be unconditionally superseded, he may, upon the consent of the lunatic and any other persons whose consent he deems necessary, order the commission to be superseded upon such terms and conditions as he thinks proper (*g*).

Supersedeas in part.

The judge in lunacy, if satisfied that a lunatic so found by inquisition is cured or capable of managing himself, and not dangerous to himself or others, though incapable of managing his affairs, may supersede the inquisition so far as the same finds that the lunatic is incapable of managing himself, and rescind or vary any order for the commitment of the person of the lunatic (*h*).

Effect of completion of *supersedeas*.

886. Upon the completion of a *supersedeas* the lunacy jurisdiction over the patient is ended; but application must be made to the master by summons (*i*) for the passing of a final account by the committee of the estate and his discharge; for the transfer of any securities or documents in the possession of the court or the committee of the estate; for taxation and payment of costs; and for any other ancillary matter.

(*c*) Rules in Lunacy, 1892, r. 17; Rule in Lunacy, 1900 (a).

(*d*) Rules in Lunacy, 1892, r. 18.

(*e*) *Re Dyce Sombre, a Lunatic* (1844), 1 Ph. 436; *Re Gordon* (1847), 2 Ph. 242.

(*f*) *Ex parte Holyland* (1805), 11 Ves. 9. The medical affidavits in support of the petition should state that the deponents have perused the evidence filed on the inquisition, that they appreciate the nature of the illness the patient was formerly suffering from, and that he has now recovered.

(*g*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 105, under which the judge not infrequently requires a settlement of the patient's property to be executed before the *supersedeas* is granted, or he may partially supersede the inquisition, that is, determine the custody of the person.

(*h*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 106. Application for a partial *supersedeas* should be made by petition in the same manner as an application for a complete *supersedeas*, and notice of the application should be given to the committees of the estate and person, and also notice of the order. A lunatic in whose favour a partial *supersedeas* has been ordered remains a person of unsound mind for all purposes other than the control of his own person (compare *Re Townshend's* (*Lord*) *Settlement, Townshend* (*Lord*) v. *Robins*, [1908] 1 Ch. 201).

(*i*) Rules in Lunacy, 1892, r. 19. As to final accounts, see p. 435, *post*.

SECT. 6.—*Transmission of Proceedings.*

SECT. 6. Transmission of Proceedings.

As between England and Ireland.

887. When it is desired that an inquisition taken or a writ of *supersedeas* issued in England or Ireland should be acted upon in Ireland or England, the proper officer may, under order of the judge in England or the Lord Chancellor in Ireland, as the case may be, transmit a transcript of the record of the inquisition, or of the writ, to the Registrar in Lunacy in Ireland, or the High Court in England, as the case may be, which transcript will thereupon be entered and be of record there respectively, and will when so entered, and if and so long only as the Lord Chancellor in Ireland and the judge in lunacy in England, as the case may be, thinks fit, be acted upon by them respectively, and be of the same validity and effect to all intents and purposes as if the inquisition had been taken or the writ issued in Ireland or England respectively (*k*).

SECT. 7.—*Inspection of Records.*

Effect of finding.

888. A finding of insanity on an inquisition can be read in subsequent proceedings between third parties, but only as evidence of the lunacy. Such a finding is *primâ facie* evidence against strangers, but is not conclusive as between them, and can be traversed (*l*). This should be borne in mind in considering the question of applying for liberty to inspect the records filed in the Lunacy Office.

Leave required.

889. An order of the judge in lunacy must be obtained before the records and documents filed in the Lunacy Office can be inspected (*m*), whether they relate to a lunatic still alive (*n*), or to a deceased lunatic (*o*). Liberty to inspect will, however, be given to any applicant on satisfying the judge in lunacy that it is required for a reasonable and proper purpose, provided that the lunatic, if alive, is not injured thereby (*p*). But inspection of the reports made to the court by its medical advisers is never permitted (*q*), and reports of the visitors in lunacy (*r*) are secret and not open to the inspection of any person except members of the Board of Visitors (*r*),

(*k*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 107. Where an order in lunacy has been made in Ireland by the court having jurisdiction for that purpose, and a transcript of the record has been transmitted to this country, the judge in lunacy must treat the order as a binding order, and has no jurisdiction to entertain an application either for the purpose of setting aside the proceedings in Ireland or for a *supersedeas*. Any such application must be made to the court which originally made the order (*Re Talbot* (*an Alleged Lunatic*) (1882), 20 Ch. D. 269, C. A.). The practice is to appoint a committee of the estate in England.

(*l*) *Hill* v. *Clifford, Clifford* v. *Timms, Clifford* v. *Phillips*, [1907] 2 Ch. 236, C. A., *per* COZENS-HARDY, M.R., at pp. 244, 245, where the following cases are examined and approved: *Sergeson* v. *Sealey* (1742), 2 Atk. 412; *Faulder* v. *Silk* (1811), 3 Camp. 126; *Van Grutten* v. *Foxwell, Foxwell* v. *Van Grutten*, [1897] A. C. 658.

(*m*) *Re Strachan* (*H. W.*) (*an Alleged Lunatic*), [1895] 1 Ch. 439, C. A.

(*n*) *Re Sartoris' Lunacy, Wylde* v. *Arnold* (1862), 1 New Rep. 4, C. A.

(*o*) *Re Silcock's Lunacy, Hutton* v. *Hutton* (1862), 1 New Rep. 4, C. A.

(*p*) *Re Strachan* (*H. W.*) (*an Alleged Lunatic*), *supra; Re Wood, Banner* v. *England* (1863), 4 De G. J. & Sm. 134, C. A.

(*q*) *Re Strachan* (*H. W.*) (*an Alleged Lunatic*), *supra.*

(*r*) As to visitors in lunacy and the Board of Visitors, see pp. 467 *et seq.*, *post.*

SECT. 7. Inspection of Records.

Destruction of reports.

and the judge in lunacy and persons appointed by him (*s*). On the patient's lunacy being superseded, or vacated and discharged, these reports must be destroyed within fourteen days, unless by order of the judge the destruction is postponed till the patient's death, when they must in any case be destroyed (*t*).

Report by medical witness.

While an inquiry as to an alleged lunatic's sanity is pending, the medical report obtained by the petitioner under an order for the examination of the patient by the medical witness cannot be inspected by the respondent (*u*).

Supply of documents under which patient confined.

890. Any person applying to the Commissioners in Lunacy *bonâ fide* on behalf of a lunatic then confined ought to be furnished with the documents or copies of the documents under which the lunatic is confined (*v*). After the discharge of any person who considers himself to have been unjustly confined as a lunatic, the secretary to the Commissioners must, if requested, supply to him free of expense a copy of the reception order and certificate under which he was confined, and, if the order was made on petition, of the petition and particulars upon which the order was made (*w*).

Part VII.—Appointment of Quasi-Committee without a Finding of Lunacy.

Persons in respect of whom *quasi*-committee may be appointed.

891. Under the Lunacy Act, 1890 (*x*), s. 116, orders may be made for the appointment of a *quasi*-committee (*a*), with powers of management and administration in the case of the following persons, that is to say:—

(1) A person lawfully detained as lunatic though not so found (*b*).

(*s*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 186 (1).

(*t*) *Ibid.*, s. 186 (2). Production of these reports was refused in a probate action where the issue was the testator's testamentary capacity, but it is doubtful whether in such a case the visitor would not be directed on *subpœna* to give the effect of the reports or his notes for their preparation (*Roe* v. *Nix*, [1893] P. 55). Lord ESHER, M.R., and BOWEN, LINDLEY, LOPES and KAY, L.JJ., concurred in the view that reports, though existing after a patient's death, must be treated as destroyed; and, further, that even on a *subpœna* the witness who made the reports would be bound so to treat them. Had it been possible to obtain production of the reports they would not *per se* have been evidence; but they might have been useful as testing the accuracy of the memory of the witness (*Roe* v. *Nix*, *supra*, *per* BARNES, J., at p. 57).

(*u*) *Re B.* (*an Alleged Lunatic*), [1892] 3 Ch. 194, C. A.

(*v*) *Re Dell* (1891), 91 L. T. Jo. 375, *per* JEUNE, J. As to inspection of documents of an alleged lunatic, see *Re Cathcart*, [1902] W. N. 80, C. A.

(*w*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 82.

(*x*) *Ibid.*, s. 116.

(*a*) As to the use of the expression "*quasi*-committee," see note (*p*), p. 415, *ante*.

(*b*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116 (1) (c). Lawfully detained means detention under the provisions of Acts of Parliament of this country; it does not mean detention in a foreign country (*Re Watkins*, [1896] 2 Ch. 336, C. A.). The detention may be under a reception order made by a judicial authority (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 4; see p. 499, *post*); or in a workhouse under a magistrate's order (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 24; see p. 499,

(2) A person proved to be of unsound mind and incapable of managing his affairs, the capital value of whose property does not exceed £2,000 or whose annual income does not exceed £100 (*c*). The proof may be in the form of the certificate of a master, or the report of the Commissioners in Lunacy, or by affidavit or otherwise.

(3) Criminal lunatics while insane and under confinement (*d*).

(4) Any person not detained and not found lunatic, but being through mental infirmity, arising from disease or age, incapable of managing his afiairs (*e*).

Exercise of powers.

892. In any of the above cases all powers which, if there had been a finding of lunacy, could have been exercised by the committee of the estate, may be exercised by the *quasi*-committee in such manner as the judge or, subject to the Rules in Lunacy, a master may direct (*f*).

Special authority

There may be conferred on such a *quasi*-committee authority

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post); or under the Idiots Act, 1886 (49 & 50 Vict. c. 25) (*Re Whalley* (*Mark*) *and Re Whalley* (*W. R.*), [1906] 1 Ch. 565, C. A.; see p. 526, *post*). Proof of detention is furnished by the medical affidavit, which exhibits copies of the medical certificates under which the reception order was made together with a copy of such reception order. If the reception order has expired application must be made to the Commissioners in Lunacy for a continuation order; see p. 512, *post*.

(*c*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116 (1) (e). In ascertaining whether the property comes within this provision, the lunatic's debts and the expenses incurred in his past maintenance since he became of unsound mind are to be deducted (*Re Faircloth* (*a Supposed Lunatic*) (1879), 13 Ch. D. 307, C. A.; *Re Adams* (1864), 9 L. T. 626; *Re Sandford, a Lunatic* (1849), 1 Mac. & G. 538).

(*d*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116 (1) (f). A criminal lunatic is:—(a) Any person for whose safe custody during His Majesty's pleasure His Majesty or the Admiralty is authorised to give order; or (b) any prisoner whom a Secretary of State or the Admiralty has in pursuance of any Act of Parliament directed to be removed to any asylum or other place for the reception of insane persons (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 341; Criminal Lunatics Act, 1884 (47 & 48 Vict. c. 64), s. 16); and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 352, note (*k*). Maintenance of a criminal lunatic is defrayed out of moneys provided by Parliament (Criminal Lunatics Act, 1884 (47 & 48 Vict. c. 64), s. 10). But where a lunatic subsequently becomes entitled to property, past maintenance is recoverable by the Treasury as a Crown debt and the Statutes of Limitation do not apply (*Re J.* (1909), 126 L. T. Jo. 350, C. A.). The court in lunacy has no power over the person of the patient (*Re Pearce, Ex parte Clark* (1843), 8 Jur. 89); that power is vested in a Secretary of State under the Criminal Lunatics Act, 1884 (47 & 48 Vict. c. 64), s. 4. The court in lunacy has, however, full jurisdiction over the property of the patient (*Re Pearce, Ex parte Clark, supra*).

(*e*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116 (1) (d). In practice it has been held that nearly every case which is not otherwise within the lunacy jurisdiction is covered by this provision. Thus, orders have been made thereunder dealing with the property of (a) idiots not detained; (b) aliens detained as lunatics in asylums abroad, but with property in England; and (c) English subjects detained as lunatics in asylums abroad, but with property in England or in an English colony. In applications under this provision no reference to "lunacy," "the master in lunacy," or "the Lunacy Acts" is made; and a special seal is kept by the officials, wherefrom all such words are eliminated. The medical evidence must show that the patient is through mental infirmity "arising from disease" or else that he is through mental infirmity "arising from age" incapable of managing his affairs, and proof of actual lunacy should be avoided; see *Re Browne*, [1894] 3 Ch. 412, 415, C. A.

(*f*) Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1.

PART VII. Appointment of Quasi-Committee etc.

to do or exercise any specified act or power, or general authority to exercise all or any of such powers without further application to the court (*g*). The *quasi*-committee is subject to the jurisdiction of the court in the same manner as a committee of the estate of a lunatic so found (*h*).

General authority.

Procedure on application for appointment of *quasi*-committee.

893. The application for the appointment of a *quasi*-committee should be by summons (*i*), seven clear days' notice of which must be given to the alleged lunatic by service on him of a copy of the summons, with a notice indorsed thereon signed by the applicant or a solicitor (*k*). The alleged lunatic may, within seven days from the date of service, file a notice of objection, which notice must be signed by himself and witnessed by a solicitor (*l*). Should the lunatic object to the proceedings and file evidence in support of his objection, the master will exercise his discretion. He may, according to the circumstances, (1) make the order as asked, or (2) visit the alleged lunatic (*m*), or (3) send a visitor in lunacy to see him and report (*n*), or (4) direct the applicant to present a petition for an inquisition (*o*), or (5) make no order.

Choice of *quasi*-committee.

The choice and desirability of a *quasi*-committee will be governed by rules similar to those which apply to the choice and desirability of a committee of the estate (*p*); and maintenance, voluntary allowances, payment of debts etc. will be dealt with on the same footing, whether the lunatic is or is not so found (*q*).

Effect of cesser of detention.

894. Where a *quasi*-committee has been appointed of the property of a person detained as a lunatic, though not so found, the cesser of detention will not discharge him, but he must, if the patient has recovered, apply in lunacy to be discharged (*r*).

Part VIII.—Judicial Powers over Person.

SECT. 1.—*In General.*

Quasi-committee has no direct control.

895. In the case of a lunatic not so found, a *quasi*-committee of whose estate has been appointed under the Lunacy Act, 1890 (*a*),

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(*g*) Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1; as to difficulties which arose prior to this Act, see *Re Baggs* (*a Person of Alleged Unsound Mind*) (1893), cited [1894] 2 Ch. 416, n., C. A.; *Re S. S. B.* (*a Person of Unsound Mind not so Found by Inquisition*), [1906] 1 Ch. 713, C. A.

(*h*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116 (3).

(*i*) Rules in Lunacy, 1892, r. 19. As to the practice, see *ibid.*, rr. 93, 94.

(*k*) *Ibid.*, r. 48. An affidavit of service must then be filed (*ibid.*, r. 49).

(*l*) *Ibid.*, r. 50, and Forms 9 and 11 in schedule thereto.

(*m*) *Ibid.*, r. 52.

(*n*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 184.

(*o*) Rules in Lunacy, 1893, r. 1.

(*p*) See p. 423, *ante*.

(*q*) Rules in Lunacy, 1892, rr. 55, 56.

(*r*) *Re B. A. S.* (*a Person of Unsound Mind not so Found*), [1898] 2 Ch. 392, C. A.

(*a*) 53 & 54 Vict. c. 5.

s. 116, there is no direct control over the person of the patient, but only an indirect one through the power of the purse.

Duty of committee of person of lunatic so found.

896. In the case of a lunatic so found, the committee of the person has the duty of fixing the residence of the lunatic, regulating his establishment, and making provision for his maintenance (*b*). He is also bound to visit the lunatic as directed by the master, and provision is made by statute for visits by the Chancery visitors (*c*).

SECT. 2.—*Maintenance and Accounting.*

Scheme.

No security.

897. A scheme of maintenance of the lunatic is from time to time settled by the master (*d*). The committee of the person is not required to give security, and his liability to account for sums received by him from the committee of the estate is determined by the form of the order made on the summons issued after inquisition found (*e*). If such order (as is the usual case) allows either the whole net income or a fixed sum per annum for the maintenance of the patient, then there is no liability to account (*f*). But if the order allows so much as shall be expended, not exceeding a fixed sum per annum, then he must account. He will also render himself liable to account if it can be shown that he has not properly maintained the lunatic in accordance with the provisions of the order (*g*), and in any circumstances he must furnish an annual statement of expenditure to the visitors in lunacy (*h*).

Liability to account.

SECT. 3.—*Residence.*

Rules as to travel out of jurisdiction.

898. The court will not readily grant permission to take a lunatic out of the United Kingdom, though it may, where shown to be in the lunatic's interest, grant permission for him to travel outside the court's jurisdiction (*i*) or, in peculiar circumstances, to reside in Scotland, on an undertaking by his committee, living in England, to bring him within the jurisdiction whenever required so to do (*k*), and in the meantime to furnish periodical reports as to his mental and bodily health (*l*).

Notification of change of residence.

Committees of the person must notify any change of residence of their patient within three days to the visitors in lunacy (*m*); and the visitors must without delay report to the Lord Chancellor when they are unable to discover the residence of any lunatic whom they intended to visit (*n*).

(*b*) Pope, Law and Practice of Lunacy, 2nd ed., 108; Elmer, Practice in Lunacy, 180.

(*c*) See p. 469, *post.*

(*d*) See, further, as to settlement of schemes for maintenance, p. 437, *post.*

(*e*) See, as to this summons, Rules in Lunacy, 1892, r. 31, and p. 423, *ante.*

(*f*) *Re French* (1868), 3 Ch. App. 317.

(*g*) *Strangwayes* v. *Read*, [1898] 2 Ch. 419.

(*h*) Rules in Lunacy, 1892, r. 107. As to the visitors in lunacy, see pp. 467 *et seq.*, *post.*

(*i*) *Re Hackett, a Lunatic* (1854), 3 I. Ch. R. 375.

(*k*) *Re Jones, a Lunatic* (1844), 1 Ph. 461.

(*l*) The old practice referred to in *Re Stair* (1846), 1 Coop. *temp.* Cott. 227, requiring security for the lunatic's return within the jurisdiction, is now obsolete.

(*m*) Rules in Lunacy, 1893, r. 11. As to the visitors in lunacy, see pp. 467 *et seq.*, *post.*

(*n*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 185 (2).

Part IX.—Judicial Powers over Estate.

SECT. 1.

SECT. 1.—*Committees and Quasi-Committees.*

SUB-SECT. 1.—*Position of Committee or Quasi-Committee.*

Committees and Quasi-Committees.

Agent of the Crown.

Duty to act under direction of court.

899. A committee or *quasi*-committee is the agent of the Crown (*o*). He should, in all important matters outside the scope of his order, act under the directions of the court, to be obtained on summons (*a*). If he neglects to obtain such directions, he will be liable for the wrong exercise of his discretion, and sometimes for the exercise of any discretion at all (*b*). He is liable only to the court, and in the absence of misconduct by him, the interference of third parties with his management of the estate will not be tolerated (*c*).

Remuneration.

He does not generally receive a salary, but there may be exceptional cases in which he ought to be paid one (*d*). In no circumstances will he be allowed, apart from salary, to make a profit out of the estate (*e*).

Employment of agent.

900. In exceptional cases involving much time and labour in collecting rents and managing a large estate, the committee or *quasi*-committee may be authorised to employ an agent at a proper salary.

Who may be appointed.

A trustee (*f*), solicitor, or other accounting party (*g*) will not usually be appointed, and the agent must not act or exercise his discretion in questions of difficulty without the leave of the court, such leave being applied for and obtained by the committee or *quasi*-committee (*h*).

(*o*) *Re Fitzgerald, a Lunatic* (1805), 2 Sch. & Lef. 432.

(*a*) Rules in Lunacy, 1892, r. 19.

(*b*) Money spent without the sanction of the court first obtained on buildings and improvements will be disallowed (*Foster* v. *Marchant* (1684), 1 Vern. 262; *Ex parte Marton* (1805), 11 Ves. 397; *Ex parte Hilbert* (1805), 11 Ves. 397), although the expenditure is to the advantage of the estate (*Re Langham, a Lunatic* (1847), 2 Ph. 299). The letting of property on his own responsibility and at an inadequate rent will render the committee or *quasi*-committee liable to make good the deficiency and all costs (*Re Wilkins* (1842), 6 Jur. 308), as also will his failure to take steps to recover money due or to obtain directions thereon (*Re Swindell, Ex parte Swindell, Ex parte Ordish* (1851), 2 De G. M. & G. 91, C. A.). He must not use his own judgment on a question of title (*Wright* v. *Chard* (1860), 6 Jur. (N. S.) 476), nor must he sue or defend without leave (*Re Notley, a Lunatic* (1839), 3 Jur. 719); see also *Re R. S. A.*, [1901] 2 K. B. 32; and p. 462, *post*).

(*c*) *Re Hitchon* (1845), 15 L. J. (CH.) 126. As to the effect of an order authorising a committee or *quasi*-committee to carry on a lunatic's business, see p. 445, *post*.

(*d*) Such exceptional cases would arise where there were a large number of rents to be collected and a number of houses to be managed (see *Re Errington, Ex parte Fermor* (1821), Jac. 404; *Re Walker, a Lunatic* (1848), 2 Ph. 630; *Re Westbrooke* (1848), 2 Ph. 631).

(*e*) *Cope's* (*Lady Mary*) *Case* (1677), 2 Cas. in Ch. 239.

(*f*) ——— v. *Jolland* (1802), 8 Ves. 72.

(*g*) *Ex parte Pincke* (1817), 2 Mer. 452; and see p. 423, *ante*.

(*h*) *Re Kilkenny* (*Earl*), *a Lunatic* (1845), 7 I. Eq. R. 594. An agent cannot lay out moneys on repairs at his own discretion (*Blunt* v. *Clitherow* (1802), 6 Ves. 799), nor lease property (*Morris* v. *Elme* (1790), 1 Ves. 139), nor raise rents, turn out tenants, nor let even for one year without leave (*Wynne* v. *Newborough*

The agent will usually be required to give security, to account for his receipts, and to deal with the same as may be directed (*i*).

SUB-SECT. 2.—*Security.*

Duty of agent. From whom security required.

901. The committee of the person is not required to give security, but the committee of the estate is always required to give security unless it is impossible to find a person who will act as committee with security (*j*). A *quasi*-committee may be appointed either with or without security (*k*). The appointment, whether of a *quasi*-committee appointed with security, or of a committee of the estate, takes effect only on the completion of his security (*l*).

Nature of security.

The security is approved by the master, who may from time to time increase or reduce it (*m*). It usually consists of a bond with two sureties, or with a guarantee society, in a penal sum equal to double the value of the lunatic's income passing through the committee's or *quasi*-committee's hands in each year. Alternatively a committee or *quasi*-committee of the estate may give security in whole or in part by bringing money or stock into court (*n*).

Sureties.

The general rule is that the committee of the person shall not be surety for the committee of the estate, but in special circumstances this rule may be relaxed (*o*). A surety is always required to justify before appointment. He is liable not only for the balance due on the committee's or *quasi*-committee's accounts, but also for the costs of all proceedings subsequently taken for the purpose of enforcing payment of such balance, and this rule applies though he had no notice of the default of his principal until after proceedings were taken (*p*). He is also liable for the

Liability.

(*Lord*) (1790), 1 Ves. 165), and if he commences proceedings duly authorised in the wrong form he may be deprived of his costs (*Re Montgomery* (1828), 1 Mol. 419). He may distrain for one year's arrears of rent without leave, but, for more, leave is necessary (*Brandon* v. *Brandon* (1821), 5 Madd. 473). There are some old cases in which paid agents were appointed because the committee of the estate could not give security or there was no suitable person for the post of committee (*Re Billinghurst, a Lunatic, Ex parte Billinghurst* (1750), 1 Amb. 104; *Ex parte Warren* (1805), 10 Ves. 622; *Re Radcliffe, Ex parte Radcliffe* (1820), 1 Jac. & W. 639). In the present day in such a case the official solicitor (see title COURTS, Vol. IX., p. 71) would be appointed committee or *quasi*-committee, as the case might be.

(*i*) Rules in Lunacy, 1892, r. 83; and see *Re Errington* (1826), 2 Russ. 567. Failure to pass accounts when due will render the agent liable to payment of interest on his balances (——— v. *Jolland* (1802), 8 Ves. 72). It is perhaps unfortunate that the description of the agent as "receiver" in force prior to the Lunacy Act, 1890 (53 & 54 Vict. c. 5), should have been perpetuated at the present day, since the rule as drawn is liable to be read as applying (which it doesnot) to persons appointed under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116. As to the use of the term "*quasi*-committee," see note (*p*), p. 415, *ante*.

(*j*) *Re Frank* (1826), 2 Russ. 450.

(*k*) Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1.

(*l*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 108 (2); Rules in Lunacy, 1892, rr. 55, 117.

(*m*) Rules in Lunacy, 1892, rr. 55, 56, 70. As to the discharge of securities, see *ibid.*, rr. 72, 81; Rules in Lunacy, 1893, r. 9.

(*n*) Rules in Lunacy, 1892, r. 71.

(*o*) *Re Burton, Ex parte Mount* (1851), 21 L. J. (CH.) 221, C. A.

(*p*) *Re Lockey, a Lunatic* (1845), 1 Ph. 509.

SECT. 1. Committees and Quasi-Committees.

costs of the removal of his principal and the appointment in the latter's place of a new committee or *quasi*-committee (*q*).

Effect of death of patient.

The death of the patient does not discharge the committee or *quasi*-committee from liability to account in lunacy for sums received in his fiduciary capacity, but after death he no longer receives moneys as committee or *quasi*-committee and, though personally liable therefor, his sureties are not liable to make good moneys which it was no part of his duty as committee or *quasi*-committee to receive (*r*).

Replacing surety.

If a surety is dead or has compounded with his creditors or otherwise become insolvent, a new bond with new sureties must be entered into; and the executors of a deceased surety may obtain an order that, in default of fresh security being given, another committee or *quasi*-committee be appointed (*s*).

Enforcing the bond.

In serious cases of either nonfeasance or misfeasance his bond may be put in suit against him (*t*).

SUB-SECT. 3.—*Lodgment of Deeds, Money, Wills etc. in Court.*

Deposit of deeds etc.

Transfer of money etc. into court.

902. In order to reduce the amount of security to be given by a committee or *quasi*-committee, or for the purposes of safe custody, the master may receive any deed or security, and may by order or certificate give liberty for payment or transfer into court of any money or stock belonging to the lunatic (*u*). Documents deposited in court will, during the lunatic's lifetime, only be handed out to the committee or *quasi*-committee on evidence proving that they are required for the purpose of properly managing the lunatic's estate (*w*). On a *supersedeas* or the death of the lunatic, the master may order the delivery or payment out of any deeds or money (*x*).

Production of deposited documents.

The court will order production of deposited documents to any person who makes out a *primâ facie* case that he is interested in them or the property to which they relate (*y*), but an order cannot be made on the committee in an action to produce such documents, since they are not under his control (*a*).

Deposit of testamentary papers.

903. Any person in whose custody or control any testamentary paper of the lunatic is may, upon oath, deposit the same in the Lunacy Office for safe custody (*b*).

(*q*) *Re Graham, Graham* v. *Noakes*, [1895] 1 Ch. 66.

(*r*) *Re Walker*, [1907] 2 Ch. 120, C. A.; and see *Re Butler* (1866), 1 Ch. App. 607.

(*s*) *Re Bull* (1843), 2 Coop. *temp.* Cott. 63.

(*t*) *Re Hill, a Person of Unsound Mind, Deceased* (1863), 1 De G. J. & Sm. 487, C. A.

(*u*) Rules in Lunacy, 1892, r. 44; *Re Eagle, a Lunatic* (1847), 2 Ph. 201.

(*w*) *Re Cooper* (1836), 1 My. & Cr. 33.

(*x*) Rules in Lunacy, 1892, r. 46.

(*y*) *Re Smyth* (*a Lunatic*) (1880), 15 Ch. D. 286, C. A.; *Re Smyth* (*a Lunatic*) (1881), 16 Ch. D. 673, C. A.; *Re Strachan* (*H. W.*) (*an Alleged Lunatic*), [1895] 1 Ch. 439, 444, C. A. As to the inspection of records of proceedings in lunacy, see p. 427, *ante*.

(*a*) *Vivian* v. *Little* (1883), 11 Q. B. D. 370.

(*b*) Rules in Lunacy, 1892, r. 45; and see *Re Humpleby* (1829), 2 Coop. *temp.* Cott. 166; *Re Thompson* (1830), 1 Russ. & M. 355. The alleged will must be enclosed in a sealed cover and handed to one of the lunacy officials, who will give a receipt for it.

The master may on being satisfied of a lunatic's death (*c*) open and read any document deposited with him purporting or alleged to contain any testamentary disposition made by the lunatic for the purpose of ascertaining who is therein nominated executor, and whether any direction is contained concerning his funeral or place of interment (*d*), and may deliver the document to the proper officer of the Probate, Divorce and Admiralty Division of the High Court to be dealt with according to law (*e*).

Delivery thereof to proper officer.

SUB-SECT. 4.—*Accounts.*

904. The committee of the estate (*f*) or the *quasi*-committee (*g*) must annually, or at such other times as the master may fix, deliver his account, or an affidavit in lieu of account, and attend at the Lunacy Office to vouch the same (*h*). When the account has been vouched and the cost of passing it assessed, the balance due from the committee or *quasi*-committee (*g*) must be ascertained, and such balance, if sufficiently large, paid into court to the credit of the lunacy and invested, and the dividends, unless otherwise directed, accumulated without further request (*i*). The accounts as vouched are then fair copied by the lunacy stationers and an affidavit indorsed at the foot or end thereof, and sworn, proving the correctness of the figures and that the committee's or *quasi*-committee's (*g*) sureties are living and that neither of them has

Delivery.

Vouching.

Payment of balance into court.

Affidavit of verification.

(*c*) The lunatic's death and identity must be strictly proved (*Ex parte Fermor* (1852), 1 W. R. 43, C. A.).

(*d*) *Re Montague, a Lunatic, Ex parte Farrar* (1838), 2 Jur. 462.

(*e*) Rules in Lunacy, 1892, r. 47. The solicitor having the carriage of the matter draws up a request (with a £1 impressed stamp thereon) that the will may be handed to the officials at the principal probate registry. An appointment is then given for the solicitor to attend with one of the lunacy officials at the registry, when the will is handed over on payment of a 10*s*. lodgment fee in stamps. A copy of the will is bespoken at the principal registry, from which copy the engrossment for probate is made, and the executor's oath exhibiting the original will must be sworn either before an official at the principal registry, or by request the original will may be sent to a district registry to be there deposed to. As to common form practice in probate matters, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 165 *et seq.*

(*f*) For cases in which the committee of the person is liable to account, see p. 431, *ante.*

(*g*) Rules in Lunacy, 1892, r. 84.

(*h*) *Ibid.*, r. 73. Failure to pass accounts regularly may involve the disallowance of costs (*Ex parte Clarke* (1791), 1 Ves. 296). With the account there should be lodged at the Lunacy Office office copies of the order appointing the committee or *quasi*-committee, and of all other orders dealing with the patient's estate, all vouchers, certificate, and transcript of the fund in court (if any), certificate of the last payment into court, and the costs of passing the account for assessment in chambers. In small cases a short statement is sometimes accepted in lieu of an account. In large and complicated cases the master sometimes refers the account to a chartered accountant.

(*i*) Rules in Lunacy, 1892, r. 76 (see rr. 55, 56). On default of payment in he may lose his costs and be charged interest (*ibid.*, r. 78; *Ex parte Catton* (1790), 1 Ves. 156; *Ex parte Clarke, supra*). There is some objection at the Lunacy Office to certifying a balance as due from a patient's estate. Where, therefore, it appears on the vouching of a committee's or *quasi*-committee's account that a balance is due to such committee or *quasi*-committee, the payments and receipts are certified as equal, and the surplus of payments (*i.e.*, the balance due from the patient's estate) are carried forward to the next account and there included as a debit.

SECT. 1. Committees and Quasi-Committees.

been adjudicated bankrupt, or compounded with his creditors (*k*). The affidavit is then returned to the Lunacy Office and the lunacy stationers make an office copy thereof, which with the contents thereof are sufficiently authenticated by the seal of the master's office (*l*).

Office copy.

SECT. 2.—*Extent of Powers of Management and Administration.*

SUB-SECT. 1.—*As to Property in Ireland and Scotland.*

Property in Ireland of lunatic so found.

905. The powers of management and administration in the case of lunatics so found, without inquisition or other proceedings in Ireland, extend to the lunatic's personal property in Ireland where it does not exceed £2,000 in value or the income thereof does not exceed £100 a year, and the like powers of management and administration conferred by the Lunacy Regulation (Ireland) Act, 1871 (*m*), extend, without inquisition or other proceedings in England, to the lunatic's personal property in England where it or the income thereof does not exceed the above-mentioned amount (*a*).

Of person of unsound mind.

The powers of management and administration in cases where the property of a person of unsound mind does not exceed £2,000 or the income thereof does not exceed £100 per annum (*b*), and the powers conferred by the Lunacy Regulation (Ireland) Act, 1871 (*c*), s. 68, extend to the property in Ireland or England, as the case may be, of the lunatic where the total value of the property both in England and Ireland does not exceed £2,000 in value or the income thereof does not exceed £100 a year (*d*), and an order of a master in England under this provision thus enables the English *quasi*-committee to deal with the Irish real or personal property of the lunatic.

Property in Scotland of lunatic so found.

906. Where a lunatic with personal property in Scotland has been so found in England or Ireland, the committee of the estate without cognition or other proceedings in Scotland has the same powers over such property or the income thereof as might be exercised by a Scottish tutor at law after cognition or a duly appointed *curator bonis* (*e*), and where a tutor at law after cognition or a

(*k*) Rules in Lunacy, 1892, r. 75.

(*l*) Rules in Lunacy, 1893, r. 8.

(*m*) 34 & 35 Vict. c. 22, ss. 60—96 inclusive.

(*a*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 131 (1). When a lunatic has been so found in England the appointment of the committee of the person rests with the master in lunacy in England, although the lunatic's property is in Ireland and a transcript of the record of the inquisition has been transmitted to that country with a view to the appointment of a committee of his estate by the Lord Chancellor in Ireland (*Re Tottenham* (1837), 2 My. & Cr. 39). For inquiries which may be made in England as to the property of a lunatic residing out of the jurisdiction, see Rules in Lunacy, 1892, r. 35. Where the personal property exceeds £2,000 in value or the income thereof exceeds £100 a year, or there is real estate, it is necessary to obtain the appointment of a committee of the estate in Ireland or England as the case may be. As to transmission of proceedings, see p. 427, *ante*.

(*b*) That is, in all cases in which a *quasi*-committee is appointed under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116 (1) (e); see p. 429, *ante*.

(*c*) 34 & 35 Vict. c. 22.

(*d*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 131 (4).

(*e*) *Ibid.*, s. 131 (2). An English committee can maintain an action in the

curator bonis has been appointed to a lunatic in Scotland who has personal property in England or Ireland, the tutor or *curator bonis*, without an inquisition or other proceedings in England or Ireland, has the same powers over such property or the income thereof as might be exercised by a committee of the estate in England or Ireland (*f*).

SECT. 2. Extent of Powers of Management etc.

SUB-SECT. 2.—*Maintenance and Voluntary Allowances.*

907. In the case of a lunatic so found, the master at the inquiry, which immediately succeeds the finding (*g*), settles a scheme of maintenance, which may from to time be resettled (*h*). In certain specified cases (*i*) an order for administration and management, which includes maintenance, is usually made on the appointment of the *quasi*-committee.

Scheme for maintenance.

Order for administration includes maintenance.

908. In administering a lunatic's property the primary considerations are his maintenance and welfare (*k*), what is best to do in his own interest, what is most expedient in managing his estate (*l*), and what fund (if more than one is available) can, from his point of view, be most advantageously charged with his maintenance (*m*). If he has a life interest in one property as well as other property to which he is absolutely entitled, the court will apply the life interest first for maintenance (*n*). Fancied enjoyments and even harmless caprice are to be indulged up to the limits of income, and for solid enjoyments and substantial comfort the court will if necessary go beyond the bounds of income (*o*).

Primary considerations.

In cases of small estates where the income is insufficient to produce the requisite maintenance, it is a common practice to have

Recourse to capital in small estates.

Scottish courts in respect of his lunatic's personal estate, but not in respect of such lunatic's real estate (*Grant* v. *Thomson* (1835), 13 Sh. (Ct. of Sess.) 878; *Gordon* v. *Stair* (*Earl*) (1835), 13 Sh. (Ct. of Sess.) 1073). This provision applies only to lunatics so found. When a lunatic was not so found, Scottish companies could formerly refuse to transfer Scottish securities in accordance with a master's order. Whether a *quasi*-committee appointed under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116, could now, pursuant to the Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1, be clothed with the powers of a committee as regards personal estate in Scotland has not yet been decided. But probably the masters would hold that they had jurisdiction to authorise such a *quasi*-committee to get in such estate.

(*f*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 131 (3). As to the curator's power to sue, see p. 463, *post*.

(*g*) See p. 423, *ante*.

(*h*) See Pope, Law and Practice of Lunacy, 2nd ed., 109.

(*i*) *I.e.*, persons within the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116 (1) (c), (d), (e), (f); see pp. 428, 429, *ante*.

(*k*) *Re Plenderleith, a Person of Unsound Mind not so Found by Inquisition*, [1893] 3 Ch. 332; *Re Winkle*, [1894] 2 Ch. 519, C. A.; Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116 (4); Rules in Lunacy, 1892, r. 31 (g), (h); and see *Re Pink* (1883), 23 Ch. D. 577, C. A. "The first thing to ascertain is what is for the benefit of the lunatic" (*ibid.*, *per* LINDLEY, L.J., at p. 581).

(*l*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116 (4).

(*m*) *Re Ashley* (1830), 1 Russ. & M. 371; *Gisborne* v. *Gisborne* (1877), 2 App. Cas. 300.

(*n*) *Re Weaver* (1882), 21 Ch. D. 615, C. A.

(*o*) *Re Persse, a Lunatic* (1829), 3 Mol. 94.

SECT. 2. Extent of Powers of Management etc.

recourse to capital (*p*), the ordinary order in such cases being to sell each year sufficient capital to raise with any income the amount fixed for maintenance. A reversionary income may be sold for the same purpose (*q*), or an annuity may be purchased for the lunatic (*r*). In making these arrangements no regard is had to any rights or claims of expectants—heir-at-law or next of kin—or of creditors (*s*).

Lunatic alone considered.

These propositions only apply to the lunatic's own maintenance: his wife's claim for maintenance is the same as that of any ordinary creditor (*t*).

Allowances to relations.

909. In deciding whether to make an allowance out of a lunatic's estate to relations for whom he is not bound to provide, the court is guided by a consideration of what the lunatic himself would probably have done if sane (*u*). Assuming the existence of an ample margin beyond the lunatic's personal requirements, the continuation of allowances, originated by him, to those to whom he stands in *loco parentis* is authorised almost as a matter of course, and in a proper case the court would itself originate such allowances. Further than this, allowances to other near relations, such as collaterals, may be made where special claims for consideration can be put forward (*v*). But it must always be borne in mind that it is not the duty of the court to deal benevolently or charitably with the patient's surplus income (*w*), and that the tendency should be towards narrowing rather than augmenting voluntary allowances (*a*).

Allowance for maintenance during temporary insanity.

910. When it appears that the unsoundness of mind of any lunatic so found is in its nature temporary and will probably be soon removed and that any ready money or income is standing to

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(*p*) *Re Persse, a Lunatic* (1829), 3 Mol. 94.

(*q*) *Re Walker, Walker* v. *Symons* (1843), 8 Jur. 49.

(*r*) *Ex parte Stonard* (1810), 18 Ves. 285.

(*s*) *Re Plenderleith* (*a Person of Unsound Mind not so Found by Inquisition*), [1893] 3 Ch. 332, C. A.; *Re Winkle*, [1894] 2 Ch. 519, C. A.; Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116 (5).

(*t*) *Re Winkle, supra.*

(*u*) *Re Hinde, Ex parte Whitbread* (1816), 2 Mer. 99; *Re Frost* (1870), 5 Ch. App. 699.

(*v*) *Re Sparrow* (*a Person of Unsound Mind*) (1882), 20 Ch. D. 320, C. A.; *Re Blair, a Lunatic* (1836), 1 My. & Cr. 300; *Re Croft* (1862), 32 L. J. (CH.) 481, C. A.; *Re Beridge* (1883), 50 L. T. 653, C. A. Allowances have been made to a daughter on her marriage, including a special allowance to her by way of outfit and for her settlement (*Re Fowler* (1842), 6 Jur. 431; *Re Drummond* (1836), 6 L. J. (CH.) 58); to a nephew who was heir-at-law and one of the next of kin (*Re Sparrow* (*a Person of Unsound Mind*), *supra*); to collaterals (*Re Blair, a Lunatic, supra; Re Croft, supra*); to the lunatic's illegitimate children, but not to their mother (*Bradshaw* v. *Bradshaw* (1820), 1 Jac. & W. 647; *Re Jodrell* (1828), Shelford on Lunatics etc., 2nd ed., 210); to an old servant as a retiring pension (*Re Carysfort* (*Earl*) (1840), Cr. & Ph. 76); for the erection of a church and parochial schools in the immediate neighbourhood of the lunatic's real estate (*Re Strickland* (1871), 6 Ch. App. 226); and in discharge of a moral obligation treated as a debt of honour (*Re Whitaker* (*a Person of Unsound Mind* (1889), 42 Ch. D. 119, C. A.).

(*w*) *Re Darling* (*a Person of Unsound Mind*) (1888), 39 Ch. D. 208, C. A.

(*a*) *Ibid.; Re Clarke, a Lunatic* (1847), 2 Ph. 282; *Re Evans* (*a Person of Unsound Mind*) (1882), 21 Ch. D. 297, C. A.

the lunatic's account with a banker or agent and is readily available, a sum may be allowed thereout for the temporary maintenance of the lunatic or of him and the members of his immediate family dependent upon him, without a grant of the custody of the estate (*b*). The person authorised to receive and apply the money must account therefor (*c*), and his receipt is a good discharge to the banker or agent who pays over the same (*d*).

Allowance for maintenance pending appointment of committee

Pending the appointment of a committee or *quasi*-committee, the master may by certificate authorise the lunatic's bankers, or any other person, to pay to the person named in such certificate out of the lunatic's cash or securities such sums as may be proper for the temporary maintenance of the lunatic or of any member of his family (*e*). The jurisdiction to grant this certificate arises in the case of lunatics so found, after the finding (*f*); and in the case of lunatics not so found, when the master is satisfied that the particular matter comes within the Lunacy Act, 1890 (*g*), s. 116, so as to justify the making of an order for administration and management (*h*).

Application of pensions.

911. Pensions payable by any public department to any person certified by a justice or minister of religion and by a medical practitioner to be mentally incapable of managing his or her affairs may be paid, as to an amount in the discretion of such department, to the institution or person having care of such person, and, as to any balance, for or towards the maintenance of the husband or wife and relatives (*i*). Where a person entitled to a savings bank annuity or insurance is insane or otherwise incapacitated to act, then, subject to certain statutory regulations (*k*), payment of the annuity or insurance may be made to such persons as may seem proper, and their receipt will be a good discharge (*l*). If a police pensioner appears to the police authority to be insane or otherwise incapacitated to act, the police authority may pay so

Savings bank annuity or insurance.

Police pensions.

(*b*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 127 (1). This provision applies only to cases in which there is evidence that the lunatic's insanity is not likely to last more than a few months. The application for temporary maintenance is made to the master on summons (Rules in Lunacy, 1892, r. 19), and is authorised by certificate under his hand.

(*c*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 127 (3).

(*d*) *Ibid.*, s. 127 (2).

(*e*) *Ibid.*, s. 130 (as to lunatics so found); Rules in Lunacy, 1892, r. 54 (as to lunatics not so found).

(*f*) Compare Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 130.

(*g*) 53 & 54 Vict. c. 5; see pp. 428, 429, *ante*.

(*h*) Compare Rules in Lunacy, 1892, r. 54. In the former case the application for temporary maintenance should be made immediately after the finding of insanity or subsequently on the summons under Rules in Lunacy, 1892, r. 31; see p. 423, *ante*. In the latter case the summons originating proceedings under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116, should ask for what is required.

(*i*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 335.

(*k*) *I.e.*, under the Government Annuities Act, 1864 (27 & 28 Vict. c. 43), s. 16 (which enables the Postmaster-General, with the consent of the Treasury, to make regulations for carrying out the provisions of the Act), as amended by the Government Annuities Act, 1882 (45 & 46 Vict. c. 51), s. 6.

(*l*) *Ibid.*, s. 9.

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much of the grant as it thinks fit to the institution or person having the care of the pensioner, and may apply any surplus, or such part thereof as it thinks fit, for or towards the maintenance and benefit of the wife or relatives of the pensioner (*m*).

Old age pensions.

Detention in an asylum within the meaning of the Lunacy Acts (*n*) will, while such detention lasts, disqualify a person from receiving or continuing to receive a pension under the Old Age Pensions Act, 1908 (*o*).

SUB-SECT. 3.—*Payment of Creditors.*

Inquiry as to debts.

912. The master may inquire as to any debts due from the lunatic (*p*). But unless the lunatic's funds are more than enough for his own purposes, creditors stand little chance of recovering their debts. During the lunacy they are without remedy; they cannot obtain any payment unless the master makes an order in their favour, and if they apply, an order may be made or refused to all or any in the discretion of the master (*q*). Even when creditors have obtained a charging order on a fund in court in lunacy (*r*), or have issued a writ of *fieri facias* (*s*), they are unable to enforce either remedy as against the court's power to dispose of funds in the custody of the Court in Lunacy for the lunatic's benefit during his life. Where necessary for the due protection of the property in this sense, the court will make an order for bringing it into court (*s*). Creditors, however, who have obtained judgment before a lunacy will not be deprived of their rights by the lunacy if execution has been levied before the lunacy jurisdiction has attached (*t*); nor will a creditor who has obtained a charging order on funds of the lunatic in the High Court, and not yet brought under the control of the Lunacy Court, even though the order was obtained after the lunacy (*a*).

Position of creditors.

Remedy as against fund in lunacy.

In the case of funds in the custody of the Court in Lunacy, charging orders, in the interests of creditors, are to be recommended, since on the recovery or death of the lunatic they become operative on the estate as it then exists (*b*).

Effect of charging order on such funds.

Such an order can, of course, in nowise prejudice the power of the lunacy jurisdiction to have recourse at any time during the lunacy to the lunatic's property so charged for any purposes beneficial to the lunatic (*c*). A charging order can be obtained in respect of debts,

(*m*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 7 (4). As to police authorities, see *ibid.*, Sched. III., and title POLICE.

(*n*) As to these Acts, see note (*l*), p. 412, *ante*.

(*o*) 8 Edw. 7, c. 40, s. 3 (1), (c); and see title POOR LAW.

(*p*) Rules in Lunacy, 1892, r. 33.

(*q*) *Re Seager Hunt, Silicate Paint Co. and J. B. Orr & Co., Ltd.* v. *Hunt*, [1906] 2 Ch. 295, *per* BUCKLEY, J., at p. 299; see also *Re Pink* (1883), 23 Ch. D. 577, C. A.

(*r*) *Re Plenderleith* (*a Person of Unsound Mind not so Found by Inquisition*), [1893] 3 Ch. 332, C. A.

(*s*) *Re Winkle*, [1894] 2 Ch. 519, C. A.

(*t*) *Re Clarke*, [1898] 1 Ch. 336, C. A.; see *Davies* v. *Thomas*, [1900] 2 Ch. 462, C. A.

(*a*) *Re Brown, Llewellin* v. *Brown*, [1900] 1 Ch. 489.

(*b*) *Re Leavesley* (*a Person of Unsound Mind, Deceased*), [1891] 2 Ch. 1, C. A.; see also title EXECUTION, Vol. XIV., pp. 104, 105.

(*c*) *Re Plenderleith* (*a Person of Unsound Mind not so Found by Inquisition*), *supra; Re Pink, supra.*

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incumbrances, past or future maintenance (*d*), and the payment of costs, and is obtainable in the case of lunatics not so found by summons, and in the case of lunatics so found by the summons issued after inquisition. When a charging order is obtained under the Judgment Acts, 1838 and 1840 (*e*), there is no power to make an order providing that the amount to be charged shall be determined by the masters in lunacy, for the judgment creditor is entitled to an unconditional order (*f*).

Repayment of advances for lunatic's maintenance.

913. Advances for a lunatic's maintenance may have been made voluntarily as a gift and without any expectation of being repaid, or by way of loan (*g*). In the former case repayment out of the lunatic's estate will be refused (*h*); but in the latter case an obligation will be implied on the part of the lunatic to repay all sums so lent for the purposes of purchasing necessaries for him, though only six years' arrears will be allowed (*i*). After the death of a lunatic payment for past maintenance can only be claimed from his representative as a debt (*k*).

Adjudication in bankruptcy.

914. The court's discretionary powers of applying the lunatic's property for his benefit cannot be defeated by an adjudication in bankruptcy made without the consent of the judge in lunacy, and it is doubtful whether an adjudication made without such consent is valid (*l*).

Lunacy following bankruptcy.

A lunatic with reference to whom no proceedings have been taken in lunacy can apparently only commit an act of bankruptcy involving intention during a lucid interval (*m*). When a lunacy follows on a bankruptcy, the bankruptcy of course remains effective, and the trustee in bankruptcy can effectively claim in the lunacy for any asset belonging to the bankrupt lunatic that properly vests in himself (*n*). A lunatic may for all purposes of the Bankruptcy Acts, 1883—1890 (*o*), act by his committee or *curator bonis* (*p*), but the latter has no *locus standi* to intervene in an English bankruptcy properly instituted by the committee (*q*).

(*d*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 117.

(*e*) 1 & 2 Vict. c. 110; 3 & 4 Vict. c. 82.

(*f*) *Horne* v. *Pountain* (1889), 23 Q. B. D. 264. As to the effect of the order, see title EXECUTION, Vol. XIV., p. 107.

(*g*) *Re Weaver* (1882), 21 Ch. D. 615, C. A.

(*h*) *Ibid.*

(*i*) *Ibid.*; *Re Harris* (1880), 49 L. J. (CH.) 327, C. A.; *Re Newbegin's Estate, Eggleton* v. *Newbegin* (1887), 36 Ch. D. 477. Necessaries mean goods suitable to the condition in life of the lunatic and his actual requirements at the time; see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 2; *Re Rhodes, Rhodes* v. *Rhodes* (1890), 44 Ch. D. 94, C. A.; and p. 398, *ante*.

(*k*) *Re Marman's Trusts* (1878), 8 Ch. D. 256, C. A.

(*l*) *Re Farnham* (*a Lunatic*), [1895] 2 Ch. 799; see, further, title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 10, 11, 37, 47.

(*m*) *Crispe* v. *Perrit* (1744), Willes, 467, *per* WILLES, C.J., at p. 473; *Re Spence, Ex parte Stamp, Ex parte Jones* (1846), De G. 345; and *Re R. S. A.*, [1901] 2 K. B. 32, C. A.

(*n*) *Re Hinds* (*a Lunatic*) (1877), 7 Ch. D. 26, C. A.

(*o*) For which see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 1 *et seq.*

(*p*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 148; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 10 *et seq.*

(*q*) *Re Aytoun, Ex parte Official Solicitor of the Supreme Court* (1904), 20 T. L. R. 252.

SECT. 3.

Power to raise Money.

Power to sell, charge, mortgage etc.

Declaration of charge.

SECT. 3.—*Power to raise Money.*

915. A committee or *quasi*-committee may be authorised to sell, charge, mortgage, or otherwise deal with the lunatic's present or future property for (1) payment of the lunatic's debts or engagements; (2) discharge of incumbrances on his property (*r*); (3) payment of past maintenance or money expended for his benefit; (4) expenses of future maintenance (*s*).

Where moneys are expended for the permanent improvement of the lunatic's property the order may declare such moneys, with interest (*t*), to be a charge upon the improved or any other property of the lunatic, provided that no right of sale or foreclosure during the lunatic's lifetime is conferred thereby (*u*). The charge may be in favour of the person advancing the money, or if the loan is made out of the lunatic's general estate, to some person as a trustee for him as part of his personal estate (*v*). An estate of which the lunatic is tenant for life cannot be charged with moneys expended on an estate of which he is tenant in tail (*w*).

SECT. 4.—*Partnership and Dissolution thereof.*

Effect of lunacy of partner.

916. The lunacy of a partner does not of itself dissolve the partnership, and until dissolution such partner is entitled to share the profits and is liable for the losses of the firm (*x*). But the

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(*r*) See *Re Fox* (*a Lunatic*) (1886), 33 Ch. D. 37, C. A., where money to pay debts of an ancestor was raised by mortgage of land descended from him, but no covenant for payment was entered into on behalf of the lunatic; see as to such a covenant, *Re Ray* (*a Person of Unsound Mind*), [1896] 1 Ch. 468, 472, C. A. As to covenants in mortgages generally, see title MORTGAGE.

(*s*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 117 (1). In the case of a charge or mortgage for future maintenance, the amount raised may be made payable contingently or on the happening of some future event, or in a gross sum or in annual or periodical sums, and at such times and in such manner as may appear to the court expedient (*ibid.*, s. 117 (2)). An application to raise a sum for future maintenance made rather in the interests of the lunatic's relations than in his own interest will be refused (*Re Pugh, a Lunatic* (1853), 3 De G. M. & G. 416). For form of mortgage of lunatic's freeholds, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 571.

(*t*) The interest must be kept down during the lunatic's lifetime out of the income of his general estate so far as the same is sufficient to bear it (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 118 (2)).

(*u*) *Ibid.*, s. 118 (1). The paramount consideration is the interest of the lunatic. But the court may also consider what is fair and right as between his real and personal estates, the character and devolution of which should be interfered with as little as possible. Regard ought also to be had to the nature and extent of the estate and to the difficulty in drawing a clear line between ordinary repairs and permanent improvements (*Re Gist* (*a Person of Unsound Mind*), [1904] 1 Ch. 398. C. A.; *A.-G.* v. *Ailesbury* (*Marquis*) (1887), 12 App. Cas. 672). As a general rule, when an order is made authorising the expenditure of money in permanent improvements, the order should at the same time direct whether the expenditure is or is not to be charged on the improved property; or if not, the order should be made expressly without prejudice to the question how as between the real and personal estates the expenditure is ultimately to be borne (*Re Gist* (*a Person of Unsound Mind*), *supra*); see also p. 449, *post*.

(*v*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 118 (3).

(*w*) *Re Vavasour* (*a Lunatic*) (1885), 29 Ch. D. 306, C. A.

(*x*) *Sayer* v. *Bennet* (1784), 1 Cox, Eq. Cas. 107; *Wrexham* v. *Hudleston* (1734), 1 Swan. 514; *Kirby* v. *Carr* (1838), 3 Y. & C. (EX.) 184; *Jones* v. *Noy* (1833), 2 My. & K. 125; *Sadler* v. *Lee* (1843), 6 Beav. 324; *Leaf* v. *Coles* (1851), 1

confirmed lunacy of a partner is a ground for dissolution (*y*), and an injunction will be granted restraining a lunatic partner from interfering in the conduct of the partnership affairs (*a*). Further, the court will dissolve a partnership at the suit of the lunatic whether he has been so found by inquisition or not (*b*). The court will require to be satisfied that the lunacy existed at the time of the application and is probably incurable; evidence of past or temporary insanity will not suffice (*c*). The judge in lunacy may also, on a partner becoming a lunatic, by order dissolve the partnership, and the committee, or such person as the judge approves on behalf of the lunatic, may carry such order into effect (*d*).

Effect of special provisions for dissolution.

Where articles of partnership provide for dissolution in certain events, the lunacy of one of the partners does not prevent the partnership being dissolved in accordance with the provisions of the articles (*e*); but where notice of dissolution has been served on a lunatic partner, it is competent for the partner serving the notice to withdraw it (*f*),

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Power of sale.

917. The committee or *quasi*-committee may by order be authorised to sell (*g*) any real or personal property, whether in possession, reversion, remainder, or expectancy, of which a lunatic is seised or possessed, and any estate or interest and any undivided share therein (*h*). Such a sale may be authorised in consideration of a perpetual rentcharge without any immediate cash payment (*i*), but not in consideration of the allotment of shares in a company (*k*). Where the lunatic is tenant for life of a fund over which he has a general power of appointment, an order may be made for the sale of the fund without prejudice to any question which may arise if the lunatic shall appoint (*l*).

Consideration.

Property subject to power.

De G. M. & G. 171; *Jones* v. *Lloyd* (1874), L. R. 18 Eq. 265; *Drew* v. *Nunn* (1879) 4 Q. B. D. 661. As to the rights and duties of partners generally, see title PARTNERSHIP.

(*y*) *Rowlands* v. *Evans*, *Williams* v. *Rowlands* (1861), 30 Beav. 302; *Kirby* v. *Carr* (1838), 3 Y. & C. (EX.) 184.

(*a*) *J.* v. *S.*, [1894] 3 Ch. 72.

(*b*) *Sadler* v. *Lee* (1843), 6 Beav. 324; *Jones* v. *Lloyd*, *supra*; *Beall* v. *Smith* (1873), 9 Ch. App. 85, 92.

(*c*) *Kirby* v. *Carr*, *supra*; *Sadler* v. *Lee*, *supra*; *Pearce* v. *Chamberlain* (1750), 2 Ves. Sen. 33; *Wrexham* v. *Hudleston* (1734), 1 Swan. 514; *Whitwell* v. *Arthur* (1865), 35 Beav. 140.

(*d*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 119, 124.

(*e*) *Robertson* v. *Lockie* (1846), 15 Sim. 285; *Mellersh* v. *Keen* (1859), 27 Beav. 236.

(*f*) *Jones* v. *Lloyd*, *supra*.

(*g*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 120 (a) (as to committees); Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1 (as to *quasi*-committees).

(*h*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 341. In *Re Weld, a Lunatic* (1885), 28 Ch. D. 514, C. A., it was held that the court had no jurisdiction to authorise the sale of a lunatic's undivided share of land to the owner of the other shares. But in view of the definition clause to the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 341, such a sale can now be carried into effect. For forms of conveyance by committee or *quasi*-committee, see Encyclopædia of Forms and Precedents, Vol. XII., pp. 539—543, 720.

(*i*) *Re Ware* (*a Person of Unsound Mind*), [1892] 1 Ch. 344, C. A.

(*k*) *Re A. B.*, [1899] W. N. 233, C. A.

(*l*) *Re Hirst* (1892), 67 L. T. 702, C. A. As to the exercise of powers vested in the lunatic, see p. 455, *post*.

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On a sale by private treaty a conditional contract should be entered into and submitted to the master in lunacy for approval (*m*), and his leave must be obtained before offering any property for sale by public auction (*n*).

Approval of contract.

Power of sale as tenant for life.

918. Where a tenant for life of land is a lunatic, the powers of selling conferred by the Settled Land Acts (*o*) on tenants for life can be exercised, in the case of a lunatic so found, by a committee of the estate pursuant to an order of the judge in lunacy (*p*); and, in the case of a lunatic not so found, by a *quasi*-committee (*q*), with the authority of a master (*q*). The committee or *quasi*-committee must obtain the leave of the court before giving the statutory notice (*r*) to the trustees of the settlement of his intention to sell (*s*), and where there are no trustees, new trustees of the settlement for the purposes of the Settled Land Acts (*o*) must first be appointed (*t*). A sale of a lunatic tenant in tail's undivided share to the owners of the other shares may be authorised (*a*). All applications, whether the lunatic be so found or not, are by summons to the master in lunacy (*b*).

Land purchased under compulsory powers.

919. Should a lunatic, whether so found or not, be seised of premises to be compulsorily acquired in fee simple, the sale can be carried into effect under an order of the master (*c*). In the case of a lunatic tenant for life the sale may be effected, if he is a lunatic

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(*m*) The application to confirm the conditional contract is made by summons (Rules in Lunacy, 1892, r. 19), supported by an affidavit of a valuer and by an affidavit as to the necessity or desirability of selling. The draft conveyance is settled and approved by the master.

(*n*) The application for leave to sell by public auction is made by summons (Rules in Lunacy, 1892, r. 19); an affidavit as to reserves from an auctioneer is required, and the draft conditions of sale are approved by the master in lunacy.

(*o*) See title SETTLEMENTS.

(*p*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 62. For a form of conveyance, see Encyclopædia of Forms and Precedents, Vol. XII., p. 720.

(*q*) Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1. As to the law before that Act, see *Re Baggs* (1893), [1894] 2 Ch. 416, n, C. A., and *Re S. S. B.* (*a Person of Unsound Mind not so Found by Inquisition*), [1906] 1 Ch. 713, C. A.; and compare *Re X.* (*a Person through Mental Infirmity incapable of managing his Affairs*), [1894] 2 Ch. 415, C. A.

(*r*) See Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 45; see title SETTLEMENTS.

(*s*) *Re Ray's Settled Estates* (1884), 25 Ch. D. 464.

(*t*) *Re Taylor* (1883), 52 L. J. (CH.) 728, C. A. The Lords Justices have repeatedly intimated that whether they have or have not power by virtue of their Chancery jurisdiction to appoint trustees under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 38, is quite immaterial, since in their view such an order ought only to be made in the Chancery Division; see the Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 1 (10) (ix.), 46 (1); and compare *Re Barber* (1888), 39 Ch. D. 187, C. A., and *Re Armfield* (1889), 88 L. T. Jo. 97, C. A. Under these circumstances the applicant should ask in his summons in lunacy that he may be at liberty in the name and on behalf of the lunatic to apply in the Chancery Division for the appointment of the proposed new trustees. See also title SETTLEMENTS; TRUSTS AND TRUSTEES.

(*a*) *Re Gaitskell* (*a Lunatic*) (1889), 40 Ch. D. 416, C. A.

(*b*) Rules in Lunacy, 1892, r. 20.

(*c*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 120 (a); Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1; see p. 443. *ante*.

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so found, by his committee (*d*), with the leave of the judge in lunacy (*e*), and if he is a lunatic not so found by a *quasi*-committee (*f*), pursuant to an order of the master (*g*). The order for payment into court (which should be made both in lunacy and in Chancery) ought to provide for payment of the purchase-money to the credit of the lunacy direct to the joint account of the lunatic and the purchaser (*h*). If the money is directed to be invested at once in an investment equivalent to the purchase of land, the name of the purchaser may be omitted from the title of the account (*i*).

Subject to a rentcharge.

When lands compulsorily taken are subject to a rentcharge in favour of a lunatic during his life, the court may authorise the committee or *quasi*-committee to release the lands from the rentcharge upon the purchasers buying, in the name of the lunatic, a Government annuity of the same yearly value for his life (*k*).

Power of exchange or partition.

920. A committee or *quasi*-committee may be authorised by the master to make exchange of or partition any property belonging to the lunatic or in which the latter is interested, and to give or receive any money for equality of exchange or partition (*l*), either with or without minerals (*m*). Any property taken in exchange is held to the same uses and subject to the same trusts, incumbrances, and conditions as the property given in exchange (*n*). The power of a tenant for life to exchange or concur in a partition of settled land (*o*) may be exercised by the committee or *quasi*-committee of a lunatic tenant for life, with the leave of the judge in lunacy (*p*).

Power to carry on business.

921. A committee or *quasi*-committee may be authorised to carry on any trade or business of the lunatic (*q*). But before sanctioning such a course the master will require to be satisfied by the clearest evidence not only that the business has been conducted hitherto at a profit, but also that it may continue by proper management to be profitably and advantageously worked in the future (*r*).

(*d*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 7.

(*e*) *Re Taylor* (1849), 1 H. & Tw. 432 (obtained from a master on summons); Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 27; Rules in Lunacy, 1892, r. 20.

(*f*) Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1.

(*g*) *Ibid.*, modifying the law as stated in title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 57, note (*d*); and compare *Re Tugwell* (1884), 27 Ch. D. 309.

(*h*) *Re Milnes* (*a Person of Unsound Mind*) (1875), 1 Ch. D. 28, C. A. As to the payment of dividends from investments to committees, see *Re Ryder* (*a Person of Unsound Mind*) (1887), 37 Ch. D. 595, C. A.

(*i*) *Re Buckingham* (1876), 2 Ch. D. 690, C. A.

(*k*) *Re Brewer* (1875), 1 Ch. D. 409, C. A. See further, as to purchase from lunatics and persons under disability, title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 57, 58, 61, 109, 110.

(*l*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 120 (b); Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1. As to partition, see title PARTITION.

(*m*) *Re Dicconson* (*a Lunatic*) (1880), 15 Ch. D. 316, C. A.

(*n*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 121.

(*o*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 3 (iii.), (iv.); see titles PARTITION; SETTLEMENTS.

(*p*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 62; Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1.

(*q*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 120 (c); Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1.

(*r*) Elmer, Practice in Lunacy, 7th ed., 96.

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The effect of an order authorising a committee or *quasi*-committee to carry on a lunatic's business is to make him the agent of the lunatic for the purpose of carrying on his business; accordingly, in the absence of evidence that he intended to pledge his personal credit, or that the goods were supplied to his personal credit, he is not liable on trade contracts (*s*).

Powers of leasing.

922. A committee or *quasi*-committee may be authorised by order of the master in lunacy:—

(1) To grant leases of any property of the lunatic for building, agricultural, or other purposes (*t*), not including, however, a lease of an easement (*a*);

(2) To grant leases of minerals forming part of the lunatic's property, whether the same have been already worked or not, and either with or without the surface or other land (*b*);

(3) To accept a surrender of any lease and grant a new lease (*c*);

(4) To execute any power of leasing vested in a lunatic having a limited estate only in the property over which the power extends (*d*).

Extent of power.

The power to authorise leases extends to property of which the lunatic is tenant in tail, and a lease properly granted pursuant to an order of the master binds the lunatic's issue and all persons entitled in remainder and reversion expectant upon the estate tail of the lunatic, including the Crown; and upon the death of the lunatic the remaindermen have the same rights and remedies against the lessee as the lunatic or his committee would have had (*e*). Leases may be granted or accepted for such number of lives or such term of years (*f*), at such rent or royalties and subject to such reservations, covenants, and conditions as the master may approve (*g*), and fines or other payments on the renewal of leases may be paid out of the lunatic's estate or charged with interest on the leasehold property (*h*).

(*s*) *Isaacs* v. *Chinery* (1896), 74 L. T. 320; *Plumpton* v. *Burkinshaw*, [1908] 2 K. B. 572, C. A. See also *Burt, Boulton and Hayward* v. *Bull*, [1895] 1 Q. B. 276, C. A.; *Owen & Co.* v. *Cronk*, [1895] 1 Q. B. 265, C. A.

(*t*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 120 (d); Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1. For a form, see Encyclopædia of Forms and Precedents, Vol. VII., p. 652. As to the law of landlord and tenant generally, see title LANDLORD AND TENANT, Vol. XVIII., pp. 331 *et seq.*

(*a*) *Re Arnott* (1891), 35 Sol. Jo. 623, C. A.

(*b*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 120 (e); Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1; *Ex parte Tabbart* (1801), 6 Ves. 428. As to mining leases generally, see title MINES, MINERALS, AND QUARRIES.

(*c*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 120 (g); Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1.

(*d*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 120 (h); Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1; see *Re Salt*, [1896] 1 Ch. 117, C. A. The powers of leasing given by the Settled Land Acts (see title SETTLEMENTS) are exercisable by the committee or *quasi*-committee of a lunatic tenant for life, with the sanction of the master in lunacy (Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 62; Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1). For a form of lease, see Encyclopædia of Forms and Precedents, Vol. VII., p. 653.

(*e*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 122 (1).

(*f*) Thus a lease has been authorised for twenty-one years if the lunatic shall so long live, determinable on his death (*Re White* (1852), 1 W. R. 294, C. A.).

(*g*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 122 (2).

(*h*) *Ibid.*, s. 122 (3). As to royalties, fines, premiums, and other payments, and how the same are to be ultimately borne, see p. 450, *post.*

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When convenient, and to prevent hardship to a tenant, the master may adopt and carry into effect an arrangement entered into without his sanction (*i*). The master will, when expedient, exercise the discretion of a landlord in giving preference to an old tenant and in not being governed entirely by the highest offer (*k*), and relief against forfeiture on breach of a covenant to repair may be granted to a tenant (*l*). Should the committee or *quasi*-committee grant a lease at an undervalue and on his own responsibility, he will be liable for any loss to the estate (*m*). If the sanction of the master to the renewal of a lease (*n*) or to a reduction of rent (*o*) is required, the application must be made by the committee or *quasi*-committee and not by the tenant, who has no *locus standi* in the lunacy, and could only be heard as a matter of grace after the refusal of the committee or *quasi*-committee to move in the matter. The practice in the Lunacy Office (*p*) is for the committee or *quasi*-committee to enter into a conditional contract with the proposed tenant or lessee and then to apply by summons, on proper evidence of value, that such contract may be confirmed and carried into effect (*q*).

Arrangements as to leases.

Leases at undervalue.

The committee or *quasi*-committee may also be authorised to surrender any lease and accept a new lease (*r*), which will be held subject to the same uses, trusts, incumbrances, and conditions as the surrendered lease (*s*). When a lease is renewed for the benefit of the lunatic's estate, the tenant should be either the lunatic, or else the committee or *quasi*-committee, according as the old lease was granted to the lunatic himself or to someone in trust for him (*t*).

Surrender of leases.

The committee or *quasi*-committee cannot maintain an action for rent accrued due after the lunatic's death, though reserved by the lease granted by himself on behalf of the lunatic, wherein the lessee covenanted with him as committee or *quasi*-committee for payment thereof (*u*).

Recovery of rent after lunatic's death.

923. A committee or *quasi*-committee may be authorised to perform any contract relating to the property of the lunatic

Contracts made before lunacy.

(*i*) *Re Wynne* (1872), 7 Ch. App. 229; see *Foster* v. *Marchant* (1684), 1 Vern. 262.

(*k*) *Re Ball, a Lunatic* (1828), 1 Mol. 141.

(*l*) *Re Edridge, Ex parte Vaughan* (1823), Turn. & R. 434.

(*m*) *Re Wilkins, a Lunatic, Ex parte Wilkins and Ex parte Jenvey* (1842), 6 Jur. 308.

(*n*) *Re Kilkenny (Earl), a Lunatic* (1845), 7 I. Eq. R. 594.

(*o*) *Re Fitch* (1830), 1 Russ. & M. 354.

(*p*) As to the Lunacy Office, see pp. 412, 413, *ante*.

(*q*) Rules in Lunacy, 1892, r. 19. As to order authorising lease and allowance of such lease when settled, see Rules in Lunacy, 1893, r. 10. A committee should execute a lease as follows:—"A. B." (the Lunatic) "by C. D. (Committee of his Estate)." But if he executes in his own name alone, such execution is good provided it is apparent from the lease that he was acting as committee (*Lawrie* v. *Lees* (1881), 7 App. Cas. 19). A *quasi*-committee should execute thus:—"A. B. by C. D."

(*r*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 120 (f); Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1.

(*s*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 121.

(*t*) *Ex parte Jermyn* (1788), 3 Swan. 131, n.

(*u*) *Foot* v. *Leslie* (1885), 16 L. R. Ir. 411.

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entered into by the lunatic before his lunacy (*a*), and the master may make such inquiries as he thinks fit respecting any dealings with the lunatic's estate, and the application thereof prior to the proceedings in lunacy and respecting the state and condition of the lunatic at the time of such dealings (*b*). Thus, transactions under a power of attorney granted by the lunatic may be inquired into; and a committee who has before inquisition managed for some time and made large profits out of his lunatic's estate may be ordered to pay interest on the savings (*c*).

Power to dispose of onerous property.

924. A committee or *quasi*-committee may be authorised to surrender, assign, or otherwise dispose of, with or without consideration, any onerous property belonging to the lunatic (*d*). In exercising his discretion, the master will act for the lunatic as if he were a person of sound mind and guided by reasonable motives (*e*).

Power to enter into patronage agreements.

925. A committee or *quasi*-committee may be authorised by the master in lunacy on summons (*f*) to enter into any agreement touching the patronage of augmented cures under Queen Anne's Bounty Act, 1714 (*g*), which the lunatic might have entered into if he had been of sound mind (*h*).

Power to consent to the exercise of any beneficial power.

926. A committee or *quasi*-committee may be authorised to exercise any power, or give any consent required for the exercise of any power, where the power is vested in the lunatic for his own benefit or the power of consent is in the nature of a beneficial interest in the lunatic (*i*). This jurisdiction is not confined to the cases enumerated in the Lunacy Act, 1890 (*j*), and the specific provisions in Part IV. thereof are enabling and not restrictive clauses (*k*). Thus the jurisdiction extends to the following powers: that is to say, power to elect (*l*); power to accept a devise containing an onerous condition (*m*); power to consent to the exercise of a power of advancement under a marriage settlement (*n*); power to revoke a voluntary settlement (*o*); power to bar the estate

(*a*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 120 (i.); Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1. As to applications, see Rules in Lunacy, 1892, r. 19. See further, as to a lunatic's contract, pp. 396 *et seq.*, *ante*.
(*b*) Rules in Lunacy, 1892, r. 34.
(*c*) *Ex parte Chumley* (1791), 1 Ves. 156.
(*d*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 120 (j); Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1. As to applications, see Rules in Lunacy, 1892, r. 19.
(*e*) *Re Sefton* (*Earl*) (*a Person of Unsound Mind*), [1898] 2 Ch. 378, C. A.
(*f*) Rules in Lunacy, 1892, r. 19.
(*g*) 1 Geo. 1, stat. 2, c. 10; see title ECCLESIASTICAL LAW, Vol. XI., p. 566.
(*h*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 120 (k); Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1. As to applications, see Rules in Lunacy, 1892, r. 19.
(*i*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 120 (l); Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1. As to applications, see Rules in Lunacy, 1892, r. 19.
(*j*) 53 & 54 Vict. c. 5.
(*k*) *Re Sefton* (*Earl*) (*a Person of Unsound Mind*), *supra*. See the Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 120, 124.
(*l*) *Wilder* v. *Pigott* (1882), 22 Ch. D. 263.
(*m*) *Re Sefton* (*Earl*) (*a Person of Unsound Mind*), *supra*.
(*n*) *Re Nevill, a Lunatic* (1885), 31 Ch. D. 161.
(*o*) *Re Price* (1909), C. A., unreported.

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tail of a lunatic tenant in tail provided that the devolution of the proceeds of sale is not affected, and that the rights of the remaindermen are not prejudiced (*p*); power to exercise the power of sale contained in a mortgage (*q*) or in a settlement (*r*). But the lunatic's interest must be a beneficial one, and the Lunacy Act, 1890 (*s*), s. 120, does not enable the exercise of a power vested in the lunatic as a trustee (*t*), nor does it enable the grant of an easement (*u*). The Lords Justices sitting in lunacy have jurisdiction to order the costs of an unsuccessful opposition to a Bill in Parliament affecting the estate of a lunatic tenant for life of settled land to be paid out of the *corpus* of the property subject to the settlement (*a*).

SECT. 6.—*Conversion.*

Purposes for which power conversion generally exercised.

927. In dealing with the property of a lunatic, the leading principle and paramount consideration is the interest of the lunatic as exemplified by the maintenance of himself and his family, or expediency in the management of his property (*b*). The court will, therefore, apply the lunatic's estate, and if necessary change the condition of the property, for these two paramount objects, without regard to the interests of the lunatic's successors or any expectancies they may have in his estate (*c*). Apart from special circumstances, there is no equity between the real and personal representatives of a lunatic (*d*).

No conversion as to property not applied.

928. Subject to the satisfaction of the above-mentioned paramount claims, the lunatic, his representatives, devisees, legatees, or assigns have the same interest in any moneys not so applied, arising from the sale, mortgage, or other disposition of the lunatic's property under the judge's order, as he or they would respectively have had in the property itself if no such sale, mortgage, or other disposition had been made; and further, the surplus moneys themselves are of the same nature as the property from which they are derived (*e*). A sale of the lunatic's property by a mortgagee under

Exception to rule.

(*p*) *Re Pares, Lillingston* v. *Pares* (1879), 12 Ch. D. 333, C. A.; see *Re Sparrow* (*a Person of Unsound Mind*) (1882), 20 Ch. D. 320, C. A.; *Re Sefton* (*Earl*) (*a Person of Unsound Mind*), [1898] 2 Ch. 378, C. A.

(*q*) *Re Harwood* (*a Person of Unsound Mind*) (1887), 35 Ch. D. 470, C. A., is not now followed, it being the practice of the master in lunacy to direct the committee to convey pursuant to the Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 120, 124.

(*r*) *Re X.* (*a Person through Mental Infirmity incapable of managing his Affairs*), [1894] 2 Ch. 415, C. A.

(*s*) 53 & 54 Vict. c. 5.

(*t*) *Re Shortridge* (*a Person of Unsound Mind*), [1895] 1 Ch. 278, C. A. As to the exercise of a power vested in the lunatic as a trustee, see pp. 455 *et seq.*, *post.*

(*u*) *Re Arnott* (1891), 35 Sol. Jo. 623, C. A.

(*a*) *Re Blake* (*a Lunatic*) (1895), 72 L. T. 280, C. A.

(*b*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116 (4); and see p. 437, *ante.*

(*c*) *A.-G.* v. *Ailesbury* (*Marquis*) (1887), 12 App. Cas. 672, *per* Lord MACNAGHTEN, at p. 688.

(*d*) *Oxenden* v. *Compton* (*Lord*) (1793), 2 Ves. 69; *Re Hole, Davies* v. *Witts*, [1906] 1 Ch. 673, 682, C. A.; see *Hartley* v. *Pendarves*, [1901] 2 Ch. 498; *Re Grange, Chadwick* v. *Grange*, [1907] 2 Ch. 20, C. A.

(*e*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 123 (1); see *Re Matson, James* v. *Dickinson*, [1897] 2 Ch. 509. Before the Lunacy Act, 1890 (53 & 54 Vict. c. 5), a sale of stock was held to adeem a bequest (*Jones* v. *Green* (1868), L. R. 5 Eq. 555; *Re Freer, Freer* v. *Freer* (1882), 22 Ch. D. 622). As to ademption, generally, see titles EQUITY, Vol. XIII., pp. 130 *et seq.*; WILLS.

SECT. 6. Conversion.

his power of sale does, however, effect conversion as regards surplus proceeds (*f*), while on a sale in a partition action there is an equity for reconversion (*g*).

Moneys deemed real estate.

929. As between the representatives of the lunatic's real and personal estates, and subject to the above-mentioned paramount claims, the following moneys, when derived from the lunatic's real estate, are considered as real estate:—(1) Moneys received for equality of partition and exchange, or under any lease of unopened mines; (2) fines, premiums, and sums of money received on the grant or renewal of a lease.

Moneys deemed personalty.

930. On the other hand, all fines, premiums, and sums of money received from the grant or renewals of leases of property of which the lunatic was tenant for life are considered as personal property (*h*), except for the paramount objects above mentioned.

No conversion unless for special reasons

931. Although it is within the power of the Court in Lunacy to change the nature of a lunatic's estate, it is contrary to the general principle and course of administration to do so unless it is considered for special reasons to be for his benefit (*i*). So the court will not invest his personal estate in the purchase of land (*k*), without by its order impressing upon the property purchased the character of personal estate (*l*). Conversion will, however, be deemed to have taken place when a contract to purchase land entered into by a lunatic while of unsound mind, but before he was proved lunatic, is completed by the committee with the sanction of the court (*m*).

Release of charge on realty.

932. When a charge on a lunatic's real estate is paid off out of his personal estate, the payment will be made without prejudice to the question how the debt should ultimately be borne (*n*). Such a debt will be borne by the real estate (*o*), unless the money so applied arises by the accumulation of surplus rents or the sale of timber (*p*).

(*f*) *Re Grange, Chadwick* v. *Grange*, [1907] 2 Ch. 20, C. A. (where the trust of the surplus proceeds was for the mortgagee, "his heirs and assigns").

(*g*) *Re Barker* (1881), 17 Ch. D. 241, C. A. See title PARTITION.

(*h*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 123 (2).

(*i*) *A.-G.* v. *Ailesbury* (*Marquis*) (1887), 12 App. Cas. 672, *per* Lord SELBORNE, at p. 683; see also *ibid.*, *per* Lord MACNAGHTEN, at p. 688; compare *Ex parte Annandale* (*Marchioness*) (1749), 1 Amb. 80, 81.

(*k*) *Ex parte Grimstone* (1772), 4 Bro. C. C. 235, n.; *Oxenden* v. *Compton* (*Lord*) (1793), 2 Ves. 69, 73.

(*l*) See *A.-G.* v. *Ailesbury* (*Marquis*), *supra*; *Ex parte Degge* (1764), 4 Bro. C. C. 235, n.; compare *Re Badcock, a Lunatic* (1840), 4 My. & Cr. 440. There may be some doubt as to what result would follow if such a direction were omitted; see *Oxenden* v. *Compton* (*Lord*), *supra*.

(*m*) *Baldwyn* v. *Smith*, [1900] 1 Ch. 588.

(*n*) *Re Leeming, a Lunatic* (1861), 3 De G. F. & J. 43, C. A.; see *Re Melly* (1883), 53 L. J. (CH.) 248, C. A.

(*o*) *Re Norfolk* (*Dowager Duchess*), *Ex parte Digby* (*Earl*) (1821), Jac. 235; *Ex parte Hinde* (1822), Amb. 706, n.; *Weld* v. *Tew* (1829), Beat. 266; *Re Leeming, a Lunatic, supra*; see *A.-G.* v. *Ailesbury* (*Marquis*), *supra*, at p. 690.

(*p*) *Ex parte Phillips* (1812), 19 Ves. 118; *Ex parte Grimstone* (1772), Amb. 706; *Newcombe* v. *Newcombe* (1841), 3 Ir. Eq. R. 414; *Leitrim* (*Lord*) v. *Enery* (1844), 6 Ir. Eq. R. 357; see *Re Hole, Davies* v. *Witts*, [1906] 1 Ch. 673, C. A. (Some of these cases, however, seem to have been decided on principles not depending on the origin of the money applied.)

When a lunatic becomes entitled to a charge on real estate belonging to him the charge will as a rule merge (*q*).

Acts in ordinary course of management.

933. Acts done in the ordinary course of managing a lunatic's estate will effect conversion (*r*). So where timber is cut and sold the proceeds will pass as personalty (*s*), and money expended on repairs, and even on some improvements, will sink into the real estate (*t*), though the cost of permanent improvements will generally be charged on the real for the benefit of the personal estate (*a*). But a mere transfer into court of stock will not adeem a bequest of such stock standing in the name of the lunatic (*b*). The court will not do anything, if it can help it, which will affect a disposition under a lunatic's will (*c*).

SECT. 7.—*Copyholds.*

General law.

934. The capacity of a lunatic to be a tenant of a manor, and the law relating to a lunatic interested in the enfranchisement, redemption, and sale of copyholds are dealt with elsewhere (*d*).

Admittance by committee or attorney.

935. Where a lunatic so found is entitled to be admitted to copyholds, his committee may offer to be himself admitted, and in default of his appearance or acceptance of admittance the lord or his steward may by attorney admit the lunatic (*e*).

Fines payable.

The customary fine will be payable (*f*), and if it is not paid within three months after demand the lord may enter upon and hold the land until the fine and the costs are paid (*g*), but the lord must yearly render an account of the rents and profits received and pay the surplus, if any, to the person entitled thereto (*h*). As soon as the fine and costs have been paid or lawfully tendered, the lord must deliver up possession under penalty of damages (*i*). If the committee pays the fine and costs, he may enter on and hold

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(*q*) *Compton* (*Lord*) v. *Oxenden* (1793), 2 Ves. 261; *Re Hole, Davies* v. *Witts*, [1906] 1 Ch. 673, 682, C. A.

(*r*) See *A.-G.* v. *Ailesbury* (*Marquis*) (1887), 12 App. Cas. 672, 688.

(*s*) *Oxenden* v. *Compton* (*Lord*) (1793), 2 Ves. 69; *Hartley* v. *Pendarvis*, [1901] 2 Ch. 498.

(*t*) *Re Badcock, a Lunatic* (1840), 4 My. & Cr. 440; *Re Gist* (*a Person of Unsound Mind*) (1877), 5 Ch. D. 881, C. A.; *Re Gist* (*a Person of Unsound Mind*), [1904] 1 Ch. 398, C. A.

(*a*) *Re Badcock, a Lunatic, supra;* see *Re Gist* (*a Person of Unsound Mind*), [1904] 1 Ch. 398, C. A.; Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 118; see note (*u*), p. 442, *ante.*

(*b*) *Re Wood, Anderson* v. *London City Mission*, [1894] 2 Ch. 577.

(*c*) *Re Wood, Anderson* v. *London City Mission, supra* (where costs were directed to be paid out of stock not specifically bequeathed); *Re Melly* (1883), 53 L. J. (CH.) 248, C. A.

(*d*) See title COPYHOLDS, Vol. VIII., pp. 49, 66, 83, 104, 113, 116. As a general rule a *quasi*-committee in lunacy will, if authorised by the master in lunacy, be clothed with sufficient authority without further application to the Board of Agriculture; see *ibid.*, p. 116.

(*e*) See title COPYHOLDS, Vol. VIII., p. 104. Here, again, a *quasi*-committee under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116, has been authorised to be admitted (*Re Andrews* (1904), Registrars' Library, Lunacy Office).

(*f*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 126 (1).

(*g*) *Ibid.*, s. 126 (2).

(*h*) *Ibid.*, s. 126 (3).

(*i*) *Ibid.*, s. 126 (4).

SECT. 7. Copyholds.

the land and receive the rents and profits until repayment, although the lunatic die before reimbursement (*k*). A lunatic is not debarred from himself controverting the legality of the fine, nor can any lunatic so found incur a forfeiture of any land for neglecting or refusing to appear at any court or to be admitted or to pay the fine on admittance (*l*).

Lord of a manor, a lunatic.

936. Where the estate of a lunatic includes a manor, the lunacy of the lord does not invalidate a grant by him of copyholds warranted by the custom (*m*).

SECT. 8.—*Stock.*

Order for transfer.

937. Where any stock (*n*) is standing in the name of or vested in a lunatic beneficially, or in a committee of the estate of a lunatic in trust for him, and the committee dies intestate, or himself becomes lunatic or is out of the jurisdiction of the High Court, or it is uncertain whether the committee is living or dead, or he neglects or refuses to transfer the stock and to receive and pay over the dividends as the judge in lunacy directs, then the judge (*o*) may order some person to transfer (*p*) the stock into court (*q*) or into the name of a new committee or otherwise, and also to receive and pay over the dividends in such manner as the judge directs (*r*).

(*k*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 126 (5).

(*l*) *Ibid.*, s. 126 (6).

(*m*) 1 Watkins, Treatise on Copyholds, 4th ed., 24, 35, 255; title COPYHOLDS, Vol. VIII., p. 83; see also Pope, Law and Practice of Lunacy, 2nd ed., 174.

(*n*) "Stock," as defined by the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 341, includes any fund, annuity, or security transferable in books kept by any company or society, or by instrument of transfer alone, or by instrument of transfer accompanied by other formalities, and any share or interest therein, and also shares in ships registered under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104).

(*o*) The master in lunacy has jurisdiction to make orders under this provision whether the lunatic is or is not so found by inquisition, or is a person with reference to whom an order has been made under the Lunacy Act, 1890 (53 & 54 Vict. c. 5) s. 116 (i.) (d) (*Re Browne*, [1894] 3 Ch. 412, C. A.; see *Re Fuller* (*a Person of Unsound Mind not so Found*), [1900] 2 Ch. 551, C. A.). A county court judge has no jurisdiction to make a vesting order of stock standing in the name of a lunatic (*Re Noyce*, [1892] 1 Q. B. 642, C. A.). Orders made under this provision must be entitled "In the matter of the Lunacy Acts, 1890—1908," as well as in the particular lunacy, except cases under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116 (i.) (d) (*Re Purvis* (*a Person of Unsound Mind*), [1904] 1 Ch. 373, C. A.).

(*p*) The person to transfer must be some proper officer of the bank, or company, or society whose stock is to be transferred (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 137).

(*q*) The usual practice in lunacy is to transfer the stock into court, unless sufficient reason exist for not doing so (*Re Browne*, *supra*, *per* LINDLEY, L.J., at p. 417; *Re Auchmuty* (1908), 99 L. T. 462, C. A.).

(*r*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 33. An order directing lodgment in court of securities, but payment of accrued dividends to date of lodgment direct to the committee or *quasi*-committee, is valid and may safely be acted upon by the bank or other company in whose possession the accrued dividends may be (*Re Spurling*, [1909] 1 Ch. 199, C. A.; see also *Re Sherwell*, Lunacy Order (1904), 29th April). Although there is also power to order

SECT. 8.
Stock.

Transfer of stock of lunatic residing out of the jurisdiction.

938. Where any stock is standing in the name of or is vested in a person residing out of the jurisdiction of the High Court, the judge in lunacy, upon proof to his satisfaction that the person has been declared lunatic and that his personal estate has been vested in a person appointed for the management thereof according to the law of the place where he is residing, may, under the Lunacy Act, 1890 (*s*), s. 134, order some fit person to transfer the stock to the person so appointed or otherwise, and also to receive and pay over the dividends thereof (*a*).

Before such an order can be made a foreign judicial declaration of lunacy must be made, and the status of the patient altered (*b*). To ascertain whether a foreign judicial declaration of lunacy has been made the court will look to the substance rather than to the form (*c*). The above-mentioned section also requires that the personal estate of the lunatic shall have been "vested" in a person appointed for the management thereof. This is not confined to vesting in the strict sense, but includes the right to obtain and deal with such estate without being the actual owner (*d*). The judge in lunacy has an absolute discretion under this provision (*e*), and the court refuses to lay down rules governing the exercise of such discretion (*f*).

Capital must be required for maintenance.

Before the court will order the capital to be transferred to the foreign curator it must as a rule be shown that it is wanted for the maintenance of the lunatic (*g*). Where it is not required for maintenance, then, unless special circumstances can be shown, the dividends only will be paid (*h*).

This provision is not applicable to a fund representing the proceeds of sale of real estate the title to which is regulated by English law. The income of the property may, however, be paid (*i*).

In the absence of a foreign judicial declaration of lunacy, the

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payment of future dividends by the bank to the committee or *quasi*-committee without lodging the *corpus* in court, the more usual and proper practice is to order the stocks themselves to be transferred into court into the name of the Paymaster-General and to direct him to pay the future dividends to the committee or *quasi*-committee (*Re Auchmuty* (1908), 99 L. T. 462, C. A.). As to the effect of such orders as indemnities, see note (*m*), p. 456, *post*.

(*s*) 53 & 54 Vict. c. 5.

(*a*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 134. The orders under this provision are made by the Lords Justices upon minutes of order submitted by the master.

(*b*) *Didisheim* v. *London and Westminster Bank*, [1900] 2 Ch. 15, C. A.

(*c*) *Re Tarratt* (1884), 51 L. T. 310, C. A.

(*d*) *Re Brown* (*a Lunatic*), [1895] 2 Ch. 666, C. A.

(*e*) *Re Barlow's Will* (1887), 36 Ch. D. 287, C. A.; *Re Knight* (*a Lunatic*), [1898] 1 Ch. 257, C. A.; *New York Security and Trust Co.* v. *Keyser*, [1901] 1 Ch. 666.

(*f*) *Re De Larragoiti* (*a Person of Unsound Mind*), [1907] 2 Ch. 14, C. A., *per* COZENS-HARDY, M.R., at p. 19.

(*g*) *Re Brown* (*a Lunatic*), *supra*; *Re Knight* (*a Lunatic*), *supra*; *Re De Larragoiti* (*a Person of Unsound Mind*), *supra*.

(*h*) *Re Stark, a Lunatic* (1850), 2 Mac. & G. 174; *Re Elias, a Lunatic* (1851), 3 Mac. & G. 234; *Re Garnier* (1872), L. R. 13 Eq. 532; *Re Mitchell* (*a Lunatic Domiciled in Scotland*) (1881), 17 Ch. D. 515, C. A.; *New York Security and Trust Co.* v. *Keyser*, *supra*.

(*i*) *Grimwood* v. *Bartels* (1877), 46 L. J. (CH.) 788.

SECT. 8.
Stock.

Jurisdiction of Chancery Division.

Chancery Division has jurisdiction to order a transfer, and will do so in a proper case where no application is in fact made in lunacy (*k*). The foreign curator may apply in his own name without joining the lunatic (*l*).

SECT. 9.—*Mortgages.*

Vesting order.

939. When a lunatic is solely or jointly (*m*) seised or possessed (*n*) of any land (*o*), or solely or jointly entitled to a contingent right in any land, by way of mortgage, the judge in lunacy may by order vest such land in such person for such estate and in such manner, or release such hereditaments from the contingent right and dispose of the same to such person as he may direct. In all such cases the judge in lunacy may, if it is more convenient, appoint a person to convey the land or release the contingent right (*p*). When the lunatic is beneficially entitled, the master in lunacy has jurisdiction not only to make an order for payment off of the mortgage money, but also to appoint a person in place of the lunatic to reconvey (*q*). A transfer of the mortgage may be effectuated under the above provision (*r*).

Appointment of person to convey.

Title of application.

Applicant.

The application should be intituled in the matter of the mortgage and of the particular lunacy and of the Lunacy Acts, 1890—1908 (*s*). The applicant should be the lunatic acting by his committee or *quasi*-committee, and the mortgagor should not be served, and even if served he is not entitled to costs out of the lunatic's estate (*t*). If the mortgagor makes the application where the committee or *quasi*-committee has not declined to do so, he may have to pay the costs (*u*).

Where service on other parties required.

Where on an application for a reconveyance there has been an assignment of the equity of redemption, the court requires the

(*k*) *Didisheim* v. *London and Westminster Bank*, [1900] 2 Ch. 15, C. A.

(*l*) *Thiery* v. *Chalmers, Guthrie & Co.*, [1900] 1 Ch. 80.

(*m*) The word "seised" in the Lunacy Act, 1890 (53 & 54 Vict. c. 5), includes any vested estate for life or of a greater description, and extends to estates at law and in equity in possession or in futurity in any lands (Lunacy Act, 1891 (54 & 55 Vict. 65), s. 28).

(*n*) The word "possessed" includes any vested estate less than a life estate at law or in equity in possession or in expectancy in any lands (*ibid.*).

(*o*) The word "land" includes an undivided share of land (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 41).

(*p*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 135 (1), (2), (4). By the Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 2, it is provided that an order under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 135 (1), (2), shall have the same effect as if the lunatic had been sane and, if solely seised, possessed or entitled as aforesaid, had executed, or, if jointly seised, possessed or entitled as aforesaid with any other person or persons, he and such other person or persons had executed a deed conveying the land for the estate named in the order, or releasing or disposing of the contingent right. The application for a reconveyance or transfer should be by summons, and may be made by any person beneficially interested in the equity of redemption or in the mortgage money, whether under disability or not (Rule in Lunacy, 1900 (b); Rules in Lunacy, 1892, r. 57 (b)).

(*q*) *Re Carnaby Gray* (1900), 26th July, *per* COLLINS, L.J., Registrars' Library, Lunacy Office. For a form, see Encyclopædia of Forms and Precedents, Vol. XVI, p. 433.

(*r*) *Re Nicholson* (*a Person of Unsound Mind*) (1887), 34 Ch. D. 663, C. A.

(*s*) Rules in Lunacy, 1892, r. 58.

(*t*) *Re Phillips* (1869), 4 Ch. App. 629.

(*u*) *Re Wheeler, a Person of Unsound Mind* (1852), 1 De G. M. & G. 434; see *Re Sparks* (*a Person of Unsound Mind*) (1877), 6 Ch. D. 361, C. A.

original mortgagor to be served or the assignment strictly proved. Copyhold land vested under this provision with the consent of the lord of the manor vests without surrender or admittance (*a*).

Copyholds.

The above provisions do not affect the jurisdiction of the High Court as to any lunatic mortgagee who is an infant (*b*).

SECT. 10.—*Power Vested in Lunatic as Trustee or Guardian.*

Exercise of fiduciary powers.

940. Where a power is vested in a lunatic in the character of trustee or guardian, or the consent of the lunatic to the exercise of a power is necessary in the like character or as a check upon the undue exercise of the power, and it appears to be expedient that the power should be exercised, or the consent given, the committee of the estate may, under an order of the judge in the name and on behalf of the lunatic upon the application of any person interested, exercise such power or give such consent in such manner as the order directs (*c*). Under the above provision a committee or *quasi*-committee may exercise any power vested in the lunatic in a fiduciary capacity, although he is not in fact a trustee (*d*), such as a joint power of appointment in a marriage settlement in favour of children (*e*), or a consent to the exercise of a power of advancement (*f*), or a power given by a settlement to a tenant for life to sell settled land (*g*).

Exercise of power to appoint new trustees.

The power to appoint new trustees is also of a fiduciary character, and the committee or *quasi*-committee can by order exercise such power (*h*). The trustees so appointed have the same rights and powers as they would have had if the order had been made by the High Court (*i*).

Vesting order

Where trustees are so appointed and it seems to the judge to be for the lunatic's benefit and also expedient, he may make a vesting order (*k*), and that by the same order as that which directs the

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(*a*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 135 (5).

(*b*) *Ibid.*, s. 143.

(*c*) *Ibid.*, s. 128. The application should be by summons (Rules in Lunacy, 1892, rr. 19, 21). The jurisdiction may be exercised by the master in lunacy (*Re Shortridge* (*a Person of Unsound Mind*), [1895] 1 Ch. 278, C. A.; *Re Fuller* (*a Person of Unsound Mind not so Found*), [1900] 2 Ch. 551, C. A.). See generally, as to the powers of the master, p. 414, *ante*.

(*d*) *Re A.* (*a Person of Unsound Mind not so Found by Inquisition*), [1904] 2 Ch. 328, C. A., *per* ROMER, L.J., at p. 333.

(*e*) *Ibid.*

(*f*) *Re Nevill, a Lunatic* (1885), 31 Ch. D. 161, C. A.

(*g*) *Re X.* (*a Person through Mental Infirmity incapable of managing his Affairs*), [1894] 2 Ch. 415, C. A.

(*h*) *Re Garrod* (*a Lunatic*) (1885), 31 Ch. D. 164, C. A.; *Re Skeats' Settlement, Skeats* v. *Evans* (1889), 42 Ch. D. 522, C. A.; *Re Shortridge* (*a Person of Unsound Mind*), *supra*. The appointment should in such a case be made by him (*Re Blake* (*a Person of Unsound Mind*), [1887] W. N. 173, C. A.); but if the committee will not act, the appointment of new trustees can be obtained by the beneficiaries under the jurisdiction of the High Court (*Re Sparrow* (1870), 5 Ch. App. 662; *Re Heaphy's Trusts* (1870), 18 W. R. 1070); but not the Court in Lunacy (*Re Garrod* (*a Lunatic*), *supra*). See also title TRUSTS AND TRUSTEES.

(*i*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 129.

(*k*) *Ibid.*

SECT. 10. Power Vested in Lunatic as Trustee or Guardian.

committee or *quasi*-committee to exercise the power of appointing new trustees (*l*).

SECT. 11.—*Power to carry Orders into Effect.*

Execution and effect of assurances.

941. A committee, *quasi*-committee, or such other person as the master approves, can in the name and on behalf of the lunatic execute and do all such assurances and things for giving effect to any order (*m*) under the Lunacy Acts (*n*) as the master directs; and every such assurance and thing is valid and effectual, and takes effect accordingly, subject only to any prior charges to which the property affected thereby at the date of the order is subject (*o*). This provision is wide enough to enable the court to authorise the committee of a lunatic to execute a conveyance on behalf of a lunatic with all such covenants as are usual in such a conveyance, including the ordinary covenants for title (*p*).

(*l*) *Re Shortridge* (*a Person of Unsound Mind*), [1895] 1 Ch. 278, C. A. (stock); *Re Bowmer, a Lunatic* (1859), 3 De G. & J. 658, C. A. (where see form of order); *Re Fuller* (*a Person of Unsound Mind not so Found*), [1900] 2 Ch. 551, C. A. (freeholds: order made by the master). As to land or stock held by a lunatic as trustee, see p. 414, *ante;* title TRUSTS AND TRUSTEES.

(*m*) The Lunacy Act, 1890 (53 & 54 Vict. c. 5), and every order made thereunder is a full discharge to the bank and every company and person for all acts done pursuant thereto, or to rules thereunder so far as relates to any property in which the lunatic is interested beneficially, or as trustee, or as mortgagee; it is unnecessary to inquire into the propriety of any order thereunder relating to such property or the jurisdiction to make the same (see *ibid.*, s. 333).

(*n*) As to these Acts, see note (*b*), p. 412, *ante.*

(*o*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 124; Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1. This provision is inserted in the Lunacy Act, 1890 (53 & 54 Vict. c. 5), in order to supply a possible defect or to get rid of a possible doubt as to the jurisdiction to order subsidiary acts to be done when exercising a limited statutory jurisdiction. It is an enabling clause, not a disabling one, and expressly recognises the power to do in detail that which the statute has authorised in more general terms (*Re Sefton* (*Earl*) (*a Person of Unsound Mind*), [1898] 2 Ch. 378, C. A., *per* LINDLEY, M.R., at p. 387).

(*p*) *Re Ray* (*a Person of Unsound Mind*), [1896] 1 Ch. 468, C. A., *per* KAY, L.J., at p. 476. *Re Fox* (*a Lunatic*) (1886), 33 Ch. D. 37, C. A., is only a decision that under the particular circumstances of that case the court would not authorise a committee to enter into covenants on the lunatic's behalf (*Re Ray* (*a Person of Unsound Mind*), *supra*). Restrictive covenants on behalf of a lunatic have been authorised (*Re S. A.* (1906), Registrars' Library, Lunacy Office). By virtue of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 7 (1) (F), a covenant is implied in cases where the person conveying is expressed to convey as committee of a lunatic so found by inquisition or under an order of the court, and such a covenant would be binding on the conveying party personally. In practice, however, this provision has no application, since a committee never does convey "as committee," but always conveys "in the name and on behalf of the lunatic" as beneficial owner or mortgagee as the case may be, in which case the covenants implied are of course those associated with the words "beneficial owner" or "mortgagee" respectively (see titles MORTGAGE; REAL PROPERTY AND CHATTELS REAL; SALE OF LAND), and are only binding on the lunatic's estate. Further, the expression "under an order of the court" is construed as meaning under an order of the High Court of Justice, and does not apply to an order in lunacy authorising the committee to convey (Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 2 (xviii.)). As to execution by the committee, compare p. 447, *ante.*

SECT. 12.—*Effect of Death of Lunatic.*

SECT. 12. **Effect of Death of Lunatic.**

Abatement of proceedings pending appointment of legal personal representative.

942. Proceedings in lunacy will be abated by the lunatic's death (*a*): and will so remain until his legal personal representative has been duly constituted. In exceptional cases and to prevent injustice there is jurisdiction to give directions ancillary to an order made during the patient's lifetime; thus the judge in lunacy may vary an order after the lunatic's death (*b*), and where a mortgage has been paid off before the lunatic's death a declaration may be made after such death as to the person in trust for whom the land is held (*c*). But as a rule no further order or direction will be made until a legal personal representative has been constituted; and costs properly incurred in the lunacy before the death will not be referred for taxation until a representative is so constituted (*d*).

Duty of representative.

943. When constituted, the executor or administrator will ordinarily apply for transfer of the lunatic's property to himself (*e*), since the master will not administer the lunatic's estate, nor decide between adverse claimants (*f*). A committee will not, before his discharge, be ordered to hand over documents in his possession to the personal representative of the lunatic (*g*). The Court in Lunacy will, however, not decide who is entitled to documents or funds in its custody or in the possession of the committee (*h*), nor will it appoint a receiver of rents (*i*), nor will it entertain an application by the legal personal representative of the lunatic against the committee for an account (*j*), nor, even when there is no adverse claim, can the committee be ordered to account in

No administration by lunacy jurisdiction.

(*a*) *Re Way, a Person of Unsound Mind* (1861), 3 De G. F. & J. 175, C. A.; and see *Foot* v. *Leslie* (1885), 16 L. R. Ir. 411, where it was held that a committee could not maintain an action for rent accrued since the lunatic's death, though the lunacy proceedings were still pending. As to the effect of death upon the percentage charge, see p. 459, *post*. As to the effect of death upon an order for payment of costs, see p. 460, *post*.

(*b*) *Re A. W.* (1910), Registrars' Library, Lunacy Office.

(*c*) *Ex parte Grimstone* (1772), Amb. 706.

(*d*) *Re Popham* (1881), 29 W. R. 403, C. A.

(*e*) The application is by summons (Rules in Lunacy, 1892, r. 19) supported by strict evidence of the lunatic's death, and the probate or letters of administration must be produced. The summons must be served on the committee although he has passed his accounts and his security has been discharged (*Re Wylde, a Lunatic* (1854), 5 De G. M. & G. 25, C. A.). Prior to the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), a fund standing to a real estate account in lunacy was paid out to the heir-at-law on his application (*Re Wharton, a Lunatic* (1854), 5 De G. M. & G. 33, C. A.). But since the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), money standing to a real estate account is paid to the lunatic's legal personal representative. In the case of money standing to a copyhold account the question of title has not yet been decided; but the money will not be paid out either to the legal personal representative or the customary heir unless they both attend and consent, and the customary heirship must be strictly proved.

(*f*) *Re Ferrior* (*a Lunatic*), *Carrow* v. *Ferrior*, *Dunn* v. *Ferrior* (1867), 3 Ch. App. 175, 181.

(*g*) *Re Hinchcliffe* (1894), 43 W. R. 82, C. A.

(*h*) *Ex parte Gilbert* (1810), 1 Ball & B. 297; *Wigg* v. *Tiler* (1779), 2 Dick. 552.

(*i*) *Re Ferrior* (*a Lunatic*), *Carrow* v. *Ferrior*, *Dunn* v. *Ferrior*, *supra*. As to the incapacity of a committee or *quasi*-committee to recover rents after the death of the patient, see p. 434, *ante*.

(*j*) *Grosvenor* v. *Drax* (1833), 2 Knapp, 82, P. C.

SECT. 12. Effect of Death of Lunatic.

lunacy for rents and income accrued since the lunatic's death (*k*); nor can the solicitor for the committee be ordered to account in the lunacy for rents so accrued and received by him as solicitor for the committee (*l*); nor will the master interfere with the legal personal representative by ordering payment of the expenses of past maintenance (*m*). In short, such is the objection to administering in any way a deceased lunatic's estate that an order for sale of funds in court and payment of proceeds of sale to the legal personal representative is almost invariably refused, the master holding that the estate ought to be transferred or paid to the person entitled thereto in the exact condition in which it then is. In all such cases when any rights have to be ascertained or any other relief is required an action must be commenced in the appropriate division of the High Court of Justice, and pending the result of such action the lunatic's property will be retained under the jurisdiction of the Court in Lunacy (*n*).

Actions maintainable in the Chancery Division.

944. An action can be maintained in the Chancery Division against a committee for an account of his dealings with the deceased lunatic's estate (*o*), and when there are adverse claims to the estate the committee may without prejudice to any question of title be restrained from interfering with the rents under colour of the authority vested in him as committee (*p*), but he will not be so restrained when he has entered into and taken possession as an adverse claimant and not as committee (*q*).

SECT. 13.—*Court Percentage.*

Rate in the case of lunatics so found.

945. Percentage is payable to the court at the rate of 4 per cent. per annum on the clear annual income amounting to £100 and upwards of every lunatic so found by inquisition, provided that no larger sum is payable in any case in any one year than £400 (*r*).

Rate in other cases.

In the case of lunatics not so found by inquisition, and of persons mentioned in the Lunacy Act, 1890 (*s*), s. 116 (1) (d), with respect to whom orders have been made, under which income is from time to time dealt with or made available, percentage is payable at the rate of 2 per cent. per annum on the clear annual income amounting to £100 and upwards so dealt with or made

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(*k*) *Re Butler* (1866), 1 Ch. App. 607; *Re Walker*, [1907] 2 Ch. 120, C. A.; and see p. 434, *ante*.

(*l*) *Re Butler, supra.*

(*m*) *Re Marman's Trusts* (1878), 8 Ch. D. 256, C. A.

(*n*) *Wigg* v. *Tiler* (1779), 2 Dick. 552.

(*o*) *Scammell* v. *Light* (1862), 7 L. T. 414; see also *Re Butler, supra; Re Walker, supra.*

(*p*) *Re Fitzgerald, a Lunatic* (1805), 2 Sch. & Lef. 432; *Re Butler, supra.*

(*q*) *Re Butler, supra.*

(*r*) Rules in Lunacy, 1892, r. 126. The authority for making rules and fixing percentages is vested in the Lord Chancellor, with the concurrence of the Treasury, pursuant to the Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 26, as altered by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), s. 6 (c); the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 148; and the Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 27 (3).

(*s*) 53 & 54 Vict. c. 5; see p. 429, *ante.*

available, provided that no larger sum is payable in any case in any one year than £200 (*t*).

SECT. 13. Court Percentage.

In the case of persons who have become subject to the lunacy jurisdiction by reason of the transmission of the record of an Irish inquisition and its entry of record here (*a*), and also in the case of persons residing abroad and declared lunatic according to their place of residence (*b*), percentage is only levied upon income arising from property within the jurisdiction of, and administered by the master in lunacy (*c*).

Irish and foreign cases.

946. Instead of applying to a committee or *quasi*-committee for payment of percentage, the master may certify to the Paymaster-General the amount of such percentage to be paid by him out of cash arising from dividends of the lunatic standing to his credit (*d*) in the lunacy, whereupon the Paymaster will carry over the amount mentioned in the master's certificate to a lunacy percentage account (*e*).

Percentage payable out of funds in court.

947. The percentage or a proportionate part thereof, as the case may require, is charged upon the estate of the lunatic and is payable thereout although before payment thereof he dies or the inquisition is superseded or is vacated and discharged on a traverse; but in either of the two last-mentioned cases the master may, if he think fit, remit or reduce the amount of the sum to be paid (*f*).

Effect of death, *supersedeas* or traverse before payment.

SECT. 14.—*Costs.*

948. The costs of all proceedings for the purpose of ascertaining whether a person is a lunatic, and of all proceedings in the matter of a lunatic, are in the discretion of the judge in lunacy, who may order all or any of such costs to be paid by the lunatic or alleged lunatic, or to be charged upon and paid out of his estate

All costs in discretion of judge.

(*t*) Rules in Lunacy, 1892, r. 127. The Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 148 (4), provides that where the property of a lunatic so found does not exceed £700 in value, or the income thereof does not exceed £50 per annum, the master may dispense with fees and percentages, but on the construction of Rules in Lunacy, 1892, rr. 126, 127, no percentage is payable on incomes under £100 per annum, whether the lunatic is so found or not. In calculating the percentage payable, sums less than 10*s.* will be disregarded, and will not be levied (Rules in Lunacy, 1892, r. 128).

(*a*) See pp. 427, 436, *ante.*

(*b*) See p. 453, *ante.*

(*c*) Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 27 (3). When a lunatic is so found in England and the record is transmitted to Ireland, where all his property is, percentage is paid on the income in Ireland; no percentage is payable to the English court in lunacy on the amount remitted to England for the lunatic's maintenance here (*Re Grehan* (*a Lunatic*), [1895] 2 Ch. 12, C. A.).

(*d*) Rules in Lunacy, 1892, r. 134.

(*e*) *Ibid.*, r. 136. Where application is made to a committee or *quasi*-committee, the practice is to send out a printed notice requiring him to pay the amount stated on the notice by impressed stamps on such notice (*ibid.*, r. 138). The percentage is payable out of the first moneys coming to the hands of the committee or *quasi*-committee on account of his patient's income (*ibid.*, r. 133), and on default in payment the master will certify the facts to the Treasury (*ibid.*, r. 140), whereupon the official solicitor (see title COURTS, Vol. IX., p. 71) will (when necessary) commence proceedings against the person in default by putting his bond in suit.

(*f*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 148 (3).

SECT. 14. **Costs.**

Death of lunatic.

or any part thereof, or by any other party to the proceedings; and in the case of the death of the lunatic or alleged lunatic, an order for payment of costs out of his estate may be made within six years next after the right to recover the costs has accrued (*g*), and every such order has the effect of an order of the High Court (*h*).

Costs of unsuccessful petition.

949. On an unsuccessful petition the court has power (1) to order the petitioner to pay the respondent's costs or any part of them; (2) to order the respondent to pay the petitioner's costs or any part of them; (3) to leave each party to pay their own costs (*i*). In determining which of the above orders should be made, the points to be considered are (1) the reasons for believing in the insanity of the alleged lunatic; (2) the reasons for believing him to be not only insane but also incapable of managing himself or his affairs; (3) the reasons for instituting any proceedings assuming him to be insane and incapable of managing himself or his affairs; and (4) the relation in which the petitioner stands to the alleged lunatic and the objects and conduct of the petitioner (*k*).

General principle and its application with regard to proceedings in lunacy.

950. The theory upon which proceedings in lunacy are taken is that the proceedings are for the benefit and protection of the persons who are believed to be incapable by reason of mental infirmity of protecting themselves and their property. The principle, therefore, applicable to a litigant who has failed in his litigation is not even *primâ facie* applicable to a petitioner who asks for the protection of the law in favour of one requiring the law's protection; and, if the demand for an inquiry is really prompted by a desire to protect the person and property of the alleged lunatic, and is presented on reasonable grounds and in a reasonable manner, the expense of such a proceeding ought not to fall upon the person so invoking the aid of the law (*l*). Moreover, the rules against champerty do not

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(*g*) The right to recover accrues at latest when the order for taxation is made (*Re Cumming, Ex parte Turner* (1860), 9 W. R. 213, C. A.), and both the order for payment and the order for taxation must be made within the six years (S. C., as reported 2 De G. F. & J. 376, C. A.). Representation to the deceased lunatic's estate must be obtained, and the executor or administrator must be before the court before an order is made.

(*h*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 109, which is framed in the widest possible terms, so as to give the court complete jurisdiction to award costs in accordance with what may appear to be right (*Re Cathcart*, [1893] 1 Ch. 466, C. A.). Although an order as to lunacy costs will have the effect of an order of the High Court, it is not an order of the High Court within the meaning of the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 49, and it is, therefore, appealable without leave (*Re Cathcart, supra*). As to appeals in lunacy, see p. 413, *ante;* and title COURTS, Vol. IX., pp. 95, 96.

(*i*) *Re Cathcart*, [1892] 1 Ch. 549, C. A., *per* LINDLEY, L.J., at p. 558. It is very doubtful whether the master in lunacy has jurisdiction to order payment of costs to an unsuccessful petitioner. Such an order would exceed the powers of a judge of the High Court, and could, it is suggested, only be made by the judge in lunacy under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 109.

(*k*) *Re Cathcart*, [1892] 1 Ch. 549, C. A., *per* LINDLEY, L.J., at p. 558, where the learned judge enumerated a fifth point to be considered. But such fifth point was subsequently disapproved by Lord HALSBURY in *Re Cathcart*, [1893] 1 Ch. 466, C. A., at p. 472.

(*l*) *Re Carthcart*, [1893] 1 Ch. 466, C. A., *per* Lord HALSBURY, at pp. 471, 472; see *Re* ———, *an Alleged Lunatic* (1889), 5 T. L. R. 227, C. A.

apply to proceedings in lunacy, and parties are to be encouraged to interfere and bring the facts before the court. This object would be impeded if agreements relative to the costs of proceedings or the ultimate division of the property were void (*a*).

Scale of costs applicable.

951. Solicitors acting in lunacy proceedings are entitled to charge and be allowed the fees they would be entitled to charge and be allowed for work and labour of a similar character transacted in the Chancery Division (*b*). But charges and expenses will not be allowed, except to committees of the estate or person, unless in special circumstances the judge or master in any case directs them to be allowed (*c*).

SECT. 15.—*Miscellaneous.*

Office copies; admissibility.

952. Every office copy of the whole of an order or report confirmed by fiat purporting to be signed by a master and sealed or stamped with a seal of the master's office, and every office copy of a certificate in lunacy is at all times, and on behalf of all persons, and whether for the purposes of the Lunacy Act, 1890 (*d*), or otherwise, admissible as evidence of the order, report, or certificate of which it purports to be a copy without any further proof (*e*).

Paymaster-General and Bank of England to act on office copy order.

953. Where an order relates to the payment, transfer, carrying over, or other disposal of any cash, stocks, funds, annuities, securities, or other effects standing to a lunacy credit, or to or in which a lunatic is entitled or beneficially interested, the Paymaster-General and the Bank of England and all other persons must act upon an office copy of the order (*f*), and all transfers and payments

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(*a*) *Persse* v. *Persse* (1840), 7 Cl. & Fin. 279, 316, H. L.; see *Re E. S.* ——— (*a Supposed Lunatic*) (1876), 4 Ch. D. 301, C. A., where costs were refused to an unsuccessful petitioner; *Re C.* (*an Alleged Lunatic*) (1874), 10 Ch. App. 75, where they were granted to such petitioner; and *Re Windham* (*an Alleged Lunatic*) (1862), 4 De G. F. & J. 53, C. A., where the question was much discussed.

(*b*) Rules in Lunacy, 1892, r. 112. As a matter of fact this rule is to some extent ignored on the principle that the taxing master is not thereby deprived of his discretion under R. S. C., Ord. 65, r. 27 (29), with reference to items specified in Appendix N (*Re Ermen, Tatham* v. *Ermen*, [1903] 2 Ch. 156). As to solicitors' remuneration, see, generally, title SOLICITORS.

(*c*) Rules in Lunacy, 1892, r. 114. The form of direction to tax in the case of *quasi*-committees is not "solicitor and client" costs, but "reasonable and proper" costs, and in the case of committees "reasonable and proper costs, charges and expenses of and incident to the order." Costs antecedent to the application are not allowed unless expressly provided for in the order. As to cases in which the committee or *quasi*-committee may be allowed a salary, see p. 432, *ante*.

(*d*) 53 & 54 Vict. c. 5.

(*e*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 144. Orders in lunacy are not conclusive evidence of anything except their own existence; but, being made by a competent tribunal in a matter within its jurisdiction, they cannot be rejected as inadmissible, or as no evidence of the truth of those facts recited in them which are essential to their validity. They are admissible as *primâ facie* evidence, and if uncontradicted they ought to be regarded as sufficient evidence of those facts, not only in this country, but in all His Majesty's dominions (*Harvey* v. *R.*, [1901] A. C. 601, P. C., *per* Lord LINDLEY, at p. 611). As to the general effect of findings of other jurisdictions, see p. 410, *ante*. See also title EVIDENCE, Vol. XIII., pp. 530, 552.

(*f*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 145.

SECT. 15. Miscellaneous.

made in pursuance of the Lunacy Act, 1890 (*g*), under a master's order or certificate, will be valid and binding on all parties (*h*).

Effect of the Lunacy Act, 1890, and orders thereunder as indemnities etc.

954. The Lunacy Act, 1890 (*g*), and every order purporting to be made under it, is a full indemnity and discharge to the Bank of England and every other company and society and their respective officers and servants, and all other persons respectively for all acts and things done or permitted to be done pursuant thereto, or pursuant to the rules made thereunder, so far as relates to any property in which a lunatic is interested either in his own right or as trustee or mortgagee; and it is not necessary to inquire into the propriety of any such order relating to any such property or the jurisdiction to make the same (*i*).

Part X.—Actions by and against Lunatics.

SECT. 1.—*Parties.*

Lunatics so found.

Parties.

955. A lunatic so found by inquisition sues as plaintiff and defends by his committee (*k*), both the lunatic and the committee of the estate being made parties to the action (*l*). An action commenced by a lunatic without his committee will be stayed until the committee has been added (*l*), and that though the finding of insanity was only a partial one (*l*).

Committee must sue or defend only by leave.

Before bringing or defending an action the committee must obtain the sanction of the master in lunacy (*m*); but provision

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(*g*) 53 & 54 Vict. c. 5.

(*h*) *Ibid.*, s. 146.

(*i*) *Ibid.*, s. 333. Though an order for payment may not be mandatory but permissive in form, it will nevertheless entitle the bank or other person acting thereunder to the protection afforded by the above provision (*Re Spurling*, [1909] 1 Ch. 199, C. A.). Where a question is unsuccessfully raised by the Bank of England as to the validity of an order directing it to pay or transfer stocks or funds, it will not as a rule be treated as a hostile litigant, but rather as *amicus curiæ*, against whom no order as to costs should be made; see *Re Shortridge* (*a Person of Unsound Mind*), [1895] 1 Ch. 278, C. A.; but see *Re Spurling, supra.*

(*k*) R. S. C., Ord. 16, r. 17. As to proceedings in matrimonial causes, see title HUSBAND AND WIFE, Vol. XVI., p. 504.

(*l*) *Re Townshend's* (*Lord*) *Settlement, Townshend* (*Lord*) v. *Robins*, [1908] Ch. 201; *Fuller* v. *Lance* (1663), 1 Cas. in Ch. 18; *Farnham* v. *Milward & Co.* [1895] 2 Ch. 730, 735. The committee and lunatic are described in the title of the action as "A. B., committee of the estate of C. D., a person of unsound mind, so found by inquisition, and the said C. D. by the said A. B., his committee," plaintiffs or defendants (as the case may be) (1 Daniell's Chancery Practice, 7th ed., 134, 137; Chitty's Practice, 1141). As to partial finding in lunacy, see pp. 420, 422, *ante.*

(*m*) *Re Hinchcliffe* (1895), 73 L. T. 522, C. A.; *Re Notley, a Lunatic* (1839), 3 Jur. 719; and see p. 432, *ante.*

out of a lunatic's estate for the costs of litigation will not be made until such costs have been incurred (*n*). If a lunatic plaintiff be made a bankrupt, and the cause of action vests in his trustee in bankruptcy, the committee cannot continue the action (*o*).

Lunacy after action brought.

Where a plaintiff becomes a lunatic so found by inquisition after action brought, the next friend should give notice to the committee (*p*), who must be joined as co-plaintiff, and obtain leave to continue the proceedings (*q*).

Lunatic not so found.

Next friend or guardian *ad litem*.

A lunatic not so found by inquisition, whether a *quasi*-committee has or has not been appointed in lunacy, sues by his next friend (*r*), and defends by his guardian *ad litem* (*s*). The *quasi*-committee, when there is one, will act as next friend or guardian, as the case may be, having first obtained the sanction of the master in lunacy (*t*). If the plaintiff be in fact sane, he may apply to have the action dismissed and the next friend ordered to pay the costs of it (*u*); and in this connection an inquiry may be directed as to whether the plaintiff is of unsound mind and whether the action is for his benefit (*v*). When it is shown that an action is not for the plaintiff's benefit the court will stay it (*w*).

Proceedings by foreign curator etc.

956. A foreign curator or tuteur duly appointed by a foreign court can sue in his own name and that of his lunatic for the

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(*n*) *Re Manson* (1852), 21 L. J. (CH.) 249, C. A.

(*o*) *Farnham* v. *Milward & Co.*, [1895] 2 Ch. 730; and see *Re Farnham* (*a Lunatic*), [1895] 2 Ch. 799, C. A.; *Re Farnham* (*a Lunatic*) (No. 2), [1896] 1 Ch. 836, C. A.

(*p*) *Hartley* v. *Gilbert* (1843), 13 Sim. 596; *Re Armstrong* (*George*) *& Sons*, [1896] 1 Ch. 536.

(*q*) *Re Green's Estate, Green* v. *Pratt* (1879), 48 L. J. (CH.) 681.

(*r*) R. S. C., Ord. 16, r. 17; *Didisheim* v. *London and Westminster Bank*, [1900] 2 Ch. 15, 43, 44, C. A. The plaintiff should be described on the writ as "A. B., a person of unsound mind, not so found by inquisition, by C. D., his next friend" (see Chitty's Forms, 570), and the next friend signs a written authority to be filed at the Central Office, or the district registry if the action is proceeding therein (R. S. C., Ord. 16, r. 20). This written authority, however, is not required where the title of the action clearly shows that the next friend is a duly appointed *quasi*-committee. As to persons appointed as next friend and their removal, see titles ACTION, Vol. I., p. 22; COUNTY COURTS, Vol. VIII., pp. 475, 479; INFANTS AND CHILDREN, Vol. XVII., pp. 140 *et seq.*; and see Yearly Practice of the Supreme Court, 1912, pp. 171 *et seq.* A next friend will not be ordered to give security for costs on the ground of his insolvency (*Cruickshank* v. *Knowles* (1897), unreported, *per* WILLS, J.), though he might on the ground that he was residing abroad (*Didisheim* v. *London and Westminster Bank*, *supra*, at p. 44).

(*s*) R. S. C., Ord. 16, r. 17. As to appearance by guardian, see p. 465, *post*.

(*t*) *Re Hinchcliffe* (1895), 73 L. T. 522, C. A.; *Re Notley* (1839), 3 Jur. 719.

(*u*) *Palmer* v. *Walesby* (1868), 3 Ch. App. 732; *Didisheim* v. *London and Westminster Bank*, *supra*.

(*v*) *Howell* v. *Lewis* (1891), 65 L. T. 672; *Pomery* v. *Pomery*, [1909] W. N. 158.

(*w*) *Didisheim* v. *London and Westminster Bank*, *supra*; *New York Security and Trust Co.* v. *Keyser*, [1901] 1 Ch. 666, 670; *Beall* v. *Smith* (1873), 9 Ch. App. 85; *Porter* v. *Porter* (1888), 37 Ch. D. 420, C. A.; *Waterhouse* v. *Worsnop* (1888), 59 L. T. 140.

SECT. 1. Parties.

Scottish curator.

recovery of the latter's property (*x*). But the court has a discretion as to directing the property to be handed over to the curator or tuteur, though an order will generally be made (*a*). A Scottish curator can sue and give discharges for his lunatic's personal estate in England (*b*); but when an English committee has been appointed, the curator has no *locus standi* as against him in England (*c*). When a writ is issued against a lunatic so found, his committee should be added as a defendant (*d*). But where the lunatic is not so found, the writ should be issued as though he were of sound mind, and without any reference thereon to his incapacity.

Effect of lunacy on retainer.

957. Where a solicitor's authority has, although without his knowledge, been revoked by his client's supervening insanity, the solicitor will be personally liable to pay the plaintiff's costs, if he enters an appearance for his client and defends an action, as having warranted an authority which he did not possess (*e*).

SECT. 2.—*Service on Lunatic Defendant.*

What is good service.

958. Where a lunatic or person of unsound mind not so found by inquisition is a defendant, service on the committee or the person with whom the person of unsound mind resides or under whose care he is will, unless the court or judge otherwise orders, be deemed good service on such defendant (*f*).

SECT. 3.—*Appearance and Default of Appearance.*

Appearance.

959. When an appearance is entered by a committee or *quasi*-committee for his lunatic, the appearance *præcipe* should show the

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(*x*) *Didisheim* v. *London and Westminster Bank*, [1900] 2 Ch. 15, 43, 44, C. A.; *Thiery* v. *Chalmers, Guthrie & Co.*, [1900] 1 Ch. 80.

(*a*) *Re Knight* (*a Lunatic*), [1898] 1 Ch. 257, C. A.; *New York Security and Trust Co.* v. *Keyser*, [1901] 1 Ch. 666; *Re Hill*, [1900] 1 I. R. 349; *Re Barlow's Will* (1887), 36 Ch. D. 287, C. A.

(*b*) *Scott* v. *Bentley* (1855), 1 Jur. (N. S.) 394.

(*c*) *Re R. S. A.*, [1901] 2 K. B. 32, C. A.; *Re Aytoun, Ex parte Robertson Dunham* (1901), 36 L. J. 407.

(*d*) For title of action, see note (*l*), p. 462, *ante*.

(*e*) *Yonge* v. *Toynbee*, [1910] 1 K. B. 215, C. A. See also as to the solicitor's liability for costs of a futile action, *Re Dunn, Simmons* v. *Liberal Opinion, Ltd.*, [1911] 1 K. B. 966, C. A.; and compare title INFANTS AND CHILDREN, Vol. XVII., p. 139, note (*i*). As to solicitor's retainer, see title SOLICITORS.

(*f*) R. S. C., Ord. 9, r. 5. The object is that service shall be effected upon some person qualified to act for the lunatic or most likely to know to whom the fact of the service ought to be communicated (*Fore Street Warehouse Co.* v. *Durrant, supra, per* GROVE, J., at p. 473; and see *Camps* v. *Marshall* (1873), 8 Ch. App. 462; *Blyth* v. *Green*, [1876] W. N. 214). In the case of a lunatic not so found, service on the keeper or medical officer of the asylum where he was detained has been allowed (*Thorn* v. *Smith*, [1879] W. N. 81; *Raine* v. *Wilson* (1873), 43 L. J. (CH.) 469), and the keeper of an asylum who refuses to allow service is liable to attachment (*Denison* v. *Hardings*, [1867] W. N. 17); service on the defendant's business manager is insufficient (*Fore Street Warehouse Co.* v. *Durrant, supra*).

committee's or *quasi*-committee's representative capacity, and state the date of the order in lunacy appointing him. It will not then be necessary to apply for the appointment of a guardian *ad litem*. When no proceedings in lunacy have been taken, the appearance should be entered as though the lunatic were of sound mind, and a guardian *ad litem* then applied for (*g*). On default of appearance by a lunatic not so found by inquisition the plaintiff must, before taking any further step in the action, apply to the court for the appointment of a guardian *ad litem* (*h*).

SECT. 3. Appearance and Default of Appearance.

Form of *præcipe*.

Appointment of guardian *ad litem*.

SECT. 4.—*Subsequent Proceedings.*

960. Any consent as to the mode of taking evidence or as to any other procedure, if given with the consent of the court or a judge by the next friend, guardian, or committee of a person under disability, has the same force and effect as if such party were under no disability. But a committee's consent is invalid as between himself and the lunatic unless given with the consent of the judge in lunacy (*i*).

Consents.

961. The non-denial by a lunatic, whether so found or not, of allegations of fact in any pleading does not amount as against him to an admission thereof (*k*).

Pleading. Admissions.

No special case to which a person of unsound mind not so found is a party can be set down for argument without the leave of a court or a judge (*l*).

Special case.

(*g*) *Cutbush* v. *Cutbush* (1893), 37 Sol. Jo. 685. The appointment of such guardian is obtained in the King's Bench Division by an *ex parte* application to a master supported by an affidavit, and in the Chancery Division by a petition of course lodged with the senior registrar. A guardian *ad litem* may be appointed at the instance of a co-defendant (*Re Dawson, Johnston* v. *Hill* (1889), 41 Ch. D. 415). A married woman is not eligible for the post (*Re Somerset* (*Duke*), *Thynne* v. *St. Maur* (1887), 34 Ch. D. 465). When the official solicitor (as to whom see title COURTS, Vol. IX., p. 71) is appointed guardian *ad litem* he has no greater rights, and is in no better position, than any other solicitor appearing for a defendant, except that probably he will be allowed costs properly incurred in the conduct of the defence (*Gill* v. *Gill*, [1909] P. 157; and compare *Eady* v. *Elsdon*, [1901] 2 K. B. 460, C. A., and *Goatly* v. *Jones*, [1907] W. N. 161). If a lunatic recovers his sanity he can apply to discharge the order appointing a guardian *ad litem* (*Dunn* v. *R.* (1900), 44 Sol. Jo. 731).

(*h*) R. S. C., Ord. 13, r. 1. The application is made after the time limited for entering an appearance has expired, and notice of the application must be served six clear days before the hearing upon, or left at the dwelling-house of, the person with whom or under whose care the defendant was at the time of the service of the writ (*ibid.*).

(*i*) R. S. C., Ord. 16, r. 21. Notwithstanding this rule it has been held that a guardian *ad litem* can consent to any matter relating to the conduct of a cause without any order (*Fryer* v. *Wiseman* (1876), 24 W. R. 205; *Piggott* v. *Toogood*, [1904] W. N. 130; *Knatchbull* v. *Fowle* (1876), 1 Ch. D. 604). By the Judicature Act, 1899 (62 & 63 Vict. c. 6), s. 1, the sanction of the court or a judge must be obtained before a consent to a final appeal being heard by two Lords Justices instead of three is given on behalf of a person of unsound mind. As between a committee and his lunatic, the consent will not be valid unless previously sanctioned by the Lord Chancellor or Lords Justices.

(*k*) R. S. C., Ord. 19, r. 13. As to pleading, generally, see title PLEADING.

(*l*) R. S. C., Ord. 34, r. 4. On an application for such leave, evidence must be filed that the statements contained in the special case, so far as the

SECT. 4. Subsequent Proceedings.

Discovery.

The committee, next friend, or guardian *ad litem* of a lunatic cannot be compelled to answer interrogatories (*m*) or to make discovery of documents (*n*).

Stay of execution.

If judgment is obtained against a lunatic defendant a stay of execution may be granted (*o*) to enable an application to be made by the committee or *quasi*-committee to the Court in Lunacy for leave to pay the amount of the judgment debt out of the lunatic's estate (*p*).

Injunction.

Damages, application of.

An injunction may be granted against a lunatic (*q*). Money or damages recovered by or on behalf of a person of unsound mind not so found in the King's Bench Division must, unless the court or a judge otherwise directs, be paid to the Public Trustee to be applied by him for the maintenance and benefit of the plaintiff (*r*).

Part XI.—Administration with regard to the Reception and Care of Lunatics.

SECT. 1.—*The Commissioners in Lunacy.*

General functions.

962. The Commissioners in Lunacy discharge, amongst other duties hereinafter more particularly referred to, the following functions:—They visit asylums (*a*) and licensed houses (*b*), make rules as to the management thereof (*c*), see patients and investigate and deal with patients (*d*), grant licences for private asylums within their jurisdiction (*e*), and report to the Lord Chancellor and also to Parliament (*f*).

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same affect the interest of the lunatic, are true (R. S. C., Ord. 34, r. 4), and on entering the case for argument a copy of the judge's order giving leave must be produced (*ibid.*, r. 5).

(*m*) *Ingram* v. *Little* (1883), 11 Q. B. D. 251. See title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 48, 49.

(*n*) *Curtis* v. *Mundy*, [1892] 2 Q. B. 178; *Dyke* v. *Stephens* (1885), 30 Ch. D. 189, where *Higginson* v. *Hall* (1879), 10 Ch. D. 235, was not followed.

(*o*) *Burt* v. *Blackburn* (1887), 3 T. L. R. 356, C. A. For rights of creditors as against a lunatic's property, when such property comes under the protection of the Court in Lunacy, see p. 440, *ante*.

(*p*) *Ames* v. *Parkinson* (1847), 2 Ph. 388.

(*q*) *J.* v. *S.*, [1894] 3 Ch. 72.

(*r*) R. S. C., Ord. 22, r. 15. These provisions apply to damages awarded under the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93) (R. S. C., Ord. 22, r. 15). As to the Public Trustee generally, see title TRUSTS AND TRUSTEES.

(*a*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 187.

(*b*) *Ibid.*, s. 191.

(*c*) *Ibid.*, s. 226.

(*d*) *Ibid.*, s. 194. See p. 471, *post*.

(*e*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 208. The Commissioners' immediate jurisdiction extends to the cities of London and Westminster, the counties of London and Middlesex, and the following parishes and places—that is to say, Barnes, Kew Green, Mortlake, Merton, Mitcham, and Wimbledon in the county of Surrey; Southend in the county of Kent; and East Ham, Leyton, Leytonstone, Low Leyton, Plaistow, West Ham, and Walthamstow in the county of Essex; and also every place within the distance of seven miles from any part of the cities of London or Westminster or of the borough of Southwark (*ibid.*, Sched. III.).

(*f*) *Ibid.*, s. 162.

SECT. 1. The Commissioners in Lunacy.

Qualifications of paid Commissioners.

Commissioners in receipt of a salary, voted by Parliament, must be either medical practitioners or barristers of not less than five years' standing (*g*). Their appointment, the appointment of their secretary and clerks, their meetings and procedure, and their reports to the Lord Chancellor and to Parliament are dealt with in the Lunacy Act, 1890 (*h*).

SECT. 2.—*The Visitors in Lunacy.*

Chancery visitors.

963. Visitors in lunacy, commonly referred to as "Chancery visitors," discharge, amongst other functions, the duty of visiting lunatics so found by inquisition (*i*), and also persons not so found, but with reference to whom proceedings have been taken in lunacy (*k*). They act in concert with and under the direction of the masters in lunacy, who are *ex officio* members of their board (*l*). Not infrequently where, on a lunacy application, conflicting medical evidence is filed, the visitors are instructed to visit and report on the condition of the patient; and they also consider the suitability of the scheme for maintenance sanctioned by the master, and call for statements of account from the committee of the person (*m*). Visitors, other than a master in lunacy, must be medical practitioners or barristers of not less than five years' standing (*i*).

Board of visitors.

Visiting committee.

964. For every asylum there must be a visiting committee of not less than seven members appointed annually by the local authority (*n*) at their quarterly meeting in November (*o*). Such visiting committee hold office until the first meeting of their successors (*p*); or if default is made in electing a new committee,

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(*g*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 150. See title BARRISTERS, Vol. II., p. 382.

(*h*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 150—162. There are five honorary Commissioners, and three medical and three legal Commissioners. Their office is situate at 66, Victoria Street, S.W.

(*i*) *Ibid.*, s. 163.

(*k*) Rules in Lunacy, 1893, r. 5.

(*l*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 167.

(*m*) Rules in Lunacy, 1892, r. 107. The appointment of Chancery visitors, their powers and their duties, are dealt with in the Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 163—168, 183—186, and in the Rules in Lunacy, 1892, rr. 100—109. There are one legal and two medical visitors.

(*n*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 169 (1). For the definition of a local authority, see *ibid.*, s. 240, and note (*h*), p. 479, *post*.

(*o*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 170. The date for the election of the members of a visiting committee is not affected by the County Councils (Elections) Act, 1891 (54 & 55 Vict. c. 68) (55 J. P. 796). In the case of a district asylum the number of members of the committee is fixed by the agreement under which the asylum is provided (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 169 (2)). Where there is more than one asylum the local authority may appoint one committee, and the latter may appoint a sub-committee for each separate asylum (*ibid.*, s. 169 (3)). And where a county borough or a borough not being a county borough has contributed to the cost of any county asylum, such borough will be entitled to appoint members on the visiting committee (*ibid.*, s. 169 (4), (5)). Boroughs the councils of which are local authorities under the Lunacy Act, 1890 (53 & 54 Vict. c. 5) (see *ibid.*, Sched. IV.), must during the continuance of a contract for the reception of their pauper lunatics into a county asylum appoint a committee to visit such lunatics in the county asylum (*ibid.*, s. 169 (6)).

(*p*) *Ibid.*, s. 172 (1). Until the first meeting of their successors the old

SECT. 2. The Visitors in Lunacy.

the committee last elected continue in office as if they had been duly re-elected (*a*).

Examination of accounts.

A visiting committee must before June in every year examine the accounts of the treasurer and clerk of the asylum and report the same to the next meeting of the local authority (*b*).

Clerk.

Every visiting committee must appoint a clerk (who may also be the clerk to the asylum) at such salary as they think fit, who continues in office, unless sooner discharged, so long as the members of the committee continue in office (*c*). The visiting committee may sue and be sued in the name of their clerk; and an action by or against them does not abate by reason of the death or removal of the clerk, but the clerk for the time being is always deemed the plaintiff or defendant in the action (*d*).

Visitors appointed by justices.

965. The justices of every county and quarter sessions not within the immediate jurisdiction of the Commissioners (*e*) must (*f*) annually appoint (*g*) three or more justices and also one medical practitioner or more (*h*) to act as visitors of licensed houses within the county or borough and otherwise for the purposes of the Lunacy Act, 1890 (*i*). Meetings of visitors are in their discretion,

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committee can enter into contracts which will bind such successors. On the death or resignation of a visitor, vacancies may be filled up by the authority which made the original appointment, and continuing members may act notwithstanding any vacancy (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 171).

(*a*) *Ibid.*, s. 172 (2). A member of a visiting committee must not be interested in any contract entered into or work done for the committee, and must not derive any profit from the funds of the asylum; but this provision does not disable a member from holding shares in a company which has entered into a contract with the visiting committee, though it will disable him from voting in respect of such contract (*ibid.*, s. 174). The meeting of a visiting committee, the appointment of their chairman, and other incidental matters are governed by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 82, if the committee are appointed by a county council, otherwise their procedure is regulated by the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 175.

(*b*) *Ibid.*, s. 173.

(*c*) *Ibid.*, s. 176 (1), which, in effect, requires the reappointment of the clerk every year.

(*d*) *Ibid.*, s. 176 (2); and see *ibid.*, s. 325, and p. 469, *post*. An action may be maintained against a visiting committee in the name of their clerk in respect of a contract properly entered into by a former committee (*Kendall* v. *King* (1856), 17 C. B. 483; and see also *Devenish* v. *Brown* (1856), 26 L. J. (CH.) 23).

(*e*) As to the immediate jurisdiction of the Commissioners, see p. 466, *ante*.

(*f*) They must be appointed whether there is a licensed house within the county or borough or not, since there are other duties for them to perform; *e.g.*, under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 199 (2), on the request in writing of the Commissioners, to visit single patients detained in unlicensed houses.

(*g*) These appointments will be made by justices of a county at their Michaelmas quarter sessions and by justices of a borough at special sessions in October. Other appointments may be made at quarter sessions or at special sessions held at the same time as any quarter sessions (*ibid.*, s. 177 (7)). An appointment of a visitor by borough justices requires the written approval of the recorder of the borough (*ibid.*, s. 180).

(*h*) As to remuneration, see note (*n*), p. 469, *post*.

(*i*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 177 (1). Interest in a licensed house will disqualify for the post of visitor (*ibid.*, s. 177 (3), (4)). The clerk to the justices of a quarter sessions borough must notify to the clerk of the peace of the borough the names, addresses, and qualifications of the visitors (*ibid.*, s. 177 (9)), and these must within fourteen days of appointment be advertised

and appointments therefor are kept secret, so that managers or persons interested in the house to be visited may have no notice of the intended visit beforehand (*k*).

Clerk to the visitors.

The clerk of the peace or some other person to be appointed (*l*) by the justices for the county or borough will act as clerk to the visitors (*m*) at a salary to be fixed by the justices (*n*). Such clerk may employ at his own cost an assistant approved by a visitor who is also a justice (*o*), but neither the visitor, clerk, nor assistant clerk may be interested in any licensed house, nor may they have been so interested within one year prior to appointment (*p*).

SECT. 3.—*Visitation.*

SUB-SECT. 1.—*Chancery Visitors.*

Visits conducted in accordance with Rules in Lunacy.

966. Chancery visitors visit lunatics so found by inquisition at such times and in such manner, and make such inquiries as to their treatment and health, as the Rules in Lunacy or as any special order of the judge in lunacy (*q*) in any particular case may from time to time direct. But every lunatic must be personally seen by one visitor at least twice a year, and the interval between successive visits must in no case exceed eight months. Where a lunatic is residing in a private house he must, during the two years next following inquisition, be visited at least four times in every year (*r*).

Number of annual visits.

Visits on request of master.

967. Chancery visitors must upon the request of the master visit and report as to any person with reference to whom or to whose estate any application is pending before or an order has been made by the master (*s*). They must also visit such persons alleged to be lunatics and must make such inquiries and reports as the judge directs (*t*).

Visits on alleged lunatics.

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in a local paper and within three days of appointment be sent to the Commissioners by the clerk of the peace (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 177 (10)). Default in publishing and sending this list renders the clerk liable to a penalty of £2 (*ibid.*, s. 177 (11)).

(*k*) *Ibid.*, s. 181.

(*l*) The appointment of a clerk by the borough justices requires the written consent of the recorder of the borough (*ibid.*, s. 180), and he must be reappointed annually (see 55 J. P. 589).

(*m*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 178 (1). The name, address, occupation, and profession of the appointee must within fourteen days of appointment be advertised in a local paper and within three days of appointment be sent to the Commissioners by the clerk of the peace (*ibid.*, s. 178 (3)). Default in publishing and sending this information renders the clerk liable to a penalty of £2 (*ibid.*, s. 178 (4)).

(*n*) *Ibid.*, s. 178 (5). The salary of the clerk is fixed by the borough justices under *ibid.*, s. 178 (5), and paid out of the borough funds under *ibid.*, s. 225. The remuneration of the medical practitioner is also fixed by the justices under *ibid.*, s. 177 (12), and paid out of the borough funds under *ibid.*, s. 225. The remuneration may take the shape of a salary; but the Act contemplates that the remuneration should be for services rendered, so that where there is no licensed house in a particular borough the clerk and medical practitioner will only be entitled to remuneration when called upon to discharge any duties under the Act (see 54 J. P. 623).

(*o*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 179.

(*p*) *Ibid.*, s. 177 (3), (4). As to licensed houses, see p. 474, *post.*

(*q*) As to the judge in lunacy, see p. 412, *ante.*

(*r*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 183.

(*s*) Rules in Lunacy, 1893, r. 5.

(*t*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 184 (1).

SECT. 3. Visitation.

Returns.

968. At the end of every six months Chancery visitors must report to the Lord Chancellor on the number of visits made, of patients seen and of miles travelled, and make a return of their travelling expenses, and a copy of every such report and return is laid before Parliament (*u*).

Nature of reports.

They must report to the Lord Chancellor on the state of mind, bodily health, and general condition and care and treatment of every person visited, and also any instance on which on proceeding to visit they have been unable to discover the lunatic's residence or for any other reason have been prevented from actually seeing him (*v*). These reports are to be filed in the office of the Chancery visitors (*a*).

SUB-SECT. 2.—*Asylums.*

Visits to asylums by Commissioners.

969. Two or more Commissioners, of whom one must be a doctor and one a barrister, must once at least in every year visit every asylum, and one or more of the Commissioners may at any time visit any asylum and make the inquiries specified in the Lunacy Act, 1890 (*b*), s. 187, as to the proper construction and management of the asylum and the treatment, food, and condition of the patients therein, and as to such other matters as the visiting Commissioners think fit (*c*).

Visits to asylums by visiting committee.

970. As regards visiting committees appointed by local authorities (*d*), at least two members of the committee must together once at least in every two months inspect every part of the asylum and see every patient therein, so as to give everyone an opportunity of complaint (*e*), and examine the certificates and books and enter any remarks they think proper in the visitors' book and sign the same (*f*). In the case of lunatics received in a county asylum under contract from a borough (*g*), the lunatics received under contract must be visited at least once in six months by at least two members of the visiting committee of the borough appointed *ad hoc*,

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(*u*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 184. Where a petition for an inquiry into the state of mind of an alleged lunatic was presented and disputes arose as to the terms under which access of medical witnesses should be allowed, the court made an order that two of the visitors should see the alleged lunatic and report to the court (*Re* ———, *an Alleged Lunatic* (1881), 18 Ch. D. 26, C. A.).

(*v*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 185.

(*a*) As to the inspection and destruction of these reports, see *ibid.*, s. 186 and pp. 427, 428, *ante.*

(*b*) 53 & 54 Vict. c. 5.

(*c*) *Ibid.*, s. 187.

(*d*) See p. 467, *ante.*

(*e*) The Commissioners state with reference to the opportunity of complaint that it "is a means of appeal to which the legislature has evidently attached much importance and which we know conduces greatly to tranquillity and contentment" (Commissioners' 59th Report, p. 329), and the matter "is one of much importance to the well-being and contentment of the patients" (*ibid.*, p. 341). In the yearly reports there are usually one or two references to complaints made by patients that the visiting committee have not complied with the above provision, and in each case the Commissioners drew the attention of the visiting committee to these complaints; as an instance, see the Commissioners' 56th Report, p. 365.

(*f*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 188.

(*g*) See p. 486, *post.*

and the result of the visit must be reported to the council of the borough (*h*). Provision is also made for an annual report by the visiting committee of every asylum to the local authority as to the state and condition of the asylum (*i*).

SUB-SECT. 3.—*Hospitals and Licensed Houses, and Single Patients.*

Visits to hospitals and licensed houses by Commissioners.

971. Every hospital and licensed house may at any time by day or night be visited by any one or more of the Commissioners (*k*). Licensed houses not within their immediate jurisdiction (*l*) must be visited twice a year by two (*m*) Commissioners (*n*), and licensed houses within their immediate jurisdiction (*l*) must be visited four times a year by two or more (*m*) Commissioners (*o*), and in addition twice a year by one or more of the Commissioners (*p*). All visits must be made without previous notice (*q*).

Visits to licensed houses by visiting committee.

972. As regards visitors appointed by justices, every licensed house within their jurisdiction may at any time by day or night be visited by one or more of the visitors, and must be visited four times a year by two visitors (one being a medical practitioner), and in addition twice a year by one or more of the visitors (*r*).

Duty of Commissioners and visitors on inspection.

973. The visiting Commissioners and visitors must, at every visit to a hospital and licensed house, inspect every part of the buildings, see every patient, peruse orders and certificates and observations in the visitors' book, and make entries therein; and also inquire as to the occupations, classifications, conditions, and diet of the patients, and of any other matter which in their view requires investigation (*s*).

Every Commissioner visiting a house licensed by justices must carefully consider the state of mind of any patient as to the propriety of whose detention there is a doubt or as to whose sanity

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(*h*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 189 (1).
(*i*) *Ibid.*, s. 190.
(*k*) *Ibid.*, s. 191 (1).
(*l*) As to the immediate jurisdiction of the Commissioners, see p. 466, *ante*.
(*m*) One of the Commissioners must be a doctor and one a barrister; compare Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 191 (2) (a), (3), (4).
(*n*) *Ibid.*, s. 191 (3).
(*o*) *Ibid.*, s. 191 (2) (a).
(*p*) *Ibid.*, s. 191 (2) (b). Under certain conditions the Lord Chancellor has power by writing under his hand to relax the number of visits to be made by the Commissioners (*ibid.*, s. 191 (7)).
(*q*) *Ibid.*, s. 191 (5). On their first visit to a house licensed by justices after the grant or renewal of the licence, the Commissioners must examine the licence and if the same is in order sign it, or if it is informal enter in the visitors' book in what respect it is informal (*ibid.*, s. 192).
(*r*) *Ibid.*, s. 193.
(*s*) *Ibid.*, s. 194. A manager who fails to show to the Commissioners or visitors any part of the hospital or licensed house or conceals any patient or refuses to answer questions is guilty of a misdemeanour (*ibid.*, s. 195). For the penalty, see p. 528, *post*. He must also produce to the Commissioners or visitors a list of his patients, the books kept by him pursuant to the Lunacy Act, 1890 (53 & 54 Vict. c. 5), or the rules made thereunder, orders and certificates, his licence (if any), and such further information as to any patient as may be required, and each Commissioner and visitor must sign the books as having been produced (*ibid.*, s. 196).

SECT. 3. Visitation.

his attention is specially called, and if the state of mind of the patient is considered doubtful and the propriety of his detention requires further consideration, a note thereof must be made in the patients' book (*t*). A copy of this note must be sent by the manager of the house to the clerk of the visitors (*u*) within two days, and the visitors, or two of them (one being a medical practitioner), must immediately visit the patient and act as they think fit (*x*).

Visits to single patients.

974. One or more of the Commissioners must annually and may at all reasonable times visit every unlicensed house in which a single patient is detained as a lunatic and report to the Commissioners as to the patient's treatment and bodily and mental health (*a*). Visitors appointed for a county or borough must also, upon the request in writing of the Commissioners, visit single patients and report (*b*).

SUB-SECT. 4.—*Pauper Lunatics.*

Visits to pauper lunatics confined in institutions.

975. A medical practitioner appointed by the guardians of a union, and also the guardians, must be permitted, whenever they see fit, between the hours of 8 a.m. and 6 p.m., to visit and examine any pauper lunatic chargeable to the union confined in an institution for lunatics, unless the medical officer of the institution delivers to the intending visitors a statement signed by him certifying that for the reasons mentioned the visit would be injurious to the lunatic (*c*).

Visits to pauper lunatics not so confined.

Every pauper lunatic (*d*) not in an institution for lunatics must once in every quarter be visited, if not resident in a workhouse, by the medical officer (*e*) of the union in which the lunatic is resident,

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(*t*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 197 (1).

(*u*) Failure on the part of the manager to notify the clerk or on the part of the clerk to communicate forthwith with the visitors is a misdemeanour (*ibid.*, s. 197 (3)). For the penalty, see p. 528, *post.*

(*x*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 197 (2).

(*a*) *Ibid.*, ss. 198, 199 (1). Refusal to show the Commissioner any part of the house and grounds is a misdemeanour (*ibid.*, s. 200). For the penalty, see p. 528, *post.*

(*b*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 199 (2). Medical journals must be produced to and signed by the person visiting pursuant to *ibid.*, s. 199 (1), (2) (*ibid.*, s. 199 (3)), and the reports are kept by the secretary to the Commissioners, and if they think it expedient laid before the Lord Chancellor (*ibid.*, s. 199 (4)).

(*c*) *Ibid.*, s. 201 (1). The medical officer must forthwith enter in the medical journal the reasons mentioned and sign the entry (*ibid.*, s. 201 (2)).

(*d*) A pauper lunatic is one who is in receipt of relief, and although by *ibid.*, s. 18, a person who is visited by the medical officer of the union at the expense of the union is for the purposes of that section to be deemed to be in receipt of relief, so that if a lunatic is sent to an asylum at the instance of the relieving officer he may be sent under that section as a pauper, yet a mere order from the relieving officer to the medical officer to visit would not appear to make the lunatic a pauper unless he is so otherwise, or entitle the medical officer to a fee for certifying under *ibid.*, s. 202 (4).

(*e*) Each medical officer is entitled to 2*s.* 6*d.* for each quarterly visit to a pauper not in a workhouse and also to 2*s.* 6*d.* for each report to the visiting committee, which sums must be paid by the same persons and charged to the same account as the relief of the pauper (*ibid.*, s. 202 (4)). Guardians must furnish the medical officers with proper forms for the prescribed returns (*ibid.*, s. 202 (2)).

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Visitation.

and if resident in a workhouse, by the medical officer of the workhouse (*f*). Where the lunatic is lawfully in the custody of a relative or friend to whom an allowance is made for the lunatic's maintenance, the medical officer must, within three days after each visit, send to the visiting committee a report stating whether the lunatic is properly taken care of and may properly remain out of an asylum (*g*).

Visits to pauper lunatics by Commissioners.

976. Any one or more of the Commissioners must, on being directed by resolution of the Commissioners, visit workhouses in which there is, or is alleged to be, any lunatic, and inquire whether the provisions of the law have been carried out, and also as to dietary, accommodation and treatment, and report to the Commissioners; and the Commissioners must forward a copy of every report to the Local Government Board (*h*).

SUB-SECT. 5.—*Special Cases.*

Immediate investigation.

977. In any case which appears to them to call for immediate investigation, the Commissioners may direct any competent person (*i*) to visit and report upon the mental and bodily condition of any lunatic or alleged lunatic or as to any other matter into which the Commissioners are authorised to inquire (*k*). And the Lord Chancellor in the case of a lunatic so found, and the Lord Chancellor or a Secretary of State in any other case, may direct the Commissioners (*l*) or any one of them or any other person (*m*) to make a similar visit, inspection, and report (*n*).

Reports on and visits to person detained without an order or certificates.

978. Where without an order and certificates any person is detained or treated without payment as a lunatic, or is in any charitable, religious, or other establishment, not being an institution for lunatics, the Commissioners may require from the person in charge periodical medical reports as to the condition of the patient and all such other particulars as to him and his property as they think fit (*o*); and the Commissioners may visit and report as to the patient, and may exercise with reference to the patient all the powers, except that of discharge, given to them as to persons confined in an institution for lunatics or as to single patients (*p*).

(*f*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 202 (1).

(*g*) *Ibid.*, s. 202 (3). The above provisions do not remove the liability of the medical officer to give notice as to any pauper lunatic who ought to be sent to an asylum under *ibid.*, ss. 14 (1) or 24 (6) (*ibid.*, s. 202 (5)). As to the medical officer's remuneration, see note (*e*), p. 472, *ante*.

(*h*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 203.

(*i*) Such person has for the special purposes of the visit all the powers of a Commissioner (*ibid.*, s. 204 (2)), and may be allowed a reasonable remuneration for his services (*ibid.*, s. 204 (3)).

(*k*) *Ibid.*, s. 204 (1).

(*l*) Who are allowed travelling and other expenses (*ibid.*, s. 205 (3)).

(*m*) Who may be allowed a reasonable fee for his services and travelling and other expenses (*ibid.*, s. 205 (2), (3)).

(*n*) *Ibid.*, s. 205 (1).

(*o*) *Ibid.*, s. 206 (1). The reports are to be kept secret, and are to be open only to the inspection of the Commissioners and the Lord Chancellor and persons authorised by the latter (*ibid.*, s. 206 (5)).

(*p*) *Ibid.*, s. 206 (2). On a report from the Commissioners the Lord Chancellor

SECT. 4.
Licensed Houses and Hospitals.

SECT. 4.—*Licensed Houses and Hospitals.*

SUB-SECT. 1.—*Licensed Houses.*

Definition.

979. A licensed house is a private establishment which is licensed for the reception of a definite number of lunatics, with, in some cases, restrictions as to the class or sex of the patients (*q*). No licence can now be granted except in renewal of or substitution for some existing licence (*r*), and no licence can be granted for a greater number of lunatics than the number authorised by the existing licence (*s*) or for a longer period than thirteen months (*t*).

Licensing authorities.

980. The licensing authorities are—

(1) In places within their immediate jurisdiction (*a*), the Commissioners (*b*).

(2) In all other places (*a*), the justices for every county and quarter sessions, who are the licensing justices, and will exercise their jurisdiction at quarter or special sessions respectively (*c*).

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may discharge the patient or order his removal to an institution for lunatics, and the expenses of the order and of the patient's maintenance must be paid by the union where he was found until the authority legally liable therefor has been ascertained, when the union will be entitled to be recouped by such authority (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 206 (3)), and the ordinary justices' jurisdiction of making adjudication and maintenance orders (see pp. 489 *et seq.*, *post*) will attach (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 206 (4)).

(*q*) To receive more patients than is authorised by the licence, or to fail to comply with the regulations as to the sex of the patients, or the class of patients, renders the licensee liable to a fine of £50 for each patient received contrary to his licence (*ibid.*, s. 220). For the penalty, see p. 528, *post.*

(*r*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 207 (6); see p. 475, *post.*

(*s*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 207 (6).

(*t*) *Ibid.*, s. 216.

(*a*) As to places within the immediate jurisdiction, see note (*e*), p. 466, *ante.*

(*b*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 208 (1).

(*c*) *Ibid.*, s. 208 (2). For the above purposes the justices of every borough must assemble in special sessions at such times as the quarter sessions for the borough are held (*ibid.*, s. 209). No one who is, or has been within one year preceding, interested in a licensed house can act in the granting of a licence (*ibid.*, s. 208 (3)). In the case of an application to justices for a licence, notice of the application should be given to the clerk of the peace of the borough in which the house is situate. Accompanying the notice should be a plan of the house and buildings drawn according to the provisions in the Rules in Lunacy, a statement of the quantity of land annexed to the house, and a statement of the number of patients of each sex to be received. Copies of the above must also be sent by the applicant to the Commissioners. The licence is drawn by the clerk of the peace. Where a special sessions is held the clerk to the justices summons it, and he must attend the meeting to advise the justices. The sessions need not be held on the same day as the quarter sessions. A copy of the plan given to the Commissioners or justices on applying for a licence must be hung in a conspicuous part of the licensed house (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 227). To supply wilfully untrue or incorrect information for the purpose of obtaining a licence is a misdemeanour (*ibid.*, s. 214). For the penalty, see p. 528, *post.* Copies of licences granted by justices must be sent to the Commissioners within seven days (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 215).

The charges for licences are:—

(1) A 10*s.* stamp; and (2) 10*s.* for every non-pauper and 2*s.* 6*d.* for every pauper patient, but in no case less than £15 under this head, unless the licence is for less than thirteen months, when the payment may be reduced to not less than £5; (3) the charge for a licence for transfer to a new house must not be less than £1 exclusive of the stamp (*ibid.*, ss. 216, 217). Licences (according as

Application of licence charges.

981. Moneys received for licences granted by justices must be paid by the clerk of the peace for the county or borough into the county or borough fund (*d*); and the justices in quarter or special sessions may order the reasonable remuneration (*e*) of the visitors and their clerk (*f*) and all other proper expenses to be paid to the clerk of the peace out of the county or borough fund (*g*).

To whom a licence may be granted.

982. A renewed licence or a new licence can only be granted—

(1) To the former licensees or any one or more of them or to their successors in the business if it appears (*h*) that the house has been in all respects well conducted by the licensees (*i*).

(2) To the licensees of an existing house in respect of a new house when it is shown (*h*) that it would be for the comfort and advantage of the patients that the new house should be substituted (on the same terms, restrictions and conditions) for the old one (*k*).

(3) To joint licensees who desire to carry on business apart, provided

(a) the joint establishment and the proposed new house both answer the conditions required for the granting of a new licence; and

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they are granted by the Commissioners or justices) are under the seal of the Commissioners or under the hand of at least three justices (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 216), and they are not to be delivered until the fees have been paid (*ibid.*, s. 217 (5)).

(*d*) *Ibid.*, s. 224 (1). The clerk of the peace must keep proper accounts (*ibid.*, s. 224 (2)), to be signed by at least two of the visitors, and in the case of a clerk of the peace for a county such accounts must be audited in accordance with the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 71 (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 224 (3)).

(*e*) The reasonableness of the sums ordered to be paid is for the justices to decide.

(*f*) As to visitors, see p. 467, *ante*. In the case of boroughs having a separate court of quarter sessions and commission of the peace, which contained according to the census of 1881 a population of less than 10,000, the Local Government Act, 1888 (51 & 52 Vict. c. 41), has not transferred from the borough to the county council the obligation of paying the salary of the borough justices; see *Thetford Corporation* v. *Norfolk County Council*, [1898] 1 Q. B. 141; affirmed, 2 Q. B. 468, C. A., the decision in which would seem to apply to a visitors' clerk's salary.

(*g*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 225 (1). Payments are made out of the county or borough fund by the treasurer and allowed in his accounts on the authority of the justices' order (*ibid.*, s. 225 (2)). But sums ordered to be paid by justices of a county are subject to the sanction of the standing joint committee of the county council and quarter sessions as provided by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 66 (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 225 (3)).

(*h*) The persons to be satisfied are the Commissioners in the case of a house within their immediate jurisdiction (see note (*e*), p. 466, *ante*), and the justices in the case of a house licensed by or within the jurisdiction of the justices (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 207 (1), (3), (4)). But the Commissioners cannot grant a licence for a new house within their jurisdiction if the old house is within the jurisdiction of the justices, nor can the justices grant a licence for a new house if the old house is within the jurisdiction of other justices or of the Commissioners (Commissioners' 57th Report, p. 14).

(*i*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 207 (1).

(*k*) *Ibid.*, s. 207 (3). On the proposed transfer of patients to a new house not previously licensed, seven clear days' notice of the intended substitution (unless the same is occasioned by fire or tempest) must be sent to the person

SECT. 4. Licensed Houses and Hospitals.

(b) no larger number of patients is detained under the renewed licences at both establishments than under the old licence at one establishment (*l*).

(4) Where the licensee is a medical man employed as manager by the proprietor of the house his licence will be transferable or renewable to him so long as he continues manager, or to the proprietor or to any other medical manager employed by the proprietor (*m*).

Residence of licensee.

A licence must not be granted unless the licensee or one of the licensees undertakes to reside in the house (*n*). A licence to several persons, one of whom dies before the expiration of the licence, will remain in force provided one of the survivors has undertaken, or undertakes within ten days after the death, to reside on the licensed premises (*o*).

Inspection prior to licence.

983. Before a house, not within the immediate jurisdiction of the Commissioners (*p*) and not previously licensed, is licensed, one or more of the Commissioners must by inspection ascertain whether the house is suitable for the reception of lunatics, and the Commissioners must report thereon to the clerk of the peace of the county or borough, and the report must be received and considered by the justices (*q*).

Alteration in premises.

984. No alteration or addition must be made to any licensed house without the previous consent in writing of the Commissioners, and also of two of the visitors in the case of a house within the jurisdiction of visitors (*r*).

Transfer of licence on incapacity or death of licensee.

985. If a licensee becomes by sickness or other sufficient reason incapable of keeping the licensed house or dies before the expiration of the licence, the Commissioners or any three justices for the county or borough, as the case be, may transfer the licence for the term then unexpired, to such person as they approve (*s*).

Revocation of licence.

986. If a majority of the justices of a county or quarter sessions borough or the Commissioners recommend to the Lord Chancellor that any licence be revoked or be not renewed, the Lord Chancellor may revoke or prohibit the renewal of the licence (*t*).

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on whose petition the reception order of each private patient was made, or to the person by whom the last payment on account of the patient was made, and to the authority liable for the maintenance of each pauper patient (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 219). As to reception orders, see pp. 499 *et seq.*, *post.*

(*l*) *Ibid.*, s. 207 (4).

(*m*) *Ibid.*, s. 207 (5).

(*n*) *Ibid.*, s. 211.

(*o*) *Ibid.*, s. 212.

(*p*) For places within the immediate jurisdiction, see note (*e*), p. 466, *ante.*

(*q*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 210.

(*r*) *Ibid.*, s. 213.

(*s*) *Ibid.*, s. 218 (1). Where the licence is transferred by justices, the clerk of the peace must within three days of the date of the instrument of transfer (under a penalty of 40*s.* for each day he is in default) send a copy thereof to the Commissioners (*ibid.*, s. 218 (2), (3)).

(*t*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 221 (1). To give gratuities to relieving officers for pauper lunatics brought to a licensed house renders the licence liable to revocation (Commissioners' 59th Report, p. 50). Notice must be given to the manager of the licensed house seven clear days before the application

Regulations.

987. The Commissioners, with the sanction of a Secretary of State, may make regulations for the government of licensed houses, which regulations, or a copy whereof, must be sent to every licensed house to which they relate and must be observed therein (*a*).

Provisions as regards medical attendants.

988. In a house licensed for one hundred patients there must be a resident medical practitioner as manager and medical officer (*b*);

A medical practitioner must visit

(a) Houses licensed for less than one hundred and more than fifty patients, daily (*c*);

(b) Houses licensed for less than fifty patients, twice a week (*d*);

(c) Houses licensed for less than eleven patients, twice a week or at such greater intervals as directed by the commissioners or visitors, but not at greater intervals than once a fortnight (*e*).

There is power for the visitors or Commissioners to direct visits at other times not oftener than once a day (*f*).

Admission of voluntary boarders.

989. With the previous consent (*g*) in writing of two Commissioners (*h*), or, where the house is licensed by justices, of two justices, voluntary boarders (*i*) may be received in a licensed house for the time mentioned in the consent, at the expiration of which period, or of any extension thereof by a further consent, the boarder must be discharged (*k*). In addition the boarder must be allowed to leave the licensed house upon giving to the manager twenty-four hours' previous notice in writing of his intention so to do (*l*).

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for revocation is made to the Lord Chancellor (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 221 (4)). A copy or notice of the revocation is sent to the manager of the licensed house, and then published in the *London Gazette* (*ibid.*, s. 221 (3)), and such revocation takes effect not more than two months after publication in the *Gazette* (*ibid.*, s. 221 (2)). To detain two or more lunatics in a house for more than two months after the expiration or revocation of the licence for the house is a misdemeanour (*ibid.*, s. 222). For the penalty, see p. 528, *post*. But all powers of Commissioners and visitors with reference to licensed houses, and the patients therein, continue in force so long as there are any patients there (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 223).

(*a*) *Ibid.*, s. 226. The Commissioners have made these regulations in their Rules dated the 26th June, 1895.

(*b*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 228 (1).

(*c*) *Ibid.*, s. 228 (2).

(*d*) *Ibid.*, s. 228 (3).

(*e*) *Ibid.*, s. 228 (3), (5).

(*f*) *Ibid.*, s. 228 (4).

(*g*) This consent will only be given upon the application of the intending boarder (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 229 (2)).

(*h*) If the house is not within the immediate jurisdiction of the Commissioners (see note (*e*), p. 466, *ante*), notice of reception must be given to them by the manager within twenty-four hours of reception under a penalty of £5 for each day he is in default (Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 20).

(*i*) Any relative or friend of the boarder may also be received on the same terms (*ibid.*, s. 229 (1)). But the total number of patients and boarders must not exceed the number of patients for which the house is licensed (*ibid.*, s. 229 (3)), and each boarder must, if required, be produced to the Commissioners or visitors on their visits (*ibid.*, s. 229 (4)).

(*k*) *Ibid.*, s. 229 (1).

(*l*) *Ibid.*, s. 229 (5). Failure to allow the boarder to leave renders the

SECT. 4.

Licensed Houses and Hospitals.

SUB-SECT. 2.—*Hospitals.*

Definition.

990. "Hospital" means in the Lunacy Acts (*m*) any hospital or part of a hospital, or other house or institution (not being an asylum) wherein lunatics are received, and supported wholly or partly by voluntary contributions, or by any charitable bequest or gift, or by applying the excess of payments of some patients towards the support, provision, or benefit of other patients (*n*). Every hospital must have a resident medical practitioner as superintendent and medical officer (*o*), and no lunatic must be received in any hospital unless it is registered (*p*).

Medical officer.

Registration.

Inspection prior to registration.

Provisional certificate.

991. When application is made for the registration of a hospital (*q*) for the reception of lunatics, the Commissioners inspect the hospital (*r*). If they consider that the hospital ought not to be registered they must so report to a Secretary of State, who must thereupon finally determine the matter (*s*). If the Commissioners are of opinion, or a Secretary of State determines, that the hospital ought to be registered, the Commissioners issue a provisional certificate of registration valid for six months or any extended time (*t*).

Approval of regulations.

Complete certificate.

Within three months from the grant of the provisional certificate the managing committee of the hospital must submit regulations for the hospital to a Secretary of State, and on his approval the Commissioners issue a complete certificate of registration specifying the number of patients of each sex to be received (*u*).

Information which may be required by the Commissioners.

992. The Commissioners may require from the superintendent or officers of a registered hospital information as to the mode in

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manager liable for an action for £10 as liquidated damages for each day or part of a day of improper detention (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 229 (6)). If the Commissioners consider any boarder unfit to remain as a boarder, they may direct the manager to remove him, or to take steps to obtain a reception order, and failure to comply with such direction involves a penalty of £5 for each day's default (Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 20).

(*m*) For these, see note (*l*), p. 412, *ante.*

(*n*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 341; as to the meaning of "asylum," see note (*k*), p. 479, *post.*

(*o*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 230.

(*p*) *Ibid.*, s. 231 (9).

(*q*) Only the buildings shown on the plans sent to the Commissioners pursuant to their rules will be considered as part of the hospital for the purpose of the reception of lunatics, and knowingly to lodge patients in any building not shown on such plans is a misdemeanour (*ibid.*, s. 233). For the penalty, see p. 528, *post.*

(*r*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 231 (1).

(*s*) *Ibid.*, s. 231 (2).

(*t*) *Ibid.*, s. 231 (3), (4).

(*u*) *Ibid.*, s. 231 (5), (6). This number will cover boarders as well as patients (*ibid.*, s. 231 (8)). Non-observance of the terms of the certificate of registration or of the statutory provisions as to hospitals by the superintendent constitutes a misdemeanour (*ibid.*, s. 231 (10)). The regulations, which may with the approval of a Secretary of State be altered (Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 12), must be printed and a copy sent to the Commissioners, and another copy hung in the visitors' room in the hospital under penalty of £20 (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 232 (2), (3)). The hospital accounts, unless submitted to the Charity Commissioners, must be audited once a year by an accountant or other auditor approved by the Lunacy Commissioners, and must be printed (*ibid.*, s. 234).

which the hospital regulations are carried out (*a*), and if dissatisfied they may give notice to the superintendent and two members of the managing committee (*b*) requiring that such regulations shall be observed (*c*).

Order for closing hospital.

On non-observance for six months of the requirements of the notice, the Commissioners, with the consent in writing of a Secretary of State, may make an order (*d*) closing the hospital for the reception of lunatics (*e*).

Complaints by residents in neighbourhood.

993. If complaints are made by persons resident in the neighbourhood of any hospital that the patients are allowed to go outside the hospital without sufficient or any control, the Commissioners may inquire and may make orders in relation thereto, and the superintendent of any hospital disobeying any such order is guilty of a misdemeanour (*f*).

Superannuation allowances.

994. The managing committee of any hospital may grant to any officer or servant who is incapacitated or who has been in the hospital for fifteen years, and is not less than fifty years old, a superannuation allowance up to two-thirds of his salary, with the value of the lodgings, rations, or other allowances enjoyed by him as the committee think fit (*g*).

SECT. 5.—*County and Borough Asylums.*

SUB-SECT. 1.—*Duty of Local Authority.*

Accommodation required.

995. Every local authority (*h*), acting through a visiting committee (*i*), must provide and maintain asylum (*k*) accommodation

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(*a*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 237 (1).

(*b*) Any medical or other officer of the hospital is disqualified from being on the managing committee, as also is anyone interested in a contract with the managing committee (*ibid.* s. 236).

(*c*) *Ibid.*, s. 237 (2).

(*d*) Before the order is made the superintendent and managing committee will be given fourteen days to state their reasons for non-compliance with the original notice; and their statement must be laid before the Secretary of State (*ibid.*, s. 237 (5)).

(*e*) *Ibid.*, s. 237 (3). To detain lunatics after this order has been made is a misdemeanour (*ibid.*, s. 237 (4)). For the penalty, see p. 527, *post.*

(*f*) Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 21. This clause was introduced into the Act in the House of Lords. The Commissioners state that they would be very reluctant to make any order thereunder, as the proper exercise of patients is part of their treatment to which the Commissioners attach great importance (Commissioners' 46th Report, p. 84).

(*g*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 235.

(*h*) The council of every administrative county and county borough respectively constituted under the Local Government Act, 1888 (51 & 52 Vict. c. 41), and the council of each of the boroughs specified in the Lunacy Act, 1890 (53 & 54 Vict. c. 5), Sched. IV., or in the case of the City of London the Common Council, is a local authority for the purposes of such last-mentioned Act (*ibid.*, s. 240).

Special provision has been made with regard to Lancashire by the Lancashire County (Lunatic Asylums and other Powers) Act, 1891 (54 & 55 Vict. c. xx.), by which a board is constituted, consisting of representatives of the county council and fifteen county boroughs, in which are vested the county asylums with powers of management.

(*i*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 239.

(*k*) "Asylum" means in the Lunacy Acts an asylum for lunatics provided

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County and Borough Asylums.

for pauper lunatics (*l*), and may provide asylum accommodation for pauper and private patients together, or in separate asylums, and may provide separate asylums for idiots or patients suffering from any particular class of mental disorder (*m*). Any such provision may be made by the local authority, either alone or by uniting with some other local authority or authorities (*n*). If the Commissioners report to the Secretary of State that any local authority (*o*) has failed to satisfy the statutory requirements as regards asylum accommodation, the Secretary of State may require the local authority to provide such accommodation (*p*).

Failure in duty of local authority.

SUB-SECT. 2.—*Provision of Asylums.*

Purchase and furnishing of buildings.

996. A visiting committee authorised to provide asylum accommodation may agree upon plans and estimates and contract (*q*) for the purchase of lands and buildings (*r*), with or without fittings and furniture, and for the erection, restoration, and enlargement of buildings (*s*) (which plans and contracts must be approved by a

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by a county or borough, or by a union of counties or boroughs (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 341). When no more patients can be accommodated in the county asylums, it is the duty of the county council to provide the additional accommodation, either by building another asylum or by making arrangements for the reception of county patients in some other asylum or institution for lunatics.

(*l*) *Ibid.*, s. 238 (1).

(*m*) *Ibid.*, s. 241.

(*n*) *Ibid.*, s. 242 (1); see further, as to such agreements, note (*b*), p. 484, *post.*

(*o*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 238 (2), (3). A local authority which is not a county council has, for the purpose of providing asylum accommodation, all the powers conferred on a county council by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 65 (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 238 (4)).

(*p*) *Ibid.*, s. 247. The remedy for breach of the above statutory duty is by mandamus to the authority at the instance of the Secretary of State. Even if special damage is suffered through the failure to provide sufficient accommodation, an action will not lie for the recovery of such special damage. As to procedure by mandamus, see title CROWN PRACTICE, Vol. X., pp. 77 *et seq.*

(*q*) All plans, estimates and contracts, and the amount to be paid by each local authority, must be reported by the visiting committees to their local authorities in any event, and must also be approved by such local authorities unless the amount to be expended has been previously sanctioned by them (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 254 (3)). A contract need not be approved before signature (*Devenish* v. *Brown* (1856), 26 L. J. (CH.) 23). In case of difference between the local authorities, the authority withholding approval to any plan, estimate, or contract must within four months after the same has been reported to it send to a Secretary of State a statement of its objections, and the Secretary of State may direct the work to be carried out with or without alterations or may direct an alternative scheme, and his decision is final (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 254 (4)).

(*r*) The Lands Clauses Acts (see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 1 *et seq.*) (not including the provisions as to compulsory purchase, sale of superfluous land, and recovery of penalties etc.) are incorporated with the Lunacy Act, 1890 (53 & 54 Vict. c. 5) (*ibid.*, s. 260), so limited owners can sell (*Devenish* v. *Brown, supra*). The power to purchase compulsorily may, however, be exercised subject to certain restrictions under the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 65. Power is also given to a local authority to purchase any licensed or other houses and land (Lunacy Act, 1890 (53 Vict. c. 5), s. 238 (3)).

(*s*) The Commissioners say they view with concern a growing tendency to

Secretary of State before being carried into effect), and also for the furnishing of buildings and for the supply of clothing, and for all the matters necessary (*a*) for carrying into effect the authority conferred upon them (*b*).

Contractor to give security.

Every person entering into a contract with a visiting committee must give sufficient security for due performance of the contract (*c*), and every contract, and all orders relating to it, must be entered in a book kept by the clerk to the visiting committee; and when the contract is completed the book must be deposited with the local authority, or where there are several authorities with that which contributes the largest proportion of the expenses of the contract (*d*).

Release from contract.

997. Where any lands contracted to be purchased or taken in exchange by a visiting committee are found unsuitable or are not required, the committee may, with the consent of a Secretary of State and upon payment of such sum, if any, as he approves, procure a release from the contract (*e*).

Lease instead of purchase.

998. Instead of purchasing land or buildings a visiting committee may take a lease thereof for not less than sixty years (*f*); and, with the sanction of their local authority, may hire or become yearly tenants, or tenants for a term of years, of any land or buildings (*g*) for the employment of asylum patients, or the temporary accommodation of pauper lunatics for whom the asylum accommodation is inadequate (*h*).

To whom land is conveyed.

999. Lands acquired for the purposes of the Lunacy Act, 1890 (*i*), may be conveyed (1) to the local authority, being a county council; (2) if such authority is a borough council, to the municipal corporation of the borough; and (3) where more than one local authority is interested, to all local authorities interested as joint tenants (*k*).

Appropriation of land not required for asylum purposes.

1000. Lands and buildings used for asylum purposes and afterwards found unsuitable or not required, may, with the consent of a

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extravagance in building asylums, and have issued a circular, urging the need of strict economy in the building, finishing, fitting, and furnishing of asylums (55th Report, p. 11). They have also issued (September, 1911) instructions relating to the sites and construction of lunatic asylums.

(*a*) As to what is reasonably necessary, see *Moffatt* v. *Dickson* (1853), 13 C. B. 543.

(*b*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 254 (1), (2); Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 16.

(*c*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 256 (1).

(*d*) *Ibid.*, s. 256 (2). This book may be inspected by ratepayers (*ibid.*, s. 256 (3)), and a copy thereof must be kept at the asylum to which the contract relates (*ibid.*, s. 256 (4)).

(*e*) *Ibid.*, s. 268 (1). The consideration for the release and the expenses of the contract and release are raised in the same manner as if the same were payable in respect of the purchase-money of lands for the purposes aforesaid (*ibid.*, s. 268 (2)).

(*f*) *Ibid.*, s. 261 (1).

(*g*) Such land and buildings are deemed part of the asylum and subject to all the existing asylum provisions (*ibid.*, s. 261 (3)).

(*h*) *Ibid.*, s. 261 (2).

(*i*) 53 & 54 Vict. c. 5.

(*k*) *Ibid.*, s. 264.

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Secretary of State and subject to such conditions as he may impose, be retained and appropriated for any purposes for which the local authority is empowered to acquire land (*l*).

Supplying deficiency in accommodation.

1001. When asylum accommodation appears to be insufficient, the local authority may supply the deficiency by exercising its powers in regard to providing accommodation or by rebuilding or enlarging any existing asylum (*m*).

Private patients.

For the purpose of providing accommodation for private lunatics the visiting committee of an asylum may, with the consent of each local authority by whom the asylum is provided and with the approval in writing of a Secretary of State, make alterations in or additions to the asylum (*n*).

Consents required.

A district asylum must not be enlarged or improved without the consent of all the parties to the agreement under which the same is provided (*o*).

Orders for repairs.

The visiting committee of an asylum may of their own authority order (*p*) all necessary and ordinary repairs; and also all necessary and proper additions, alterations, and improvements to an amount not exceeding £400 in any one year (*q*).

Burial of patients and officers.

1002. The visiting committee may, with the consent of their local authority and of a Secretary of State, arrange for the burial of lunatics dying in their asylum and of their officers and servants by (*inter alia*) providing burial grounds, enlarging existing burial grounds, or agreeing with persons willing to provide for such burial (*r*).

(*l*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 265.

(*m*) *Ibid.*, s. 238 (2).

(*n*) *Ibid.*, s. 255.

(*o*) *Ibid.*, s. 257.

(*p*) An order for payment of the cost incurred may be made on the treasurer of the authority or of each authority liable for payment, and the treasurer must pay the amount mentioned in the order out of the county or borough fund (*ibid.*, s. 266 (5)). The obligation of the visiting committee to make orders for payment appears to be enforceable by mandamus, and the obligation of the treasurer of the local authority to pay on the order made by the visiting committee not by mandamus, but by action; see *Re Richmond Gas Co. and Richmond (Surrey) Corporation*, [1893] 1 Q. B. 56, and *R.* v. *London and North Western Railway and Great Western Railway* (1896), 65 L. J. (Q. B.) 516.

(*q*) Lunacy Act, 1890 (53 & 34 Vict. c. 5), s. 266 (1). An order for any of such works exceeding £100 must be signed by at least three visitors at a meeting of the visiting committee summoned for consideration of the matter (*ibid.*, s. 266 (2)). Expenditure, except for repairs, must be reported to the local authority liable therefor (*ibid.*, s. 266 (3)). In the case of a district asylum the visiting committee must apportion the expenses in the proportion in which the local authorities have contributed to the erection of the asylum, or where the agreement to unite deals with the proportions then in accordance with such agreement; and if the agreement deals only with repairs, then the additions, alterations, and improvements must be borne in the same proportion as the repairs (*ibid.*, s. 266 (4)).

(*r*) *Ibid.*, ss. 258, 259. See title BURIAL AND CREMATION, Vol. III., p. 545. As to what burial fees are payable on the burial of a lunatic, see *Wood* v. *Headingley-cum-Burley Burial Board*, [1892] 1 Q. B. 713, and *Williams* v. *Briton Ferry Burial Board*, [1905] 2 K. B. 565.

SUB-SECT. 3.—*Rules and Officers of Asylums.*

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Approval of rules.

1003. The visiting committee of an asylum must within twelve months after its completion submit to a Secretary of State rules for the government of the asylum, and such rules, when approved by a Secretary of State, must be printed and observed (*s*). The visiting committee must also make regulations as to the number and description of officers and servants and their respective duties and salaries (*t*) and must determine the diet of the patients (*a*).

Regulations as to officers.

Officers.

1004. The visiting committee must appoint:—

(1) A chaplain (*b*); (2) a medical officer (*c*); (3) a superintendent, or if there is more than one division, a superintendent of each division of the asylum, who must be the resident medical officer of the asylum or of the division of which he is appointed superintendent, unless a Secretary of State authorises the committee to appoint some other person than a medical officer to be superintendent; (4) a clerk; (5) a treasurer; (6) such other officers and servants as they think fit (*d*).

Appointees may be removed, and vacancies in the above-mentioned posts (1) to (5) must, and in the posts referred to in (6) may, be filled by the committee (*e*), who also fix the salaries, wages, and remuneration of every person appointed (*f*).

(*s*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 275 (1). The rules may be altered and varied with the approval of a Secretary of State (*ibid.*, s. 275 (2)).

(*t*) *Ibid.*, s. 275 (3). The regulations may provide that any number of beds may be reserved for specified cases, and in that event the asylum will be considered full for non-specified cases when there are no vacant beds except those so specially reserved; but the committee may, if they think fit, fill any reserved beds (*ibid.*, s. 275 (4)). The regulations may also provide for the exclusion of contagious or infectious maladies, or of those coming from a place where such a malady is prevalent (*ibid.*, s. 275 (5)). But this will not enable the committee to require the guardians to furnish certificates that the patient is free from certain specified infectious maladies. The regulations may also provide for the absence for a period not exceeding four days of a patient from the asylum by permission of the manager (*ibid.*, s. 275 (5)).

(*a*) *Ibid.*, s. 275 (6).

(*b*) See title ECCLESIASTICAL LAW, Vol. XI., p. 650. The chaplain is not compelled by statute to reside in the asylum, or to give his whole time to the duties of his office therein (*R.* v. *Hereford County Council* (1890), 38 W. R. 775), but the committee may reasonably appropriate a house for him within the asylum premises, and require him to reside there (*Congreve* v. *Upton Overseers* (1864), 4 B. & S. 857). A minister of any religious persuasion may be appointed to attend patients of the same religion as himself (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 276 (2)), and one not so appointed and not belonging to the Established Church may, at the request of a patient of the same religion as himself, or at the request of the patient's friends, be authorised to visit the patient, subject to such regulations as the medical officer approves (*ibid.*, s. 277 (3)).

(*c*) He must reside in the asylum, and must not be the clerk or treasurer thereof (*ibid.*, s. 276 (1) (b)). Residence in the asylum means that the doctor's house must be in the grounds appropriated to the asylum so as to be reasonably within it (*Congreve* v. *Upton Overseers*, *supra*). A visiting physician or surgeon may also be appointed by the committee (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 276 (4)).

(*d*) *Ibid.*, s. 276 (1) (c), (d), (e), (f).

(*e*) *Ibid.*, s. 276 (3).

(*f*) *Ibid.*, s. 276 (5). Provision has been made by the Asylum Officers' Superannuation Act, 1909 (9 Edw. 7, c. 48), for gratuities and superannuation allowances to officers and servants of asylums, who are for this purpose divided

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Duty of officers to keep books etc.

1005. The clerk to the asylum must keep all books and documents which the visiting committee are required to keep (*g*) and an account of receipts and expenditure on account of the asylum (*h*); and the treasurer and every officer of the asylum who receives or expends money or goods on the account of the asylum must keep accounts of his receipts and expenditure (*a*).

SUB-SECT. 4.—*Agreements to unite Contributions, and Contracts for Reception of Pauper Lunatics.*

Agreements to unite.

1006. Local authorities may unite either jointly to provide and maintain a district asylum or, upon terms as to payment, for the joint use as a district asylum of an existing asylum.

Agreements to unite (*b*) must state—

(1) The number of visitors to be chosen by each contracting

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into two classes (Asylum Officers' Superannuation Act, 1909 (9 Edw. 7, c. 48), s. 1), those having charge of patients and other officers or servants. The ordinary allowance is one-fiftieth or one-sixtieth of the salary (according to class) for each year of service, with power to the visiting committee to increase it in special cases to an amount not exceeding two-thirds of the salary, while no gratuity can exceed one year's salary (*ibid.*, s. 2). Allowances are not assignable, and may be applied by the visiting committee in repayment of parochial relief received by the officer, or otherwise for his support, or for the benefit of those dependent on him (*ibid.*, s. 14). Provision is also made for the granting of gratuities to dependants in case of the death of an officer or servant (*ibid.*, s. 4), and the forfeiture by any officer or servant who is guilty of any offence of a fraudulent character or of grave misconduct of all claim to any superannuation allowance (*ibid.*, s. 5), for contribution by officers and servants annually of a percentage amount of their salaries towards a superannuation fund (*ibid.*, ss. 8, 9), and also for the return of such contributions in certain cases to officers or servants who have not become entitled to a superannuation allowance (*ibid.*, s. 10).

(*g*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 278 (1).

(*h*) *Ibid.*, s. 278 (2). Before the 30th September in each year, or at such other date as the Local Government Board appoint, the clerk must send to the Local Government Board and to the Commissioners (*ibid.*, s. 278 (3)) an abstract of the previous year, containing such particulars and in such form as the Local Government Board direct (*ibid.*, s. 278 (4)), and a copy of this abstract must within one month of its receipt be laid before both Houses of Parliament if then sitting (*ibid.*, s. 278 (5)). The provisions of the Local Government Act, 1888 (51 & 22 Vict. c. 41), relating to the accounts of the county councils and their officers and to the audit of such accounts will apply to every asylum belonging wholly or in part to a county council and to the visiting committee and officers thereof (Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 18). See title LOCAL GOVERNMENT, p. 362, *ante*.

(*a*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 278 (6).

(*b*) Agreements to unite require the approval of a Secretary of State (*ibid.*, s. 242 (3)). As to obtaining such approval, see *ibid.*, s. 272. For form of agreement, see *ibid.*, Sched. II., Form 21. The agreement may, with the consent in writing of a majority of visitors of each contracting party and of the Secretary of State, be altered or varied, but not so as to contain provisions which could not originally have been included in it (*ibid.*, s. 250). An agreement to unite must be reported as soon as possible to the local authorities interested (*ibid.*, s. 251 (1)), and the original must be delivered to the clerk of the authority within whose administrative area the asylum is situate to be kept by him among the records of the local authority (*ibid.*, s. 251 (2)). The original may be inspected by any commissioner or member of the council of the contracting authorities without payment (*ibid.*, s. 251 (3)), and the clerk must within twenty days make and send one copy to each of the contracting local authorities (*ibid.*, s. 251 (4)). As to provisions relating to the acquisition of land and furnishing of asylums by local authorities, see pp. 480 *et seq.*, *ante*. For a form of clause relating to lunatic asylums in an agreement to unite contributions, see Encyclopædia of Forms and Precedents, Vol. XVI., pp. 362, 363.

party; (2) the proportion in which the expenses of providing the asylum are to be borne by each contracting party (*c*) and the basis upon which such proportion is fixed; (3) where the agreement provides for the joint user of an existing asylum, the sum to be paid by each contracting party towards expenses already incurred (*d*). Provisions subjecting the visiting committee (*e*) to any control not provided by the Lunacy Act, 1890 (*f*), except the control of a Secretary of State, are invalid (*g*).

Dissolution.

1007. A visiting committee, with the consent of a Secretary of State, may by resolution passed by a majority of the whole number of the members of the committee at a meeting summoned upon notice for that purpose dissolve an agreement to unite (*h*). But before the dissolution takes effect every local authority interested under the agreement to unite must elect a committee to provide asylum accommodation (*i*).

Liability of borough council after contribution by county borough.

1008. Where a county borough has contributed to the cost of building and furnishing a county asylum the existing liability of the borough council continues until a new arrangement is made (*k*), and the county council must provide accommodation and

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(*c*) This proportion may be fixed either according to the extent of the accommodation required for each county and borough or in proportion to the respective population of each county and borough according to the last census (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 249).

(*d*) Such sum is paid to the treasurer of the local authority entitled thereto as part of the county or borough fund and must be applied to the purposes for which capital is properly applicable (*ibid.*, s. 252). For a form of clause providing for contribution, see Encyclopædia of Forms and Precedents, Vol. XVI., pp. 362, 363.

(*e*) As soon as the agreement has been reported each local authority must elect its number of visitors authorised by the agreement, and such visitors must carry the agreement into effect, and are the visiting committee of the asylum until the election of a visiting committee in their place (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 253). As to the annual election of a visiting committee, see p. 467, *ante*.

(*f*) 53 & 54 Vict. c. 5.

(*g*) *Ibid.*, s. 248.

(*h*) *Ibid.*, s. 267 (1). In case of a dissolution between authorities, one of whom, having no asylum of its own, makes an annual fixed payment to the other authority for the use of the latter's asylum, the paying authority may raise such a sum for compensation to the receiving authority as the visiting committee who dissolve the union approve (*ibid.*, s. 267 (3)). The visiting committee may divide the real and personal property held under the agreement to unite amongst the local authorities in the proportions in which they contributed thereto or in such other proportions as a Secretary of State may approve; and such sum as may be approved by a Secretary of State may be awarded to any local authority instead of a share of the property (*ibid.*, s. 267 (4)).

(*i*) *Ibid.*, s. 267 (2).

(*k*) A refusal to agree to a new arrangement, or an adjustment of property, debts, and liabilities on the making of such new arrangement (*ibid.*, s. 244 (2)), or any question as to the asylums or the maintenance of the lunatics, may be referred to an arbitrator chosen by the parties, or, in default of agreement, by the Local Government Board (Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 14), and sums ordered to be paid by way of adjustment may be raised out of the borough funds as provided by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 62 (5), (6), (7) (Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 15). All costs consequent upon a new arrangement or the termination of the old contract must be borne by the council of the borough upon whom is cast the duty of providing an asylum for the reception of lunatics.

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maintain pauper lunatics sent from the borough on the same terms as before (*l*).

Contract for reception of pauper lunatics from county borough.

1009. The council of a county borough may contract with the visiting committee of an asylum for the reception of the pauper lunatics of the borough into the asylum (*m*) upon terms to be agreed between the parties (*n*). The contract must be approved by a Secretary of State (*o*), and while it is in force the council of the borough will not be required to provide an asylum alone or in union (*p*).

Contributions and contracts by boroughs specified in Lunacy Act, 1890, Sched. IV.

Where any borough specified in Schedule IV. (*r*) to the Lunacy Act, 1890 (*q*), contributes to a county asylum, such borough, so long as it continues to contribute, is deemed to satisfy the statutory requirements with respect to asylum accommodation (*r*). In the alternative the borough council may resolve for the purpose of providing asylum accommodation to separate from the county to which it contributes (*s*).

Where any such borough (*t*) has contracted for the reception of its lunatics in the asylum of the county in which the borough is situate, the borough, on the determination of the contract, ceases to be a local authority under the Lunacy Act, 1890 (*q*), and is liable to contribute to the county rate of the county in respect of such lunatic asylum in like manner as the rest of the county (*u*).

Contract by visiting committee with manager of licensed house.

1010. A visiting committee may contract (*a*) with the manager of a licensed house for the reception therein of all or any of the

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(*l*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 244 (1).

(*m*) *Ibid.*, s. 243 (1).

(*n*) *Ibid.*, s. 243 (2).

(*o*) *Ibid.*, s. 243 (4).

(*p*) *Ibid.*, s. 243 (3). Where three boroughs agreed to pay an annual rent to the treasurer of the county lunatic asylum for the privilege of using the same it was held that the liability of the boroughs to provide for the maintenance, management of, and dealings with the joint asylum was not extinguished, but was transferred under the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 38 (1), from the boroughs to the county council, but subject to the existing contracts between the boroughs and the visiting justices of the asylum (*Re Salop County Council* (1891), 65 L. T. 416). For a form of agreement, compare Encyclopædia of Forms and Precedents, Vol. XVI., p. 369. As to the termination of agreements, see note (*a*), *infra*.

(*q*) 53 & 54 Vict. c. 5.

(*r*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 245 (1), and Sched. IV., as amended by Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 29.

(*s*) *Ibid.*, s. 245 (2). Notice of the resolution to separate must be given to the clerk of the county council, and six months after the date of such notice the borough council becomes subject to the statutory obligations to provide asylum accommodation (*ibid.*, s. 245 (3)), and also continues liable to contribute to the county asylum so long as any of its pauper lunatics are therein (*ibid.*, s. 245 (4)).

(*t*) See the text and note (*r*), *supra*.

(*u*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 246. For a discussion on the above provision, see *Howlett* v. *Maidstone Corporation*, [1891] 2 Q. B. 110, C. A. The borough will be treated as part of the county, and if and so far as it has not contributed towards the expenses of providing the county asylum its indebtedness will be fixed by agreement, or in default of agreement by an arbitrator appointed by the parties, or if they cannot agree by the Local Government Board. In ascertaining the sum to be paid, the borough must be credited with any sums already contributed for lunacy purposes in excess of its legal liability, and consideration must also be given to amounts which the borough may have paid for the reception or maintenance of its lunatics in the county asylum (Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 13 (1); see also *ibid.*, s. 13 (2)).

(*a*) These contracts (hereinafter called reception contracts) must not be for

pauper lunatics of the local authority for whom the committee is acting or for the use and occupation of the whole or any part of the house. A visiting committee may also enter into a similar contract (*b*) for the reception of pauper lunatics with any other committee in respect of the latter's asylum (*c*).

Accommodation of out-county pauper lunatics.

1011. Where an asylum is more than sufficient for the pauper lunatics who for the time being can be lawfully received, the visiting committee may by resolution permit any other pauper lunatics to be received in the asylum (*d*).

Private patients.

1012. Private patients may be received into any asylum upon such terms as to payment and accommodation as the visiting committee think fit; and the conditions as to their reception and detention are the same as in the case of private patients received into hospitals or licensed houses (*e*).

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more than five years, but may be renewed (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 269 (3)). They cannot be carried into effect until approved by a Secretary of State, and may be determined by him (*ibid.*, s. 269 (5)). If made with the manager of a licensed house they determine on the house ceasing to be licensed (*ibid.*, s. 269 (6); see note (*t*), p. 476, *ante*). A reception contract made on behalf of a borough with the visiting committee of an asylum and determinable by the parties can only be determined with the consent of a Secretary of State (*ibid.*, s. 269 (4)). If a Secretary of State determines a reception contract, liability for asylum accommodation attaches to the authority whose lunatics were received under the contract, although the term specified therein has not expired (*ibid.*, s. 269 (7)). The local authority liable under a reception contract defrays out of the county or borough fund so much of the weekly charge agreed upon for each pauper lunatic as in the opinion of the visiting committee represents the sum, not exceeding one-fourth of the entire weekly charge, due for accommodation in exoneration to that extent of the union to which the maintenance of any such pauper lunatic is chargeable (*ibid.*, s. 269 (9)). As to fixing the weekly charge, see pp. 488 *et seq.*, *post*.

(*b*) See note (*a*), p. 486, *ante*. For a form of agreement, see Encyclopædia of Forms and Precedents, Vol. XVI., p. 369; and see also *ibid.*, p. 363.

(*c*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 269 (1). Where a reception contract between a visiting committee and the subscribers to a hospital (see p. 478, *ante*), or between the council of a borough and the hospital, was subsisting on 26th August, 1889, such contract continues in force; and in the case of a contract entered into by the visiting committee on its expiration, a new contract may be substituted; whilst in the case of a contract entered into by the council of a borough, such contract may be renewed subject to the same conditions and with the same consequences as if it had been entered into by a visiting committee on behalf of the borough (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 269 (2); Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 17). Except as before mentioned, a visiting committee must not enter into a reception contract with subscribers to a hospital (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 269 (8)). Where a reception contract has been entered into by the visiting committee of an asylum with the subscribers to a hospital, or the manager of a licensed house, the hospital or house may be visited by any member for the time being of the committee of the asylum (*ibid.*, s. 269 (10)).

(*d*) *Ibid.*, s. 270 (1). The resolution, which may be rescinded or varied (*ibid.*, s. 270 (3)), may require an undertaking from the guardians to whose union the lunatic is chargeable for payment of the expenses of his maintenance, his burial, if he dies in the asylum, and his removal within six days after notice from the manager of the asylum (*ibid.*, s. 270 (2)).

(*e*) *Ibid.*, s. 271 (1). An account of the amount by which the sums charged for private patients exceeds the amount of the sums charged for pauper patients settled in any place which has contributed to provide the asylum must be made up to the last day of each year. Out of this ascertained amount such sums for building, repairs, outgoings, and expenses as the visiting committee think proper may be allowed, and the surplus, if any, must be paid to the

SECT. 5.

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SUB-SECT. 5.—*Miscellaneous.*

Payments by local authority.

1013. Expenses to be paid by a local authority for the purposes of the Lunacy Act, 1890 (*f*), must be paid by their treasurer out of the county or borough fund to the treasurer of the asylum to which the local authority is liable (*g*).

Asylum situated without limits of local authority.

1014. When an asylum is situate without the limits of the administrative area of the local authority providing it, the council and justices of the county or borough to which the asylum belongs have full power and authority to act in the county or borough in which the asylum is situate so far as concerns the regulation thereof (*h*).

Assessment.

1015. Lands and buildings purchased or acquired for the purposes of any asylum and any additional building thereon will, while used for those purposes, be assessed to county, parochial, district, and other rates, on the same basis and to the same extent as other lands and buildings in the same parish or district (*i*).

Approval by Secretary of State and Commissioners.

1016. Where the approval of a Secretary of State to any agreement, contract, or plan is necessary the document, together with an estimate of its probable cost, must be submitted to both the Commissioners and the Secretary of State, and the Commissioners must report to the Secretary of State, who may approve the agreement, contract, or plan, with or without modification, or may refuse his approval (*k*).

SECT. 6.—*Expenses of Pauper Lunatics.*

SUB-SECT. 1.—*Fixing the Charge for Maintenance etc.*

Charge fixed by visiting committee.

1017. Every visiting committee must fix a weekly sum for the expenses of maintenance (*l*) and other expenses of each pauper

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treasurer of the authority to which the asylum belongs; or where the asylum belongs to several authorities, to their respective treasurers in the proportions in which they contributed to the asylum, and must be applied as part of the county or borough fund (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 271 (2)). As to providing accommodation for private patients, see *ibid.*, s. 255; and p. 482, *ante.*

(*f*) 53 & 54 Vict. c. 5.

(*g*) *Ibid.*, s. 273. The local authority may, with the consent of the Local Government Board and subject to the provisions of the Local Government Act, 1888 (51 & 52 Vict. c. 41), and the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), according as the same respectively are applicable to the local authority, borrow on the security of the county or borough fund and [or] of any revenue of the local authority for the purpose of paying money payable under the Lunacy Act, 1890 (53 & 54 Vict. c. 5) (*ibid.*, s. 274 (1)). The Public Works Loans Commissioners may, if they see fit, make loans to the local authority on the above security and for the above-mentioned purposes (*ibid.*, s. 274 (2)).

(*h*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 262.

(*i*) *Ibid.*, s. 263. As to decisions with reference to the principles on which asylums are rated, and the law on the subject, see title RATES AND RATING.

(*k*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 272. *Ex post facto* consent by a Secretary of State is invariably refused, however desirable the work may have been (see Commissioners' 53rd Report, pp. 18, 29, 35, and 59th Report, p. 26). As to obtaining the approval of the Secretary of State and the Commissioners to plans, see the instructions issued in September, 1911, by the Commissioners relating to the sites and construction of lunatic asylums.

(*l*) *I.e.*, the reasonable charge of the lodging, maintenance, medicine, clothing, and care of the lunatic (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 287 (1)).

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lunatic (*m*) in the asylum (*n*), of such amount, not exceeding 14*s*., that the total of such weekly sums must be sufficient to defray such expenses, and also the salaries of the officers and attendants of the asylum, and such weekly sum may from time to time be altered. If 14*s*. a week is found insufficient, the local authority may order the necessary addition to the weekly sum. Every such order must be signed by their clerk and published in a local newspaper (*o*).

Charge in respect of out-county pauper lunatics.

A committee may fix a greater weekly sum, not exceeding 14*s*., to be charged in respect of pauper lunatics other than those sent from or settled in a parish or place within the county or borough to which the asylum belongs (*p*). Any excess created by the payment of such greater weekly sum may, if the visiting committee think fit, be paid over to a building and repair fund to be applied to the altering, repairing, or improving the asylum (*q*), and the committee must submit annually to the local authority a detailed statement of such application (*r*).

Uniform charge for several asylums.

Where the visiting committee have more than one asylum under their control they may, subject to any direction from the local authority, provide for a uniform charge for maintenance of lunatics in the several asylums, and for this purpose any surplus from one asylum may be applied to any deficit on another (*s*).

SUB-SECT. 2.—*Liability for Maintenance etc.*

Medical examination.

1018. Whenever a justice directs a lunatic or alleged lunatic, whether a pauper or not, to be examined by a medical practitioner under the provisions of the Lunacy Acts (*t*), he or any other justice having jurisdiction where the examination took place may order the guardians to pay such reasonable remuneration (*u*) to the

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(*m*) The provisions, set out in pp. 488, *ante*—499, *post*, as to expenses of pauper lunatics are applicable not only to lunatics received as paupers, but to lunatics in institutions who become paupers (Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 22).

(*n*) The compound phrase "expenses of maintenance and other expenses of each pauper lunatic in the asylum" includes the payment of parochial and other rates charged on the buildings of a county asylum, and payment thereof may lawfully be made out of the maintenance fund of the asylum (*R.* v. *Dolby*, [1892] 2 Q. B. 301).

(*o*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 283 (1), (2). If the amount so fixed is found to be more than sufficient, it seems that the unions contributing have no claim for repayment of any part (*Proctor* v. *Cheshire County Council* (1892), 56 J. P. 532).

(*p*) This greater weekly sum not exceeding 14*s*. is not an excess sum over and above the sum not exceeding 14*s*. referred to in the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 283 (1). A visiting committee have no power, therefore, to fix a greater weekly sum than 14*s*. for out-county paupers; all they can do is to differentiate and charge less than 14*s*. for home lunatics, but a greater sum up to the 14*s*. limit for out-lunatics (*Fitch* v. *Bermondsey Guardians*, [1905] 1 K. B. 524, C. A.).

(*q*) If the committee do not utilise the excess in the way directed the local authority would seem to be able to claim the amount (*Proctor* v. *Cheshire County Council*, *supra*).

(*r*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 283 (3), (4).

(*s*) *Ibid.*, s. 284.

(*t*) See note (*l*), p. 412, *ante*.

(*u*) In an Irish case it was held that remuneration could only be made for professional services, not for loss of the doctor's time (*R.* v. *Delvin Union Guardians*, [1908] 2 I. R. 15).

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medical practitioner (*v*), and all other reasonable expenses of the examination and inquiry and of carrying out any order (*w*).

Costs of order of removal.

1019. The costs of obtaining an order for the removal of a lunatic in a licensed house or hospital who becomes a pauper (*x*), and of his removal, must be repaid to the manager by the authority liable for maintenance, and any justice having jurisdiction where the hospital or house from which the lunatic was removed is situate has power to fix the amount and to order the repayment (*y*).

What union is deemed to be chargeable.

1020. Where a pauper lunatic is sent to an institution for lunatics, or where a lunatic in such an institution becomes a pauper (*x*), he is deemed to be chargeable to the union from which he was sent until it is established that he is settled in some other union or that it cannot be ascertained where he was settled, and the manager must forthwith give notice to the authority liable for maintenance (*z*) that the lunatic has become destitute. Every pauper lunatic chargeable to a union is while residing in an institution for lunatics deemed for purposes of settlement to be resident in the union to which he is chargeable (*a*).

Order on union for expenses of maintenance.

1021. The justice by whom any pauper lunatic is sent to an institution, or any two justices of the county or borough in which the institution where any pauper lunatic is confined is situate, or from any part of which any pauper has been sent, or any two justices being visitors of such institution, may order guardians to whose union the lunatic is chargeable to pay to the treasurer or manager of the institution the reasonable charges of the lodging, maintenance, medicine, clothing, and care (referred to as expenses of maintenance) of such lunatic (*b*). Such an order may be wholly or partly retrospective or prospective and is not subject to appeal (*c*).

(*v*) If the justice has authority to call in two medical practitioners (*e.g.*, under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 13 (2); see p. 506, *post*), he can properly order payment of their remuneration.

(*w*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 285.

(*x*) See p. 519, *post*.

(*y*) Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 19 (2). In the case of refusal or neglect to pay, such amounts can be recovered by distress or action under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 314; see p. 492, *post*.

(*z*) The council of each county must from time to time pay out of the county fund to the guardians of every poor law union or council of a borough wholly or partly in the county a sum equal to 4*s*. a week for each pauper lunatic, chargeable to the union or borough and maintained in an asylum, registered hospital, or licensed house for whom the net charge upon the guardians, after deducting any amount received by them for the maintenance of such lunatic from any source other than local rates, is equal to or exceeds 4*s*. a week throughout the period of maintenance for which the sum is so paid (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 24 (2) (f), (g)). As to the fund from which these payments are made, see *ibid.*, s. 24 (2) (e). As to the deduction from the cost of maintenance of, and the right of a county council to recover, sums received from a source other than local rates, see *Calne Union* v. *Wilts County Council*, [1911] 1 K. B. 717.

(*a*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 286.

(*b*) In fixing the amount of these charges, justices are not restricted to the limit of 14*s*. per week (see p. 489, *ante*) imposed by the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 283 (*Glamorgan County Asylum* (*Committee of Visitors*) v. *Cardiff Guardians*, [1911] 1 K. B. 437, C. A., overruling the *dictum* of WRIGHT, J., in *Suffolk County Lunatic Asylum* v. *Stow Union Guardians* (1897), 76 L. T. 494).

(*c*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 287. Orders made under this provision will be rightly made *ex parte* (*R.* v. *Bruce*, [1892] 2 Q. B. 136). The

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Nature of orders.

1022. Orders for payment of expenses may be made by justices upon guardians although the union is not within such justices' jurisdiction. Guardians of any union may obtain orders as to settlement or chargeability and payment of expenses of pauper lunatics (*d*). Orders for future maintenance will extend to expenses incurred in any institution where for the time being the lunatic is confined (*e*).

Liability of union wherein lunatic has acquired exemption from removal.

1023. All incidental expenses and maintenance of a lunatic removed to an institution who would at the time (*f*) of his removal have been exempt from removal to the parish of his settlement or country of his birth by reason of some provision of the Poor Removal Act, 1846 (*g*), as amended, must be paid by guardians of the union wherein the lunatic has acquired such exemption, and no order (*h*) must be made in respect of such lunatic upon the guardians of the union wherein the lunatic is settled, while the above-mentioned expenses are to be paid and charged in this way (*i*).

Expenses of removal, discharge or burial.

1024. The necessary expenses attending the removal, discharge, or burial of a pauper lunatic in an institution must be borne by the union to which he is chargeable or the local authority liable for maintenance, and must be paid by the guardians or the treasurer of the local authority (*j*).

Liability of relatives etc.

1025. The liability of any relation or person to maintain any lunatic is not taken away or affected where the lunatic is confined

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substantive order is not subject to appeal, but the refusal to make an order can be appealed from; see p. 494, *post*. As to why no appeal is given, see *R.* v. *Northampton* (*Recorder*) (1865), 6 B. & S., 653, *per* COCKBURN, C.J., at pp. 660, 661; *R.* v. *Bruce*, [1892] 2 Q. B. 136, *per* WRIGHT, J. Notwithstanding that the order is not subject to appeal, where an action is brought to enforce the order the defendants are entitled to plead and defend (*Suffolk County Lunatic Asylum* v. *Stow Union Guardians* (1897), 76 L. T. 494).

(*d*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 292.

(*e*) *Ibid.*, s. 293.

(*f*) The time of the removal determines the liability. If irremovability has been acquired, subsequent loss of that status is immaterial (*R.* v. *St. Giles-in-the Fields Overseers* (1860), 30 L. J. (M. C.) 13; *Thame Union Guardians* v. *Wandsworth Union Guardians* (1871), 36 J. P. 167).

(*g*) 9 & 10 Vict. c. 66, as amended by the Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), s. 4; Poor Removal Act, 1861 (24 & 25 Vict. c. 55); and Union Chargeability Act, 1865 (28 & 29 Vict. c. 79). See title POOR LAW.

(*h*) When the lunatic cannot be removed to the parish of his settlement or the country of his birth the expenses are thrown upon the union in which he has a status of irremovability, and the justices may make an order on the guardians of that union for the payment of such expenses (*Leeds Guardians* v. *Wakefield Guardians* (1857), 7 E. & B. 258).

(*i*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 294; the words of which are "as herein provided," and seem to refer to the section and not to the Act generally. Therefore, in cases coming within *ibid.*, s. 294, orders for adjudication and for payment of expenses and maintenance cannot be made under ss. 288, 289, *ibid.* (see p. 490, *ante*). Orders hereunder are appealable (*R.* v. *London Justices, Ex parte Edmonton Union* (1896), 60 J. P. 456), and can be made *ex parte* (*R.* v. *Bruce*, [1892] 2 Q. B. 136); see also *Hendon Union* v. *Hampstead Guardians* (1893), 62 L. J. (M. C.) 170.

(*j*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 297. See also title BURIAL AND CREMATION, Vol. III., p. 545; and see p. 482, *ante*.

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in any institution by any provision in the Lunacy Acts (*k*) concerning lunatics' maintenance (*l*).

Application of provisions.

1026. The provisions of the Lunacy Acts (*k*) for the payment of expenses of pauper lunatics are applicable to persons confined as pauper lunatics sent to institutions under any Act, other than the Lunacy Acts (*m*), authorising their reception as pauper lunatics, and, save as otherwise provided for lunatics appearing to have any real or personal property applicable for maintenance, to all other lunatics sent to any institution under a justices' order prior to the Lunacy Acts (*k*), or under a summary reception order made by a justice under the Lunacy Acts (*k*), or under an order of two or more Commissioners, as if such last-mentioned lunatics were at the time of being so sent actually chargeable to the union from which they are sent (*n*).

SUB-SECT. 3.—*Payment and Recovery of Expenses.*

Payment without order.

1027. Guardians upon whom an order for payment might be made may pay without an order (*o*), and may charge the payment to such account as they could have done if an order had been made (*p*).

Recovery of expenses of medical examination.

1028. The guardians may recover any sum paid under the order for medical examination and detention of a lunatic or alleged lunatic from him or his estate and from the person or authority legally liable for his maintenance (*q*).

Recovery on default of treasurer of authority or of guardians.

1029. If the treasurer of any local authority upon whom any order of justices for the payment of money is made refuses or neglects for twenty days after due notice of the order to pay, the money, with the expenses of recovering it, may be recovered by distress and sale of such treasurer's goods by warrant under the hands of two justices or by an action or other proceeding. In the case of guardians so refusing or neglecting to pay, the money, with the expenses, may be recovered by an action or other proceeding (*r*). In any such action or proceeding no objection can be

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(*k*) See note (*l*), p. 412, *ante*.

(*l*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 296. The fact that a maintenance order has been obtained against a husband is no reason why a similar order should not be obtained against a son (*Cole* v. *Brown*, [1907] 2 K. B. 301). See, generally, title POOR LAW.

(*m*) *E.g.*, Criminal Lunatics Act, 1884 (47 & 48 Vict. c. 64), s. 8; Army Act, 1881 (44 & 45 Vict. c. 58), s. 91; Naval Enlistment Act, 1884 (47 & 48 Vict. c. 46), s. 3; as to the Lunacy Acts, see note (*l*), p. 412, *ante*.

(*n*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 298.

(*o*) But if they pay by mistake and without justices' order when no order could have been made against them, they cannot recover the amount (*Ipswich Union* v. *Macclesfield Union* (1890), 55 J. P. 134).

(*p*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 295.

(*q*) *Ibid.*, s. 285.

(*r*) For payment of debts by guardians, see Poor Law (Payment of Debts) Act, 1859 (22 & 23 Vict. c. 49). Such weekly sum for maintenance ordered by justices to be paid under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 287 (see p. 490, *ante*), is a debt, claim, or demand due from guardians within the meaning of the Lunacy Act, 1890 (53 & 54 Vict. c. 5) (*R.* v. *Stepney Union* (1874), L. R.

taken to any defect or want of form in any reception or maintenance order, certificate, or adjudication if the order or adjudication (*s*) has not been appealed against, or if appealed against, has been affirmed (*t*).

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Seizure and sale of lunatic's surplus property.

1030. If it appears to any justice that a lunatic chargeable to any union or local authority (*u*) has any real or personal property more than sufficient (*a*) to maintain his family (if any), such justice may order a relieving officer of the union or the treasurer or some other officer of the local authority to seize so much of any money (*b*), or to seize and sell so much of any other personal property (*c*), and to receive so much of the rents of any land (*d*) of the lunatic as the justice may think sufficient to pay for the maintenance and incidental expenses incurred and to be incurred in relation to the lunatic (*e*). If (*f*) any trustee or bank or other society or person

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9 Q. B. 383), and must accordingly be paid or proceedings taken to recover it within the time thereby limited.

(*s*) The adjudication is conclusive for the purposes of this provision. Thus in an action under this provision to recover expenses of maintenance from guardians against whose union an order was made, evidence to show that the order was in fact wrongly made or that the lunatic had since acquired a fresh settlement was held inadmissible (*Suffolk County Lunatic Asylum* (*Visiting Committee*) v. *Nottingham Union Guardians* (1905), 69 J. P. 120).

(*t*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 314.

(*u*) The benefit of this provision is intended to be given to any local authority in fact maintaining the lunatic, and is applicable to the case of a person originally confined as a pauper but since classified as a private patient (*R.* v. *Fulham Guardians*, [1909] 2 K. B. 504), and also to the case of a lunatic not confined in an asylum.

(*a*) It is to be noted that the wants of the lunatic's family must be satisfied before the local authority can seize and apply towards the lunatic's maintenance; only the overplus not so needed can be seized, the policy being not to deprive such persons of the necessaries of life, without which they would themselves become chargeable; compare *Re Tye* (*a Person of Unsound Mind not so Found*), [1900] 1 Ch. 249, C.A.

(*b*) Money in the Post Office Savings Bank was seized in *Re Bethel's Application* (1899), 80 L. T. 492.

(*c*) There is no jurisdiction to order a seizure of a lunatic's shares in a company (*Re Noyce*, [1892] 1 Q. B. 97). In such a case a vesting order from the High Court would be necessary.

(*d*) A mortgagee's statutory right to appoint a receiver would appear to have priority over the local authority's rights given by this provision.

(*e*) These do not affect the jurisdiction of the judge in lunacy, as to which see pp. 412 *et seq.*, *ante*. He has, of course, discretion in the application of the lunatic's property, and can apply such property for the lunatic's maintenance without regard to the question of whether the same is more than sufficient to maintain his family (*Re Tye* (*a Person of Unsound Mind not so Found*), *supra*). So, also, guardians will be restrained from enforcing an order under this provision when once an order in lunacy has been obtained (*Winkle* v. *Bailey*, [1897] 1 Ch. 123). As to a claim by guardians against the representatives of a deceased lunatic, see p. 441, *ante*. The Summary Jurisdiction Acts (as to which see title MAGISTRATES) have no application to these orders (Summary Jurisdiction Acts, 1848 (11 & 12 Vict. c. 43), s. 35; 1879 (42 & 43 Vict. c. 49), s. 54), which should be applied for in open court. The justices have no power to give costs, nor have they power to state a case (*Re Bethel's Application*, *supra*). As to the rights of guardians in respect of the property of paupers under the Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), s. 16, see title POOR LAW.

(*f*) This provision is permissive only, and imposes no obligation on the

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having possession of any property of a lunatic pay or transfer the same as aforesaid in or towards repayment of the charges above mentioned, whether under an order or without an order (*g*), such officer's or treasurer's receipt shall be a good discharge (*h*).

Appeal against justice's refusal of order.

1031. Any person aggrieved by the refusal of an order by a justice or justices as to the payment of expenses of pauper lunatics (*i*) may appeal to quarter sessions upon giving fourteen days' notice to the justice or justices against whom the appeal is made. The determination of the court on the appeal is final (*k*).

Order of county court.

1032. The power of a county court judge to make an order for payment of expenses incurred by guardians is dealt with elsewhere (*l*).

Other remedies.

1033. Apart from the provisions of the Lunacy Acts (*m*), local authorities can recover sums expended by them for the relief or maintenance of a pauper lunatic—

(1) Judgment in ordinary action;

(1) By obtaining judgment against him, when alive (*n*), or against his estate, when dead (*o*), as ordinary creditors. There is an implied common law obligation on the lunatic to refund the amount so expended (limited to six years' arrears (*p*)), if able so to do (*n*).

(2) Petition for payment out of fund in court;

(2) Where money to which the lunatic is entitled has been paid into court a petition for payment out to the guardians may be presented (*q*). But there is a discretion to refuse an order for repayment unless it be for the benefit of the lunatic (*r*).

(3) Receipt of annuity or other periodical payment;

(3) Where a pauper is entitled to an annuity or other periodical payment the trustee or person liable therefor may from time to time pay to the guardians (whose receipt is a good discharge) the cost incurred in the relief of the pauper accrued since the last

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persons named to pay (*Winkle* v. *Bailey*, [1897] 1 Ch. 123; *Re Newbegin's Estate, Eggleton* v. *Newbegin* (1887), 36 Ch. D. 477, *per* CHITTY, J., at p. 481).

(*g*) It is advisable, and in the Post Office it is the invariable rule, to require a justice's order before payment.

(*h*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 299.

(*i*) See pp. 490 *et seq.*, *ante*.

(*k*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 301.

(*l*) See title COUNTY COURTS, Vol. VIII., p. 670.

(*m*) See note (*l*), p. 412, *ante*.

(*n*) *Re Clabbon* (*an Infant*), [1904] 2 Ch. 465; *Birkenhead Union Guardians* v. *Brookes* (1906), 95 L. T. 359; and *Re Newbegin's Estate, Eggleton* v. *Newbegin, supra*.

(*o*) *Re Webster, Derby Union Guardians* v. *Sharratt* (1884), 27 Ch. D. 710; *Re Drewery's Trust* (1854), 2 W. R. 436; *Laver* v. *Chesterfield Union* (1894), 43 W. R. 25; *Re Watson, Stamford Union* v. *Bartlett*, [1899] 1 Ch. 72.

(*p*) *Re Watson, Stamford Union* v. *Bartlett, supra; Re Harris* (1880), 49 L. J. (CH.) 327, C. A.; *Re Newbegin's Estate, Eggleton* v. *Newbegin, supra*.

(*q*) *Re Upfull's Trust* (1851), 3 Mac. & G. 281; *Re Parker* (1854), 2 W. R. 139; *Re Drewery's Trust, supra*.

(*r*) *Re Buckley's Trust* (1860), John. 700. The court, whilst refusing payment for past maintenance, has authorised the application of dividends for future maintenance (*Re Coleman's Trusts* (1866), 14 L. T. 587), and payment of the sum annually certified to have been expended by the guardians in each year has been sanctioned, every such payment to be on account of arrears (*Re Williams' Trusts* (1907), 122 L. T. Jo. 366).

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instalment (*s*). Relief given to a pauper who is a member of a benefit or friendly society constitutes a debt recoverable from himself or his representative after his death, and the managing body of the society must on notice pay the money in their hands to the guardians, whereupon they will be exonerated from any further liability in respect thereof. Should the trustee or society decline to make the necessary payment the guardians may apply to the justices in petty sessions for an order for payment (*t*).

(4) By grant of letters of administration to the estate of a deceased pauper lunatic in favour of the guardians, or their nominee, as creditors (*a*), or by a similar grant of letters of administration to the estate of a deceased sane person for the use and benefit of a pauper lunatic next of kin maintained at the guardians' expense (*b*). (4) By representation to estate;

(5) The guardians can also apply by summons in lunacy for the appointment of their nominee as receiver of the lunatic's estate and payment of six year's arrears of maintenance (*c*). (5) Appointment of receiver.

SUB-SECT. 4.—*Adjudication of Settlement.*

1034. Any two justices for the county or borough in which an institution for lunatics where a pauper lunatic is or has been confined is situate (*d*), or to which such institution, being an asylum, wholly or in part belongs, or from any part of which any pauper lunatic is or has been sent for confinement, may at any time inquire Who may adjudicate.

(*s*) Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 23.

(*t*) *Ibid.* The justices' jurisdiction only extends to undisputed amounts (*R.* v. *Richardson*, [1894] 2 Q. B. 323), and a trade union is not a benefit or friendly society for these purposes (*Winder* v. *Kingston-on-Hull Corporation for the Poor* (*Governors and Guardians*) (1888), 20 Q. B. D. 412). As to the conditions to which such claim is subject, and the sums (including those required to maintain membership in the benefit or friendly society) which take priority thereto, see Poor Law Amendment Act, 1879 (42 Vict. c. 12), s. 1, and title FRIENDLY SOCIETIES, Vol. XV., p. 149.

(*a*) Citation of next of kin and the King's Proctor is usually necessary before a grant will be authorised (*Lambeth Guardians* v. *Bradshaw's Next of Kin* (1886), 57 L. T. 86), though notice instead of citation may be accepted where the estate is small (*In the Goods of Teece*, [1896] P. 6; see also *In the Goods of Reeves* (1890), 55 J. P. 24; *Re Byrne* (1888), 52 J. P. 281; *In the Goods of Luce* (1890), 54 J. P. 695; *In the Goods of King* (1893), 58 J. P. 464; *In the Goods of Lilliicrap* (1891), 55 J. P. 525). As to grants of administration to creditors, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 188 *et seq.*

(*b*) Grants have been made to guardians or their clerk for the use and benefit of lunatics in the case of a lunatic daughter sole next of kin of her deceased mother (*In the Goods of Findlay, Mile-End Old Town Guardians* v. *Findlay* (1863), 3 Sw. & Tr. 265), a lunatic husband whose wife died intestate (*In the Goods of Eccles* (1889), 15 P. D. 1), and a lunatic widow whose husband died intestate (*In the Goods of Everley*, [1892] P. 50). In the above cases the sureties were required to justify.

(*c*) *Re Taylor, Edmonton Union* v. *Deely*, [1901] 1 Ch. 480, C. A. But these applications are not favoured, the view of the masters in lunacy being that the clerk to the guardians is, under ordinary circumstances, an undesirable person to be appointed receiver of the patient's estate.

(*d*) Orders can only be made under this provision where the lunatic is confined in an institution: no order can be made where the lunatic is in the workhouse.

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into such lunatic's settlement (*e*), and may adjudge the settlement and order the guardians to pay to the guardians of any other union the expenses, referred to as incidental expenses, incurred in or about the lunatic's examination and appearance before a justice or justices, and his removal and conveyance to or from any institution, and all moneys paid by such guardians to the treasurer or manager of the institution for the lunatic's maintenance incurred within the previous twelve months (*f*), and if the lunatic is still in confinement to pay to such treasurer or manager the future maintenance of the lunatic (*g*).

Where settlement cannot be ascertained.

1035. If a pauper lunatic is not settled in the union from which he was sent to an institution for lunatics, and his settlement cannot be ascertained (*h*), and the lunatic was sent from a quarter sessions borough which is free from contributing to payment of expenses of pauper lunatics chargeable to the county in which the borough is situate, or from a place not in such a borough, then the relieving officer of the union must give to the clerk of the local authority within whose area the lunatic is found ten days' notice to appear before two justices having jurisdiction within such area (*i*).

Such justices may adjudge the lunatic to be chargeable to the local authority, and order the local authority's treasurer to pay the guardians the incidental expenses of the lunatic, and all moneys paid by such guardians for the lunatic's maintenance incurred within the previous twelve months (*j*), and also to pay the lunatic's future maintenance (*k*). The justices can direct other inquiries to ascertain the union of settlement, and may delay the adjudication until after such inquiries (*l*).

Local authority adjudged chargeable may procure another settlement.

1036. Every local authority to whom a pauper lunatic is adjudged chargeable may make inquiries and may procure him to be

(*e*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 288.

(*f*) The limitation of twelve months only applies to the lunatic's maintenance, not to the incidental expenses (*R.* v. *Winster* (*Inhabitants*) (1850), 14 Q. B. 344).

(*g*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 289. Adjudication orders, with payment of incidental expenses, can be made after the death or discharge of the lunatic. So long as it stands, an adjudication order is final and conclusive (*Suffolk County Lunatic Asylum* v. *Nottingham Union Guardians* (1905), 69 J. P. 120), but it can be got rid of if fresh facts proving a change of settlement appear (*West Derby Union* v. *Liverpool Vestry* (1882), 46 J. P. 372). It may be made *ex parte*, and an appeal lies to quarter sessions (*R.* v. *London Justices, Ex parte Edmonton Union* (1896), 60 J. P. 456).

(*h*) A person born in Scotland, Ireland, the Channel Islands, or any foreign country, and not having gained any settlement in England, is a person whose settlement cannot be ascertained (*Somersetshire* (*Clerk of the Peace*) v. *Shipham Overseers* (1863), 3 B. & S. 507). So also, apparently, is a lunatic with an acquired settlement which has been destroyed by the division of a parish under the Local Government Act, 1894 (56 & 57 Vict. c. 73) (*R.* v. *Newchurch* (*Inhabitants*) (1862), 3 B. & S. 107).

(*i*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 290 (1).

(*j*) See note (*f*), *supra*.

(*k*) The local authority has no appeal, the order being in the nature of an interim order (*Wilson* v. *Liverpool Overseers* (1851), 17 Q. B. 303). Where application under this provision is opposed, the burden of proof that the lunatic had in fact a settlement is on the respondents (*Chertsey Union* v. *Surrey* (*Clerk of the Peace*) (1893), 57 J. P. 372).

(*l*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 290 (2), (3); compare *All Saints, Poplar* v. *Middlesex* (*Clerk of the Peace*) (1860), 24 J. P. 661.

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adjudged to be settled in any other union (*m*), and thereupon any two justices of the county or borough in which the institution where the lunatic is confined is situate, or from any part of which the lunatic was sent, or any two justices being visitors of the institution, may order payment by the guardians to the local authority of the lunatic's maintenance incurred within the previous twelve months and may provide for payment of his future maintenance (*n*).

Copy of adjudication to guardians of union of settlement.

1037. The party obtaining any adjudication with regard to settlement must, within a reasonable time, send a copy to the guardians in whose union the lunatic is adjudged to be settled, together with a statement of the description and address of the guardians or clerk obtaining the order (*o*), and the place of confinement of the lunatic and the grounds of adjudication. On the hearing of an appeal against the order (*p*), the respondents must not give evidence of any other grounds in support than those set forth in the statement (*q*).

SUB-SECT. 5.—*Appeal from Order of Adjudication.*

The appellate court.

1038. The guardians may appeal (*r*) to quarter sessions for the county or borough (*s*) on behalf of which the order was obtained or in which the union obtaining the order is situate, or where such union extends into several counties, then to the next quarter sessions for the county or borough in which the institution where the lunatic is or has been confined is situate (*t*).

Supply of copy of order to appellant.

1039. The clerk to the justices making the order, or, if they have no clerk, the clerk of the peace to whom the depositions must be sent, must, within seven days after application by any party authorised to appeal, furnish a copy of the dispositions to the applicant on payment. No omission or delay in furnishing such copy is a ground of appeal, and on the trial of the appeal an order cannot be set aside wholly or in part on the ground that the depositions do not furnish sufficient evidence to support, or that any matter therein contained or omitted raises an objection to, the order or grounds on which it was made (*u*).

(*m*) See note (*g*), p. 496, *ante*.

(*n*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 290 (4), 291.

(*o*) Omission of the description and address can be amended under *ibid.*, s. 307 (*R.* v. *Manchester Guardians* (1856), 6 E. & B. 919); see p. 498, *post*.

(*p*) See the text, *infra*.

(*q*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 302.

(*r*) The provisions of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31, do not apply to these appeals (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 313.

(*s*) As to when the appeal lies to county quarter sessions and when to borough quarter sessions, see Archbold's Poor Law, 15th ed., 477. Where the notice is erroneously given to borough sessions, and before being acted on by either party proper steps are taken to rectify the mistake, the mention of borough sessions may be treated as surplusage. Not so, however, where the notice has been acted on (*R.* v. *Salop Justices* (1854), 19 J. P. 149).

(*t*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 303. As to appeal from an order of justices adjudicating that a pauper lunatic has acquired a status of irremovability, see *Eastbourne Guardians* v. *Croydon Guardians*, [1910] 2 K. B. 16. The court has power to adjourn the hearing of a part-heard appeal (*R.* v. *Cambridge Union Guardians* (1861), 9 W. R. 599).

(*u*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 304. If the justices have no clerk,

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Notice of appeal.

Grounds of appeal.

1040. Notice of appeal must be sent to the party who obtained the order within twenty-one days after the sending of the copy of the order or within fourteen days after the supply of a copy of the depositions (*v*). The appellant must, with the notice, or fourteen days at least before the first day of the sessions at which the appeal is to be tried, send to the respondent a statement of the grounds of such appeal, and cannot, on the hearing, give evidence of any other grounds (*a*).

Objections to form.

1041. No objection is allowed on account of any defect in the form of setting forth any ground of adjudication or appeal in any such statement, and no objection to the reception of legal evidence offered in support of any ground alleged to be set forth is to prevail unless the court considers that such alleged ground is so imperfectly set forth as to be insufficient to enable the party reviewing the same to prepare for trial. Where the court considers that either of such objections ought to prevail, the court may cause the statement to be amended, or may postpone the trial (*b*).

Amendment of order.

1042. If an objection is made on appeal or on *certiorari* on account of an omission or mistake in drawing up the order, and it is shown that sufficient grounds were proved before the justices to authorise the drawing up thereof free from the omission or mistake, the court can amend the order and give judgment on such terms as it thinks fit (*c*). No objection as to such omission or mistake will be allowed on a *certiorari* unless specified in the rule for issuing the writ (*d*). The court's decision on (1) the sufficiency and effect of the statement and of the copy or duplicate order sent to the appellant, and (2) the amending or refusal to amend the order or the statement is final (*e*).

Order for costs.

1043. The court can order payment of costs and charges by the unsuccessful party, and can certify the amount (*f*). Grounds set out in the statement which, in the court's opinion, are frivolous or

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the party obtaining the order must so state in the statement of the grounds of adjudication (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 304 (5); *R.* v. *St. Peter, Barton upon Humber* (*Inhabitants*) (1851), 17 Q. B. 630; *Heston Overseers* v. *St. Bride's Overseers* (1853), 1 E. & B. 583).

(*v*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 305; *William* v. *Burgess* (1840), 12 Ad. & El. 635.

(*a*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 306. The court can enter and respite an appeal although the statement was sent neither with the notice of appeal, nor within fourteen days of the first day of the sessions to which the notice relates (*Bath Union Guardians* v. *Woolwich Union Guardians* (1904), 68 J. P. 240; *R.* v. *Shropshire Justices* (1838), 8 Ad. & El. 173).

(*b*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 307.

(*c*) The court must not amend the order in such a way as to change the parties to the appeal (*Re Lancaster, R.* v. *Liverpool* (*Inhabitants*) (1860), 24 J. P. 646). As to *certiorari*, see title CROWN PRACTICE, Vol. X., pp. 155 *et seq.*

(*d*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 308.

(*e*) *Ibid.*, s. 310. In *Epping Union* v. *Canterbury Union* (1908), 73 J. P. 411, it was held that quarter sessions could not, for this reason, state a case for the opinion of the High Court.

(*f*) The order for costs must be made by the sessions which heard the appeal (*R.* v. *Staffordshire Justices* (1857), 22 J. P. 209).

vexatious will render the party setting up the same liable for the other party's costs of disputing them (*a*).

SECT. 6. Expenses of Pauper Lunatics.

Abandonment of order.

1044. When an order has been made the party who obtained the order, whether notice of appeal has been given or not, and whether the appeal has been entered or not, may abandon the order by notice to the appellant or party entitled to appeal, and thereupon the order and all proceedings thereon will be void and cannot be given in evidence should any other order for the same purposes be obtained (*b*), and the party abandoning must in case of an appeal pay the appellant's costs (*c*).

Access to lunatic.

1045. The guardians, clerks to guardians, and relieving officers of every union, and the clerk of the local authority, interested in the inquiry or appeal as to settlement, and persons duly authorised by them or him, must be allowed free access in the presence of the medical attendant to the lunatic to examine him (*d*).

Part XII.—Reception and Care of Lunatics and Idiots.

SECT. 1.—*Reception of Lunatics.*

SUB-SECT. 1.—*In General.*

Lawful detention.

1046. Except for a short time in urgent cases (*e*), or in the case of relatives or friends (*f*), a person can only be lawfully detained against his will as a lunatic under an order made by some person authorised by law (*g*). Such orders may be made (1) by a judicial authority on petition (*h*); (2) in a summary way, without petition, by a justice or a chairman of guardians (*i*); (3) by two or more Commissioners in Lunacy (*k*); (4) by a committee of the person or a master in lunacy in the case of a lunatic so found by inquisition (*l*); and (5) in urgent cases by a relative of the lunatic (*m*).

(*a*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 309.
(*b*) *Ibid.*, s. 311 (1).
(*c*) *Ibid.*, s. 311 (2); as to taxation, see *ibid.*, s. 311 (3).
(*d*) *Ibid.*, s. 312.
(*e*) See p. 500, *post.*
(*f*) See p. 501, *post.*
(*g*) See Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 4 (1); and as to the penalty for detaining lunatics without authority, *ibid.*, s. 315, and p. 527, *post.* As to reception orders made before the Act, the person who signed the order is clothed with all the powers and subject to all the obligations of a petitioner for a reception order under the Act, see Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 336.
(*h*) See p. 501, *post.*
(*i*) See p. 505, *post.*
(*k*) See pp. 499, 509, *post.* As to the Commissioners in Lunacy, see p. 466, *ante.*
(*l*) See p. 415, *ante.* As to committees of the person and masters in lunacy, see pp. 414, 423, *ante.*
(*m*) See note (*q*), p. 500, *post.*

SECT. 1.
Reception of Lunatics.

Order of Commissioners.

1047. Any two or more Commissioners may visit a pauper lunatic or alleged lunatic not in an institution for lunatics or workhouse, and may, if they think fit, call in a medical practitioner. Should the latter sign a medical certificate with regard to the lunatic, they may by order direct the lunatic to be received in an institution for lunatics, and may require the relieving officer of the district or any constable to convey him to such institution (*n*).

Order of committee of person or master.

1048. A lunatic so found by inquisition may be received in an institution for lunatics or as a single patient upon an order signed by the committee of the person of the lunatic, and having annexed thereto a copy of the order appointing the committee, or, if no such committee has been appointed, upon an order signed by a master (*o*).

Urgency order.

1049. In cases of urgency, where it is expedient either for the welfare of a person (not a pauper) alleged to be a lunatic, or for the public safety that the patient should be forthwith placed under care and treatment, he may be received and detained in an institution for lunatics or as a single patient upon an urgency order (*p*) made, if possible, by the husband or wife, or by a relative of the alleged lunatic, accompanied by one medical certificate (*q*). But this procedure should only be adopted where instant intervention is required either for the sake of the alleged lunatic or for the sake of the public (*r*). An urgency order will remain in force for seven days from its date, or, if a petition for a reception order is pending, then until the petition is finally disposed of (*s*).

Removal to workhouse in urgent cases.

1050. If a constable, relieving officer, or overseer is satisfied that it is necessary for the public safety or the welfare of an alleged lunatic that the latter should, before proceedings can be taken, be placed under care or control, he may remove the alleged lunatic to

(*n*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 23. The order, if it appears to be in conformity with the Act, is a sufficient authority to anybody acting thereunder (see *ibid.*, s. 35 (1); and pp. 510 *et seq.*, *post*), but will cease to have any force unless it is acted upon within seven clear days from its date (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 36 (3)).

(*o*) *Ibid.*, s. 12.

(*p*) An urgency order, if it appears to be in conformity with the Act, is a sufficient authority to anybody acting thereunder (see *ibid.*, s. 35 (1); and p. 510, *post*).

(*q*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 11 (1). The medical certificate must contain a statement that it is expedient for the welfare of the alleged lunatic or for the public safety that he should be forthwith placed under care and treatment, with the reasons for such statement (*ibid.*, s. 28 (3)); and it must appear from it that the alleged lunatic was examined not more than two days before reception (*ibid.*, s. 29 (3)). The forms to be used are set out in Sched. II., (*ibid.*), and must include a statement of particulars (*ibid.*, s. 11 (7)). An urgency order may be signed before or after the medical certificate (*ibid.*, s. 11 (2)). If not signed by the husband or wife or a relative of the patient, the order must state the reason for this omission and the connection with the patient of the person who signs and the circumstances under which he signs (*ibid.*, s. 11 (3)). The person signing must be twenty-one years of age, and must have seen the patient within two days from the date of the order (*ibid.*, s. 11 (4)). If an urgency order is made before a petition for a reception order is presented, it must be referred to in the petition. If made after the presentation of a petition, a copy thereof must be sent to the judicial authority to whom the petition has been presented (*ibid.*, s. 11 (5)).

(*r*) *Re Cathcart*, [1893] 1 Ch. 466, C. A., *per* Lord HALSBURY, L.C., at p. 475.

(*s*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 11 (6).

the workhouse of the union in which the alleged lunatic is; and the master of the workhouse must, unless he has no proper accommodation, receive and detain him for a period not exceeding three days, before the expiration of which period the constable, relieving officer, or overseer must take the necessary proceedings for a summary order before the judicial authority (*t*).

Retention by relation or friend.

1051. A relation or friend may be allowed to retain or take a lunatic, as to whom a summary reception order might be made, under his own care, provided that a justice having jurisdiction to make such summary reception order, or the visitors of the asylum in which the lunatic is or is intended to be placed, are satisfied that proper care will be taken of the lunatic (*u*).

Care of pauper lunatic by relative or friend.

Any relative or friend of a pauper lunatic confined in an asylum may on application be authorised by the visiting committee to take charge of him; but the committee must be satisfied that the lunatic will be properly taken care of, and that the application has the approval of the guardians to whom the lunatic is chargeable, or the local authority liable for his maintenance, and in case the proposed residence is outside the limits of such union or such local authority's area, then the approval also of a justice having jurisdiction in the place where the relative or friend resides. When such order is made the authority liable for maintenance must, to an amount in its discretion, pay to the person taking charge an allowance for the lunatic's maintenance, which, however, must not exceed the expenses the authority would have been put to had the lunatic remained in the asylum (*a*).

SUB-SECT. 2.—*Reception Orders on Petition.*

Judicial authorities.

1052. Reception orders on petition must be made by a judicial authority (*b*). The statutory powers of the judicial authority may

(*t*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 20. Under this provision an absolute discretion is vested in the constable, relieving officer, or overseer with regard to the duties imposed on him thereunder. So in a case where a plaintiff was taken by a relieving officer to an infirmary upon a certificate of a doctor that he was insane, and the plaintiff turned out to be sane, he was non-suited in an action for damages against the doctor, whose certificate was not the *causa causans* of the removal to the infirmary (*Thompson* v. *Schmidt* (1891), 56 J. P. 212, C. A.). The officer has only to be satisfied that it is necessary for the public safety or for the welfare of the alleged lunatic that he should be placed under care and control, and if a jury find that, although satisfied, the officer did not take reasonable care to satisfy himself, and award damages against him, judgment will be entered for the officer (*Harward* v. *Hackney Union* (1898), 62 J. P. 227, C. A.); see also *Morris* v. *Atkins* (1902), 18 T. L. R. 628, C. A.; *Welsh* v. *Duckworth* (1902), 18 T. L. R. 633. Whether the patient is or is not a lunatic, the expenses of his maintenance in the workhouse can be recovered as a necessary at common law (*West Ham Union Guardians* v. *Pearson* (1890), 62 L. T. 638). As to the proceedings to be taken, see p. 494, *ante*.

(*u*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 22.

(*a*) *Ibid.*, s. 57 (1), (2). For the definition of a relative, see *ibid.*, s. 341. For the purposes of the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 24 (2) (f), a lunatic boarded out is deemed to be a lunatic maintained in an asylum. This boarding out will not therefore disentitle the guardians to continue to receive from the county council the 4*s*. grant—in cases where it is made (see p. 490, *ante*)—in respect of paupers so boarded out (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 57 (3)). As to allowance for maintenance, see pp. 488 *et seq.*, *ante*. As to visits by medical officer, see p. 472, *ante;* and as to removal back to the asylum, see p. 519, *post*.

(*b*) A reception order cannot be made by a relative of the petitioner, or of

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be exercised by (1) a justice of the peace appointed annually by justices of county and quarter sessions boroughs out of their own body to exercise lunacy jurisdiction (*c*), or in any place where there are no separate quarter sessions, a justice appointed under the hand of the Lord Chancellor to exercise lunacy jurisdiction (*d*); (2) a county court judge (*e*); (3) a stipendiary or metropolitan police court magistrate (*f*).

A county court judge or magistrate is not required to exercise his statutory powers so as to interfere with or delay the exercise of his ordinary jurisdiction (*g*).

Jurisdiction and powers.

Every judicial authority, in the exercise of his lunacy jurisdiction, has the same jurisdiction and power as regards the summoning and examining of witnesses, the administration of oaths and otherwise, as if he were acting in the exercise of his ordinary jurisdiction, and will be assisted, if he so requires, by the same officers as if he were so acting (*h*).

Evidence in support.

1053. The application must be made by petition referring to a statement of particulars and two medical certificates (*i*). The

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the lunatic, or of the husband or wife of the lunatic (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 4 (1)).

(*c*) *Ibid.*, ss. 9 (1), 10 (1). A specially appointed justice can, whilst sitting in his own county or borough, make orders with reference to any lunatic anywhere in England (Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 24 (1); 70 J. P. (Journal) 119). The above annual appointments of justices are made by justices of a county at their Michaelmas quarter sessions and by justices of a borough at special sessions in October (Lunacy Act, 1890 (53 & 54 Vict. c 5), s. 10 (2)). All the justices of the county or borough may be appointed (Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 24 (4)). Every justice appointed has full authority, and his appointment continues until a fresh appointment is made (*ibid.*, s. 24 (5)); whilst even if a reception order be made by a justice not duly appointed, subsequent signature within fourteen days by a duly appointed justice will validate the order (*ibid.*, s. 24 (3)). If no appointments or insufficient appointments are made, the Lord Chancellor may by writing under his hand rectify the omission (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 10 (3)); as may also either the justices of the county or borough or the Lord Chancellor in the case of death, absence, inability or refusal to act (*ibid.*, s. 10 (5)). Appointments of justices are to be recorded by the clerk of the peace or the clerk to the justices, according as there are separate quarter sessions or not in the particular place; the names of the justices appointed are to be published in each petty sessional division of the county (*ibid.*, s. 10 (6)), and sent to the Commissioners and to the master in lunacy (Stone's Justices' Manual (1911), 781), and the guardians ought also to obtain a list (Local Government Board Circular, 23rd April, 1890).

(*d*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 10 (4).

(*e*) *Ibid.*, s. 9 (1).

(*f*) *Ibid.*; and see *ibid.*, s. 341.

(*g*) *Ibid.*, s. 9 (3). Pursuant to *ibid.*, s. 338 (4), the Lord Chancellor has made a rule providing that a county court judge, unable through pressure of other business to deal with a lunacy matter, shall sign a certificate in a prescribed form and forward a copy thereof to him, and pursuant to the same provision the Secretary of State has made a similar rule applicable to magistrates.

(*h*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 9 (2).

(*i*) *Ibid.*, s. 4 (2). The petition must be signed by the petitioner, and the statement of particulars by the person making the statement (*ibid.*, s. 5 (4)). This statement is one made in a judicial proceeding and is privileged. An action for libel cannot, therefore, be maintained for any defamatory matter contained therein (*Hodson* v. *Pare*, [1899] 1 Q. B. 455, C. A.). As to privilege generally, see

petitioner should be the husband or wife or a relative of the alleged lunatic, or in default, the petitioner must explain why the petition is not presented by such person and the connection of the petitioner with the alleged lunatic and the circumstances under which the petition is presented. The petitioner must be twenty-one years of age, and must have personally seen the alleged lunatic within twenty-one days of the presentation of the petition.

The petitioner.

1054. Upon the presentation of the petition the judicial authority considers it and the evidence in support. He may (1) personally see and examine the alleged lunatic if dissatisfied with the evidence, or if he considers such a course advisable, or (2) he may make an order forthwith, or (3) he may appoint a time, not more than seven days after presentation of the petition, for the consideration thereof, and may make further inquiries, or (4) he may at the time appointed for consideration dismiss the petition or adjourn the matter for not more than fourteen days from the first hearing for further inquiries to be made, and may summon any person to attend before him (*k*).

Duty of judicial authority.

1055. When a petition is dismissed the judicial authority delivers to the petitioner a statement of his reasons for dismissing the same,

Procedure on dismissal.

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title LIBEL AND SLANDER, Vol. XVIII., pp. 677 *et seq.* Should the medical certificate omit to state the name of the street and the number of the house, but simply that the doctor examined the lunatic in A. (a considerable town), the certificate is defective, and the lunatic may be discharged on *habeas corpus* on the ground that the detention is illegal, unless it be shown that it would be injurious to himself or others to set him at liberty (*Re Greenwood, R.* v. *Pinder* (1855), 24 L. J. (Q. B.) 148). The petitioner must undertake to visit the patient at least once in every six months, such undertaking being recited in the order (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 5 (3)). The medical certificates must not be signed by the petitioner, or by his husband or wife, near relative, partner or assistant (*ibid.*, s. 30). Wherever practicable, one of the certificates must be signed by the alleged lunatic's usual medical attendant; and where impracticable, an explanation (to be treated as part of the petition) must be furnished (*ibid.*, s. 31). Interested parties, such as the manager or regular medical attendant of the institution where the patient is to be detained, persons interested in payments on his behalf, or their partners or assistants, or near relatives of any of the above, are precluded from signing medical certificates (*ibid.*, s. 32); as also are Commissioners or visitors, unless acting at the request of a judicial authority, a judge in lunacy, or a Secretary of State (*ibid.*, s. 33).

(*k*) *Ibid.*, s. 6. Notice of the time and place appointed for the consideration of the petition must be given to the petitioner personally, or sent to him by registered letter at the address given in the petition (*ibid.*, s. 6 (1)). The petition will be considered in private, and only the petitioner, the alleged lunatic (unless the judicial authority otherwise orders), one person appointed by the alleged lunatic on his behalf, and the doctors who signed the medical certificates may be present without the leave of the judicial authority (*ibid.*, s. 6 (3)). The judicial authority and all persons who are present or who have official cognisance of the petition, other than the alleged lunatic and the person appointed on his behalf, will be bound to keep secret all matters and documents which may come to his or their knowledge by reason thereof, except when required to divulge the same by lawful authority (*ibid.*, s. 6 (5)). An order may be made under this provision without any inquiry upon the petition and certificates. By *ibid.*, s. 28 (4), the medical certificates have the same effect as if verified on oath. It is, therefore, unnecessary for the persons who signed to attend, but if they do not it would appear that their signatures must be proved before the certificates can be taken as evidence. As to the time during which a reception order remains valid, see p. 510, *post*

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and sends a copy thereof to the Commissioners; and also, where the alleged lunatic is detained under an urgency order, sends notice of dismissal to the person having charge of the alleged lunatic (*l*).

Second petition.

If after a petition has been dismissed another petition is presented as to the same alleged lunatic, the subsequent petitioner, so far as he has any knowledge of the previous petition, and its dismissal, must state such facts in his own petition, and must also, with his own petition, lodge a copy, to be obtained from the Commissioners at his own expense, of the statement of the reasons for dismissing the first petition. If he wilfully omits to comply with this provision he is guilty of a misdemeanour (*m*).

Right of patient to be seen by judicial authority.

1056. When, in the reception order made in respect of a private patient, no statement is contained that the judicial authority making such order personally saw the patient, the latter is entitled to see some other judicial authority (*n*), unless a certificate is sent to the Commissioners by the medical officer of the institution, or in the case of a single patient by his medical attendant, within twenty-four hours after reception, that the exercise of this right would be prejudicial to the patient (*o*). In the absence of such a certificate the doctor or person in charge must, within twenty-four hours after reception, give notice in writing to the patient of his right to see a judicial authority (*n*), and if within seven days the patient expresses a desire to exercise such right, the doctor or person in charge must procure him to sign a notice to that effect, and must transmit the same to the judicial authority (*n*) or to the justices' clerk (*p*). On receipt of the notice the judicial authority (*n*) either visits the patient or has the patient brought before him (*q*). After personally examining the patient and inspecting, if he so desires, the evidence on which the reception order was made (*r*), the judicial authority (*n*) reports to the Commissioners, who take any necessary steps to give effect to the report (*a*).

(*l*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 7 (1). The judicial authority must, when required, give to the Commissioners all such information as they may require as to the circumstances under which the order was made or refused (*ibid.*, s. 7 (2)); and on the dismissal of the petition or the release of the alleged lunatic, the Commissioners may give such information as they think proper to any person who satisfies them that he is a proper person to receive such information (*ibid.*, s. 7 (3)).

(*m*) *Ibid.*, s. 7 (4). For the penalty, see p. 528, *post.*

(*n*) The judicial authority must be a person exercising jurisdiction in the place where the lunatic is confined and not being the judicial authority who made the reception order (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 8 (4)).

(*o*) *Ibid.*, s. 8 (1).

(*p*) On failure to perform any of the duties imposed on him by this section, the doctor or person in charge will be guilty of a misdemeanour (*ibid.*, s. 8 (5)). For the penalty, see p. 528, *post.*

(*q*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 8 (2).

(*r*) *Ibid.*, s. 8 (3).

(*a*) *Ibid.* Justices' clerks are entitled to their fees for arranging for the above visits and preparing the above reports to the Commissioners out of the county or borough fund, and this course has the sanction of the Commissioners.

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1057. The petitioner has certain powers of removal (*b*) and discharge (*c*) of the lunatic. The Commissioners may by order substitute for the person upon whose petition a reception order was made, and either during his life or after his death, any other person who is willing to undertake the duties and responsibilities of the petitioner (*d*).

Powers of petitioner. Substitution.

SUB-SECT. 3.—*Summary Reception Orders.*

1058. A summary reception order is an order for the reception of an alleged lunatic on an application not originated by petition (*e*), and may be made in the case of :—

Definition.

(1) lunatics not under proper care and control, or cruelly treated or neglected (*f*) ;

When applicable.

(2) resident pauper lunatics (*g*) ;

(3) lunatics wandering at large, whether they are paupers or not (*h*), and

(4) lunatics in workhouses who ought to be in asylums (*i*).

As regards class (1), the order can only be made by a judicial authority (*k*), but orders dealing with classes (2), (3) and (4) may be made by any justice within his jurisdiction (*l*), or by a chairman of a board of guardians (though not a justice), duly authorised by the Lord Chancellor (*m*).

1059. Every constable, relieving officer (*n*), and overseer of a parish who has knowledge (*o*) that any person within his district or

(1) Lunatics not under proper care and control, or cruelly treated or neglected.

(*b*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 58 ; see p. 519, *post.*

(*c*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 72 (1) ; see p. 522, *post.* The petitioner's consent must also be obtained for the absence of the patient from the asylum (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 55 (5)), and notice of the patient's death must be sent to him (Commissioners in Lunacy Rules, 1895, r. 27 (4) (f)).

(*d*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 48 (1). From the date of the order the substituted person is subject to all the obligations and may exercise all the powers and authorities of the original petitioner (*ibid.*, s. 48 (2)), but the latter is not released from liabilities already incurred (*ibid.*, s. 48 (3)). An order will not be made without the consent of the petitioner or fourteen days' notice to him (*ibid.*, s. 48 (4)), and he may object in writing or appear personally before the Commissioners to object (*ibid.*, s. 48 (5)).

(*e*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 19 (1).

(*f*) *Ibid.*, s. 13 ; see the text, *infra*, and pp. 500, 501, *ante.*

(*g*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 14 ; see p. 506, *post.*

(*h*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 15 ; see p. 508, *post.*

(*i*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 24 (6) ; see p. 508, *post.*

(*k*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 13 (1) ; see p. 501, *ante.*

(*l*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 16, 24.

(*m*) Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 25 ; but the chairman only has jurisdiction to authorise detention in an "institution for lunatics," which does not include a workhouse (see Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 341, and note (*b*), p. 506, *post*).

(*n*) Should the guardians, with the sanction of the Local Government Board, have directed one relieving officer to discharge throughout the union the duties of relieving officer in respect of lunatics, every other relieving officer having the necessary knowledge as to lunatics not under proper care and control or cruelly treated or neglected must inform the relieving officer so directed of the circumstances. The officer so directed then gives information thereof upon oath (Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 2 (2)).

(*o*) This may apparently be the personal knowledge of the officer or knowledge

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parish, who is not a pauper and not wandering at large, is deemed to be a lunatic, and is not under proper care and control, or is cruelly treated or neglected by any relative or other person having the care or charge of him, must within three days after obtaining such knowledge give information thereof upon oath to a justice who is a judicial authority (*p*).

Examination by judicial authority and medical practitioners.

Upon such information, the judicial authority may visit the alleged lunatic, and must in any case direct two medical practitioners to examine the alleged lunatic and to certify as to his mental state (*q*). Each of the medical practitioners must examine the alleged lunatic separately from the other (*r*), and each must sign a separate certificate (*s*). Acting upon the medical certificates or after such inquiry as he thinks necessary (*a*), the judicial authority may direct the lunatic to be received and detained in an institution for lunatics to which, if a pauper, he might be sent (*b*).

Conveyance of lunatic.

The constable, relieving officer, or overseer upon whose information the order has been made (*c*), or any constable whom the judicial authority may require so to do, must either forthwith convey the lunatic to the institution named in the order (*d*), or may make other proper arrangements for the performance of the duty (*e*).

(2) Resident pauper lunatics.

1060. Every medical officer of a union who has knowledge that a pauper resident within the district of the officer is or is deemed to be a lunatic, and a proper person to be sent to an asylum, must within three days after obtaining such knowledge give notice in

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acquired by him by means of credible information supplied by a trustworthy informant (compare *Lister* v. *Perryman* (1870), L. R. 4 H. L. 521).

(*p*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 13 (1). As to such judicial authorities, see p. 501, *ante*.

(*q*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 13 (2).

(*r*) *Ibid.*, s. 29 (2).

(*s*) *Ibid.*, s. 13 (3).

(*a*) The judicial authority must proceed in the same manner so far as possible, and has, as to the alleged lunatic, the same powers as if a petition for a reception order had been presented by the person by whom the information with regard to the alleged lunatic has been sworn (*ibid.*, s. 13 (2); see p. 502, *ante*).

(*b*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 13 (3). An "institution for lunatics" means an asylum, hospital or licensed house (*ibid.*, s. 341; see pp. 474, 478, 479, *ante*).

(*c*) Having regard to the effect of the order (see Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 35 (1), and p. 510, *post*), even if the patient, so properly conveyed under lawful authority to the asylum, were of sound mind, it would not be illegal on the part of the keeper of the asylum to detain him until proper authority for his discharge was received (*Mackintosh* v. *Smith and Lowe* (1865), 4 Macq. 913, H. L.). As to suspension of the execution of the order for a period not exceeding fourteen days, and as to temporary removal to the workhouse, see p. 509, *post*. But in all other cases the reception order will cease to be of any force unless the lunatic has been received thereunder before the expiration of seven clear days from its date (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 36 (3)

(*d*) *Ibid.*, s. 13 (3).

(*e*) Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 2 (1). The lunatic must be classified as a pauper until it is ascertained that he is entitled to be classified as a private patient (*ibid.*, s. 3). If it is afterwards discovered that he has means he may be classified as a private patient and discharged on the application of the next of kin (*Re Steneult* (1894), 29 L. J. 345).

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writing to the relieving officer of the district, or if there is no such officer, to an overseer of the parish where the pauper resides (*f*). The relieving officer or overseer, as the case may be, on obtaining such knowledge, either through the medical officer or otherwise (*g*), must within three days give notice thereof to some justice having jurisdiction in the place where the pauper resides (*h*), who must either require the relieving officer or overseer giving the notice to bring the alleged lunatic before him or some other justice at some time within three days from the date of the notice (*i*), or examine him at his own house or elsewhere (*k*).

Examination by justice.

This examination should, if possible, be made in private and not in open court, and, where practicable, the justice should attend at the place where the alleged lunatic is living, whether at his own place of abode or at the workhouse (*l*). The justice must call in a medical practitioner and make such inquiries as he thinks advisable (*m*), and, acting on the certificate of the medical practitioner, may direct the lunatic to be received and detained in an institution for lunatics (*n*). But he must not sign the order unless he is satisfied that the lunatic really is a pauper by being in receipt of relief or by being in such circumstances as to require relief (*o*).

How made.

Medical certificate.

The relieving officer, overseer, or constable who brought the lunatic before the justice must either forthwith, so soon as the order is made (*p*), convey the lunatic to the institution named

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(*f*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 14 (1).

(*g*) If the relieving officer is aware of the fact that a pauper is a lunatic, whether by notice from the medical officer or otherwise, it is his duty to act independently of the medical officer and to take the alleged lunatic before a justice. Lunacy is not sickness so as to enable the relieving officer to give an order for medical relief under art. 215 of the General Consolidated Order; compare 55 J. P. 828.

(*h*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 14 (2). As to the case when there are two or more relieving officers in the union and one has been directed to discharge the duties throughout the union, see note (*n*), p. 505, *ante*. When a borough has no separate court of quarter sessions, the county justices have jurisdiction within the borough concurrently with the borough justices under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 154. The powers of a relieving officer or overseer in urgent cases to remove an alleged lunatic to a workhouse and the power of detaining him there, for a period not exceeding three days, are the same as in the case of a lunatic not under proper care and control (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 20); see p. 505, *ante*.

(*i*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 14 (3).

(*k*) *Ibid.*, s. 17.

(*l*) Circular Letter from Poor Law Board, 26th November, 1867.

(*m*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 16. The justice must not act on a certificate by a medical man of whom he knows nothing; the doctor must be approved and called in by the justice. The justice and doctor must both examine the alleged lunatic, but it is not obligatory on the doctor to examine him in the presence of the justice, nor on the justice to examine him in the presence of the doctor (*R.* v. *Whitfield* (1885), 15 Q. B. D. 122, C. A., *per* LINDLEY, L.J., at p. 148).

(*n*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 16.

(*o*) *Ibid.*, s. 18. A person who is visited by a medical officer of the union or parish at the expense of the union or parish is for this purpose to be deemed in receipt of relief (*ibid.*).

(*p*) The authority for the order is the same as in the case of lunatics not

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therein (*q*), or he may make other proper arrangements for the performance of the duty (*r*).

(3) Lunatics wandering at large, whether paupers or not.

1061. Every constable, relieving officer, and overseer who has knowledge that any person (whether a pauper or not) wandering at large (*s*) within his district or parish is deemed to be a lunatic must immediately apprehend and take him or cause him to be apprehended and taken before any justice (*t*). But in urgent cases the officer may remove the alleged lunatic to the workhouse in a similar manner, and subject to similar rules and limit of time, as in the case of lunatics not under proper care and control, or resident pauper lunatics (*a*), and the subsequent proceedings are similar to those in the case of resident pauper lunatics except that (1) the justice must be satisfied before making his order that the alleged lunatic was wandering at large in addition to being a lunatic and a proper person to be detained, and (2) the justice need not be satisfied that the lunatic is a pauper (*b*).

(4) Lunatics in workhouses who ought to be in asylums.

1062. If, in the case of a lunatic being in a workhouse, (1) the medical officer thereof does not sign a certificate for his detention therein, or (2) if at or before the expiration of fourteen days from the date of the certificate an order is not made by a justice for the detention of the lunatic in the workhouse, or (3) if after an order has been made the lunatic ceases to be a proper person to be detained in a workhouse, the medical officer of the workhouse must forthwith give notice in writing to the relieving officer of the union to which the workhouse belongs, who must thereupon proceed in the same manner as in the case of a resident pauper lunatic (*c*).

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under proper care and control (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 35 (1)); see p. 505, *ante;* as to suspension of the execution of the order for a period not exceeding fourteen days, and as to temporary removal to a workhouse, see p. 509, *post.*

(*q*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 16.

(*r*) Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 2 (1).

(*s*) A person deemed to be a lunatic (by reason of a medical certificate to that effect) and not being under control is a person wandering at large within the meaning of this provision (*Morris* v. *Atkins* (1891), 18 T. L. R. 628, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 630).

(*t*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 15 (1). As to when there are two or more relieving officers in the union and one has been directed to discharge the duties throughout the union, see note (*n*), p. 505, *ante,* and Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 2 (2).

(*a*) See pp. 505, 506, *ante.*

(*b*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 16—18.

(*c*) *Ibid.*, s. 24 (6). As to the above-mentioned certificate and order, see p. 509, *post;* and as to the proceedings to be taken, see p. 506, *ante.* Where a union is in more than one county, and the workhouse of the union is in one county and the place from which the lunatic was sent to the workhouse is in another county, an order may be made by a justice for the county from which the lunatic was sent for the removal of the lunatic either to the asylum of the county in which the workhouse is or to the asylum of the county from which the lunatic was sent, and such latter order may be made notwithstanding that there may be an asylum of the county in which the workhouse is, and there may not be a deficiency of room or any other special circumstances by reason whereof the lunatic cannot conveniently be taken to that asylum (Lunacy Act, 1890 (53 & 54 Vict. c. 8), s. 68); see also Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 6.

Pending the proceedings for his removal, the lunatic may be retained in the workhouse (*d*).

Removal of patient from workhouse by order of Commissioners.

1063. Two or more Commissioners may by order direct that a lunatic or alleged lunatic in a workhouse be removed to an institution for lunatics, and such order will have the same effect as a summary reception order (*e*). The guardians of the union may appeal against such an order to the Secretary of State, whose decision, made on the report of some person specially authorised by him, is final (*f*).

Suspension of order by justice.

1064. A justice making a summary reception order may suspend its execution for any period not exceeding fourteen days, and in the meantime may give directions for the proper care of the lunatic (*g*). Where a reception order has been made and the execution of the order has been suspended the lunatic may be received in the institution for lunatics named in the order at any time within fourteen days after the date of the reception order (*h*).

Suspension of removal by medical practitioner.

1065. If a medical practitioner after examining a lunatic as to whom a summary reception order has been made certifies in writing that the lunatic is not in a fit state to be removed, the removal must be suspended until the same or some other medical practitioner certifies that the lunatic is fit to be removed, and every medical practitioner who has certified that the lunatic is not in a fit state to be removed must, as soon as in his judgment the lunatic is in a fit state to be removed, certify accordingly (*i*); whereupon the lunatic may be received in the institution for lunatics named in the order within three days after the medical certificate of fitness (*k*).

Removal to workhouse in urgent cases.

1066. In any case where a summary reception order either might be or has been made (*l*), any justice, if satisfied that it is expedient for the welfare of the lunatic or for the public safety that the lunatic should forthwith be placed under care and control, and if it appears to him that there is proper accommodation for the lunatic in the workhouse of the union in which the lunatic is, may make an order for taking the lunatic to and receiving him in that workhouse (*m*). Such an order will not authorise the detention of a lunatic in a workhouse for more than fourteen days, after which period his detention in the workhouse will only be lawful on a

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(*d*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 24 (6).
(*e*) *Ibid.*, s. 60 (1).
(*f*) *Ibid.*, s. 60 (2).
(*g*) *Ibid.*, s. 19 (1). An order made on petition must be executed within seven days (*ibid.*, s. 36 (3)); see p. 511, *post.*
(*h*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 36 (1).
(*i*) *Ibid.*, s. 19 (2).
(*k*) *Ibid.*, s. 36 (2).
(*l*) The power to order removal to a workhouse only arises in cases where a summary reception order has been or might be made; see p. 505, *ante.* It follows that all the requirements (see p. 506, *ante*) as to inquiries, medical examinations etc. laid down by the Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 13—22, must be fulfilled in the several cases to which they apply before such an order for removal can be made.
(*m*) *Ibid.*, s. 21 (1), (2).

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certificate of the medical officer of such workhouse (*n*). Where a reception order has been made and the lunatic has been temporarily taken to the workhouse, he may be received in the institution for lunatics named in the order at any time within fourteen days after the date of the reception order (*n*).

Asylum which must be authorised by order.

1067. Every summary reception order must authorise the reception of the lunatic named therein into an asylum of the county or borough in which the place from which the lunatic is sent is situate, unless there is no such asylum or there is a deficiency of room therein (*o*), or there are any other special circumstances; in any of which cases, the particular reason being stated in the order, the lunatic may be sent to any other institution for lunatics (*p*).

SUB-SECT. 4.—*Effect and Duration of Reception Orders.*

Effect.

1068. If a reception order appears to be in conformity with the Lunacy Act, 1890 (*q*), it is a sufficient authority for the petitioner or any person authorised by him to take the lunatic and convey him to the place mentioned in such order and for his reception and detention therein, and the order may be acted on without further evidence of the signature or of the jurisdiction of the

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(*n*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 36 (1). During the fourteen days there must be a certificate of the workhouse medical officer under *ibid.*, s. 24 (1), which will authorise further detention for fourteen days from the date of the certificate (*ibid.*, s. 24 (2); see p. 513, *post*), and during such period an order for continued detention may be made (see *ibid.*). Except under the provisions referred to at p. 512, *post*, there can be no order for continued detention in a workhouse. If the case looks like a workhouse case in the first instance the relieving officer should place the lunatic in the workhouse, under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 20 (see p. 500, *ante*), for three days, and then apply within that time for a justice's order for continued detention under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 24 (4) (see p. 513, *post*). It will be still open to the justice on that application to make a summary reception order for the asylum instead under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 18 (see p. 505, *ante*), if he is of opinion that it is not a workhouse case and if he has jurisdiction otherwise.

(*o*) As to reserved beds, see Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 275 (4); and note (*t*), p. 483, *ante*.

(*p*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 27 (1), (2). If on the lunatic's arrival the asylum is found to be full the superintendent should send the lunatic back to the justice making the reception order with a written statement of the reasons why he cannot be taken in, in order that the justice may state the circumstances in the order on sending him elsewhere (see *ibid*, s. 27 (2)). Where a workhouse is situated in a county which does not include the union to which the workhouse belongs, a summary reception order made by a justice of the county in which the workhouse is situate may order a lunatic in a workhouse to be received in any asylum to which pauper lunatics chargeable to the union to which the workhouse belongs may legally be received (Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 6; see p. 496, *ante*). A pauper lunatic may not be received into any asylum other than one belonging wholly or in part to the county or borough in which his place of settlement is situate unless there is a subsisting contract for the reception of lunatics of such county or borough therein, or such borough otherwise contributes to the asylum into which the pauper is to be received (as to such contracts and contributions, see p. 486, *ante*), except the order is indorsed by a visitor of that asylum. The manager of a hospital or licensed house is not bound to receive any lunatic under any such order except in pursuance of a subsisting contract (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 27 (3), (4)).

(*q*) 53 & 54 Vict. c. 5.

person making it (*r*). A reception order for a private patient made upon petition is not a peremptory order, but merely an authorisation (1) for the petitioner, or any person authorised by him, to take and convey the lunatic to the asylum named therein, and (2) for the medical superintendent of the asylum to receive the patient, and the statute affords no means whereby the execution of the order can be enforced by the judicial authority.

Duration of validity of authorisation.

The order ceases to be in force (*i.e.*, to give the authorisation above mentioned) unless the lunatic is received thereunder before the expiration of seven clear days from its date (*s*). A petitioner not choosing to execute the order, or to cause it to be executed, does so at his own risk. If he detains the lunatic for payment in an unlicensed house he is guilty of a misdemeanour (*t*). If after the expiration of the order he detains the party as a lunatic at all, he is guilty of a misdemeanour (*a*), unless he can justify it at common law as necessary to prevent injury to the party himself or to others (*b*).

Pending temporary removal or transfer.

1069. If a patient is removed temporarily from the place in which he is confined (*c*), or is transferred from one place of confinement to another (*d*), the original order and certificate or certificates upon which he was received remain in force (*e*).

Pending re-classification.

1070. An order for the reception of a patient as a pauper will authorise his detention though it afterwards appears that he is entitled to be classified as a private patient, and an order for the reception of a private patient will authorise his detention although it afterwards appears that he ought to be classified as a pauper patient (*f*).

Amendment.

1071. If an order or certificate for the reception of a lunatic is after such reception found to be in any respect incorrect or defective, it may within fourteen days after such reception be amended by the person who signed it, with the sanction of one of the Commissioners and, in the case of a private patient, the consent of the judicial authority who signed the reception order. If the Commissioners consider a certificate to be incorrect or defective, they may in writing addressed to the manager of the institution for lunatics

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(*r*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 35 (1). The order, together with the petition, statement of particulars, and medical certificates upon which the order was made, must be delivered or sent by post to the petitioner, and must by him or his agent be delivered to the manager of the institution for lunatics in which or to the person by whom the lunatic is to be received (*ibid.*, s. 35 (2)).

(*s*) *Ibid.*, s. 36 (3).

(*t*) *Ibid.*, s. 315; see p. 528, *post.*

(*a*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 315 (1).

(*b*) *Brookshaw* v. *Hopkins* (1773), Lofft, 240, 243; *Scott* v. *Wakem* (1862), 3 F. & F. 328; *Symm* v. *Fraser* (1863), 3 F. & F. 859; see 55 J. P. 476.

(*c*) On trial or for health (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 55); see p. 517, *post.*

(*d*) See p. 518, *post.*

(*e*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 37 (2); and see *ibid.*, s. 38 (3), and note (*i*), p. 502, *ante.*

(*f*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 37 (1). As to classifying a pauper patient as a private one on discovery of his means, see *Re Steneult* (1894), 29 L. J. 345; and note (*e*), p. 506, *ante.*

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or the person who has charge of the single patient, as the case may be, require it to be amended by the person who signed it, and in default of amendment to their satisfaction within fourteen days may make an order for the patient's discharge. An amended order or certificate will take effect as though the amendment had been contained therein when it was signed (*g*).

Reception orders last for one year.

1072. Save in the case of lunatics so found by inquisition (*h*), a reception order lasts in the first instance for one year from its date. On a special report to the Commissioners by the medical officer of the institution or the medical attendant of the lunatic, as the case may be, and a certificate that the patient is a person of unsound mind and a proper person to be detained under care and treatment, sent not more than a month nor less than seven days before the reception order expires, the order will be automatically continued for another year, then on similar evidence for two years, then on similar evidence for three years, then on similar evidence for successive periods of five years (*i*).

Continuation on special report.

Duty of Commissioners on unsatisfactory report.

If, however, in the opinion of the Commissioners the special report does not justify the accompanying certificate, then in the case of a patient in a hospital or licensed house, or under care as a single patient, they must make further inquiries, and if dissatisfied they may direct his discharge. In the case of a patient in an asylum the Commissioners must send a copy of the report, with any other information in their possession relating to it, to the clerk to the visiting committee of the asylum, and the committee must thereupon investigate the case and may discharge the patient or give such directions respecting him as they may think proper (*k*).

SUB-SECT. 5.—*Lunatics in Workhouses.*

Grounds on which patients may remain in workhouse.

1073. Save in certain exceptional cases (*l*), no person is allowed to remain in a workhouse as a lunatic unless the medical officer of the workhouse certifies in writing—

(*g*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 34. The alteration of an order or certificate for reception in any material particular, except with the sanction mentioned in the above provision, at all events if made with the privity of the person who relies on it, makes the whole document invalid, and precludes any reliance being placed thereon. But it is not so where the alteration is immaterial (*Lowe* v. *Fox* (1887), 36 W. R. 25, H. L.).

(*h*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 38 (10).

(*i*) *Ibid.*, s. 38 (1); Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 7. For the sake of conformity the Commissioners may, by orders under their seal, direct that reception orders may expire on any quarter day next after the one on which they would otherwise expire (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 38 (2)). An order for the removal of a patient from one custody to another will not be deemed to be a reception order within *ibid.*, s. 38, but the patient who is removed will, after removal, be deemed to be detained under the original reception order (*ibid.*, s. 38 (3)). A special report or certificate may refer to more than one patient (*ibid.*, s. 38 (8)).

(*k*) *Ibid.*, s. 38 (6). The manager of an institution for lunatics, and any person having charge of a single patient, who detains a patient after knowledge that the reception order has expired, is guilty of a misdemeanour (*ibid.*, s. 38 (7)). For the penalty see p. 527, *post.*

(*l*) These exceptional cases are under the Lunacy Act, 1890 (53 & 54 Vict.

(1) that such person is a lunatic and the grounds for the opinion;

(2) that he is a proper person to remain in a workhouse; and

(3) that there is sufficient accommodation in the workhouse for his care and treatment apart from the other non-lunatic inmates, or that his condition is such that it is not necessary, either for his own convenience or that of the other inmates, that he should be kept separate from them (*m*).

Authority for detention.

The medical certificate is the authority for detention for fourteen days (*n*), after which an order of a justice having jurisdiction in the place where the workhouse is situate is required (*o*), such order being obtained on the application of the relieving officer of the union, supported by two medical certificates, one of which must be signed by a medical practitioner, not being an officer of the workhouse, and one by the workhouse medical officer (*p*).

Pauper lunatic discharged from institution and detained in workhouse.

1074. Where a pauper lunatic is discharged from an institution for lunatics, but the medical officer thereof is of opinion that the patient is a proper person to be kept in a workhouse as a lunatic, he must so certify, and the lunatic may thereupon be received and detained against his will in a workhouse without further order, provided that the medical officer of the workhouse certifies that the accommodation therein is sufficient for the lunatic's proper care and treatment, or that his condition is such that it is not necessary for his convenience or that of the other inmates that he should be kept separate (*q*).

Reception of chronic but not dangerous lunatics.

1075. The visitors of any asylum may, with the consent of the Local Government Board and the Commissioners, and subject to

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c. 5), ss. 20, 21, which refer to temporary removal to the workhouse in urgent cases (see pp. 500, 509, *ante*), and under a justice's order under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 24 (8), dealing with lunatics in workhouses before the passing of the Act; and under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 25, 26, dealing respectively with discharged paupers who have not recovered and chronic lunatics (see note (*q*), *infra*, and note (*r*), p. 514, *post*); and see Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 4 (1).

(*m*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 24 (1). The doctor, who is not the medical officer of the workhouse, is entitled to a fee for his certificate from the guardians of the union (*ibid.* s. 24 (5)). If the medical officer does not sign the certificate mentioned in *ibid.*, s. 24 (1), or a justice's order for detention is not obtained, or the lunatic ceases to be a proper person to be detained in the workhouse, the medical officer must give notice to the relieving officer, and the latter must proceed as though the lunatic were a pauper deemed to be a lunatic and a proper person to be sent to an asylum (*ibid.*, s. 24 (6); see pp 506, 507, *ante*). In the case of a lunatic in an asylum under the statutory jurisdiction of the Metropolitan District Asylums Board, the necessary proceedings are taken by one of the officers of the asylum nominated by the managers of the asylum district (*ibid.*, s. 24 (7)). The medical certificates on which a justice's order is founded must be attached to such order (Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 5). As to the removal of lunatics from a workhouse to an asylum by order of justices or Commissioners, see p. 509, *ante*.

(*n*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 24 (2).

(*o*) *Ibid.*, s. 24 (3).

(*p*) *Ibid.*, s. 24 (4).

(*q*) *Ibid.*, s. 25. Two certificates are contemplated, namely, (1) by the medical officer of the institution for lunatics; and (2) by the medical officer of the workhouse, and a copy of the former must accompany the notice of discharge (Commissioners in Lunacy Rules, 1895, r. 23 (4)).

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such regulations as they respectively prescribe, make arrangements with the guardians of any union for the reception into the workhouse of any chronic lunatics, not being dangerous, who are in the asylum, and have been selected and certified by the manager of the asylum as proper to be removed to the workhouse, and every lunatic so received in a workhouse will, while he remains there, continue a patient on the books of the asylum for the purposes of the Lunacy Act, 1890 (*r*), so far as it relates to lunatics removed to asylums (*s*).

SECT. 2.—*Care and Treatment of Lunatics.*

SUB-SECT. 1.—*Reports on and Visits to Private Patients.*

Reports to Commissioners.

Report on patient in licensed house.

1076. The medical officer of every institution for lunatics and the medical attendant of every single patient must, at the termination of one month from reception of a private patient, send a report to the Commissioners in such form as they direct. In the case of a licensed house (*t*) he must also at the same time send a copy of such report to the clerk of the visitors of licensed houses in the county or borough where the house is situate (*u*).

Visits by Commissioners;

or medical or other visitors.

On receipt of this report as to any patient in a licensed house within their immediate jurisdiction (*w*), the Commissioners must arrange for an early visit by one or more of themselves to report as to the propriety of his detention (*x*). In the case of a private patient in a licensed house the visitors arrange for a like visit by the medical visitor alone or with the other visitors, and if this visit results in any doubt as to the propriety of the detention, the visitor reports in writing to the Commissioners, who in their turn satisfy themselves by inquiry both as to such propriety and as to the expediency of reporting the case to the Lord Chancellor with a view to an inquisition (*a*).

Report on single patient.

On receipt of a similar report as to a single patient, the Commissioners must arrange for a similar visit, either by one or more of themselves or by a medical visitor for the district in which the patient resides. Should the latter course be adopted, the person directed to visit must report to the Commissioners and has all the powers of a Commissioner (*b*).

Report on private patient in asylum or hospital.

In the case of a private patient in an asylum or hospital, the Commissioners, on receipt of the report, arrange for a visit by one or more of themselves to inquire and report as to the detention, or

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(*r*) 53 & 54 Vict. c. 5, s. 26. The lunatic may be chargeable to any union or parish, not necessarily to the one in which the workhouse is situate (Commissioners' 17th Report, p. 23; 18th Report, p. 73). The removal of patients to the workhouse does not affect their subsequent treatment, removal, discharge, and chargeability, or the rights of the guardians of the union or parish to which they are chargeable to take proceedings (see pp. 492 *et seq.*, *ante*) for rendering their property (if any) available for their maintenance (Commissioners' 21st Report, p. 32; 22nd Report, p. 86; 23rd Report, p. 92).

(*s*) See p. 509, *ante*.

(*t*) See p. 471, *ante*.

(*u*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 39 (1), (2)

(*w*) As to this jurisdiction, see note (*e*), p. 466, *ante*.

(*x*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 39 (3).

(*a*) *Ibid.*, s. 39 (4).

(*b*) *Ibid.*, s. 39 (5), (6).

the Commissioners may send a copy of the report to the clerk to the visiting or managing committee of the asylum or hospital respectively, and one or more of the committee must thereon visit the patient and report to the committee as to the propriety of the detention, and the committee, or any three of them, may on consideration discharge the patient or give such directions as they think fit (*c*).

Where no special visit required.

No special visit is necessary in cases where, within one month from reception of a private patient, the institution or house is visited by the Commissioners or visitors, the patient then and there examined by them, and a report made as to the propriety of his detention (*d*).

Discharge by Commissioners.

The Commissioners in any of the foregoing cases can discharge any patient whose case they think justifies a discharge (*e*). None of the above provisions applies to lunatics received under a removal order or to any lunatic so found by inquisition (*f*).

SUB-SECT. 2.—*Medical Attendance.*

Practitioners disqualified for attendance on patient.

1077. A medical practitioner who has signed a certificate on which a reception order has been made is disqualified from being the regular professional attendant of the lunatic while detained under the order. Similarly, a medical practitioner being a Commissioner or visitor is disqualified from professionally attending a patient in a hospital or licensed house, unless directed to visit the patient in pursuance of his official duties as Commissioner or visitor (*g*).

Number of visits.

The Commissioners may direct how often a single patient is to be visited by a medical man, but, in the absence of any order, one visit in every two weeks must be made by a medical practitioner not deriving, and not having a partner, father, son, or brother who derives, any profit from the patient's charge. The medical attendant of any single patient may be discontinued and some other person employed in his place by direction of any two Commissioners. Any person having charge of a single patient who fails to carry out the Commissioners' directions under these provisions is guilty of a misdemeanour (*h*). These provisions do not apply to lunatics so found by inquisition (*h*).

Special medical reports.

The Commissioners may at any time require a special medical report as to any single patient from his medical attendant. This is additional to the requisite periodical reports, and must be in such form and specify such particulars as the Commissioners direct (*i*).

SUB-SECT. 3.—*Visits of Friends, and Correspondence.*

Order for admission of relations, friends etc.

1078. The Commissioners or visitors of licensed houses, according to their respective jurisdictions, may at any time give a written

(*c*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 39 (7).
(*d*) *Ibid.*, s. 39 (8).
(*e*) *Ibid.*, s. 39 (9).
(*f*) Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 8; see, further, as to visiting, pp. 469 *et seq.*, *ante*.
(*g*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 43.
(*h*) *Ibid.*, s. 44. For the penalty, see p. 528, *post*.
(*i*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 45.

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order for the admission of any relation or friend or any medical man desired by either of the latter to visit any patient anywhere within the limits of their authority (except in prison). Such an order may be limited to a single visit, or may extend to a specified number of visits, or be a general authority to visit at any reasonable time with or without restrictions as to an attendant's presence (*k*).

Penalty for non-compliance.

Failure to comply with the order on the part of the manager or principal officer renders him liable to a fine not exceeding £20 (*l*).

Letters.

1079. All letters written by any patient must be forwarded unopened by the manager of every institution for lunatics, and by every person having charge of a single patient, if addressed to the Lord Chancellor, judge in lunacy, Secretary of State, Commissioners, the person signing the reception order or the petitioner for such order, Chancery or any other visitors, or the visiting committee. The forwarding of other letters is a matter of discretion. Any default involves liability to a penalty not exceeding £20 (*m*).

Notices to be posted up in institutions.

1080. Whenever the Commissioners so direct (*n*), printed notices must be posted up in every institution, enabling every private patient to see them, setting forth every such patient's right—

(1) to have any letter written by him forwarded as above mentioned;

(2) to request a personal and private interview with a visiting Commissioner or visitor at any visit made to the institution.

Any default in posting these notices, or failure for ten days to comply with the Commissioners' directions as to their situation, involves liability to a penalty not exceeding £20 (*o*).

SUB-SECT. 4.—*Treatment.*

Subjection to mechanical means of restraint.

1081. No lunatic must be subjected to mechanical means of restraint (which includes such instruments and appliances as the

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(*k*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 47. The Commissioners in Lunacy are anxious that, subject to proper restrictions, patients should be visited by relations and friends. At the same time by a circular addressed to superintendents of asylums and managers of licensed houses they draw attention to the subject of the execution of documents affecting lunatics' property. Whilst it is no part of their duty to determine the general question of the validity of documents so executed, the Commissioners are of opinion that superintendents and managers ought not in any circumstances to permit or knowingly afford facility for, but ought, on the contrary, to prevent, the execution by persons of unsound mind in their charge of any document other than a will or codicil affecting their property or income. They except the case of a will or codicil because testamentary dispositions made during lucid intervals are held to be valid (see p. 403, *ante*), and are always open to be contested before being rendered operative by probate. As to access by a solicitor to his client in an asylum to obtain an affidavit required by rules of court, see *Re Petition for Judicial Separation, Ex parte Beecham*, [1901] P. 65, where the above circular is set out.

(*l*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 47.

(*m*) *Ibid.*, s. 41.

(*n*) By Order of 14th May, 1890, these notices are directed to be put up in every institution for lunatics.

(*o*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 42.

Commissioners may from time to time determine (*p*)) unless the restraint is necessary for surgical or medical treatment, or for prevention of injury to himself or others (*q*). Should restraint of this kind be applied, a medical certificate must forthwith be signed describing the means used and the ground on which the certificate is founded. This certificate must be signed by the medical officer of the institution for lunatics or workhouse, or in the case of a single patient by his medical attendant. A full record of every case of restraint by these means must be kept from day to day and a copy of the record and certificate sent quarterly to the Commissioners. Where the patient is in a workhouse the record must be kept by the medical officer and the copies above mentioned forwarded by the clerk to the guardians. Any contravention of these provisions is a misdemeanour (*r*).

Diet.

1082. All questions as to diet may be determined and regulated in the case of pauper lunatics in a hospital or licensed house by the visiting Commissioners; and, subject to the directions of the visiting Commissioners, visitors of a licensed house have a like power as to that house (*s*).

Employment of males in custody of female patients.

1083. No male person may be employed in the personal custody or restraint of any female patient in an institution for lunatics. Violation of this rule renders the employer liable to a penalty not exceeding £20. An exception, however, is made in cases of urgency or necessity, but the manager must report such employment to the Commissioners or visitors on their next visit (*a*).

Entries in workhouse books of visiting guardians.

1084. Visiting guardians must once at least in each quarter enter in a book to be kept in the workhouse such observations as they think fit as to diet, accommodation, and treatment of any lunatics in the workhouse. The book must be kept by the master and laid before the Commissioners when next visiting (*b*).

SUB-SECT. 5.—*Absence on Trial or for Health or Change of Residence.*

Absence on trial.

1085. Any two visitors of an asylum may, with the medical officer's written advice, permit a patient to be absent on trial so long as they think fit, and in the case of a pauper an allowance,

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(*p*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 40 (6). By Regulations dated 17th April, 1895, the Commissioners have defined at great length mechanical means of bodily restraint.

(*q*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 40 (1). Restraint of a lunatic to prevent him from injuring himself or others is justifiable at common law (*Scott* v. *Wakem* (1862), 3 F. & F. 328; *Brookshaw* v. *Hopkins* (1773), Lofft, 240, 243). On the other hand, restraint greater in degree, more severe in character, or longer in duration than necessary for the security and care of the lunatic is an offence at law punishable on indictment (*R.* v. *Roberts* (1853), *per* Lord CAMPBELL, C.J., Commissioners' 8th Report, p. 37).

(*r*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 40 (2), (3), (4), (5), (7). For the penalties, see pp. 528, 529, *post*.

(*s*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 52; and see *ibid.*, ss. 187 (1) (g), 194 (1) (f), 275 (6), pp. 471, 483, *ante*.

(*a*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 53.

(*b*) *Ibid.*, s. 54 (1), (2).

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not exceeding the charge in the asylum, may be made to him while so absent (*c*).

Absence to travel or on trial.

The manager of any hospital or licensed house may take or send under proper control any private patient to any specified place or to travel in England for the benefit of his health, or permit such a patient to be absent on trial, but only with the consent of a Commissioner, or, in the case of a hospital, of two members of its managing committee, or, in the case of a house licensed by justices, of two of its visitors. Any such consent may be renewed and the place specified varied. Before this consent is given, the written approval of the petitioner for the reception order or of the person making the last payment on account of the lunatic must be produced, unless dispensed with by the respective consenting persons for cause shown (*d*).

Absence of pauper patient on trial.

A Commissioner as regards any hospital or licensed house and two of the managing committee of a hospital and two of the visitors of a house licensed by justices may permit a pauper patient to be absent on trial for any period, and may make or order an allowance to the pauper not exceeding the charge made for him in the hospital or house, which shall be paid to him or for his benefit, as the Commissioner or visitors direct (*e*).

Absence by leave of medical officer.

The medical officer of a hospital or licensed house may permit any patient to be absent for a period not exceeding forty-eight hours (*f*). If a person allowed to be absent on trial for any period does not return at the expiration thereof, and a medical certificate certifying that his detention is no longer necessary is not sent to the visitors of the asylum or the manager of the hospital or house, he may at any time within fourteen days after the expiration of the period of trial be retaken as in the case of an escape (*g*).

Change of residence of single patient.

1086. Any person having charge of a single patient may change his residence and remove him to any new residence of such person in England, but before so doing he must give seven days' notice thereof and of the new residence to the Commissioners, and to the petitioner for the reception order, or to the person making the last payment on account of the lunatic (*h*).

(*c*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 55 (1), (2). The regulations of an asylum may provide for the absence of a patient for not more than four days with the leave of the manager (*ibid.*, s. 275 (5)). The medical officer's recommendation must accompany every application for leave of absence (Commissioners in Lunacy Rules, 1895, r. 21 (2)).

(*d*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 55 (3), (4), (5), as amended by Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 9.

(*e*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 55 (6), as amended by Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 9.

(*f*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 55 (7), as amended by Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 9. Absence on trial from an asylum under this provision will not amount to a break of residence so as to destroy the status of irremovability of a lunatic irremovable at the time of his admission (see p. 491, *ante*), if the lunatic is not at the time of his release on leave capable of exercising an independent choice as to his place of residence (*R.* v. *Bruce*, [1892] 2 Q. B. 136).

(*g*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 55, as amended by Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 9.

(*h*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 56 (1), (2).

Absence to travel or on trial.

Any person having charge of a single patient may, with the previous consent of a Commissioner, take or send the patient under proper control to any specified place for any definite time (*i*) for the benefit of his health, or permit him to be absent on trial for such period as may be thought fit. The approval of the petitioner or of the person making the last payment on account of the lunatic must be produced to the Commissioner before his consent can be given, unless dispensed with by him for cause shown (*k*).

SUB-SECT. 6.—*Removal*

Persons who may authorise removal.

1087. Anyone having authority to order the discharge of a private patient from an institution for lunatics, or of any single patient, may with the written consent of a Commissioner by order in writing direct removal of the patient to any institution, or to the charge of any person named in the order (*l*).

Transfer by order of Commissioners.

Any two Commissioners may order the transfer of a lunatic from one institution for lunatics to another (*m*), or from the charge of any person under whose care he is as a single patient to the charge of any other person, or to any institution for lunatics (*n*). On the death of a person having charge of a single patient the Commissioners may, on application by the person having authority to discharge, or if no such application is made within seven days from the death, on their own motion direct the lunatic's removal to the charge of some person to be named in the order (*n*).

Removal of pauper to asylum.

1088. Where the visiting committee of an asylum has made an order for delivery of a pauper therein to the custody of a relative or friend, any two members of the committee may at any time, if they think fit, order his removal to the asylum (*o*).

Any two visitors of an asylum may order a pauper lunatic chargeable to any union within any county or borough to which the asylum wholly or in part belongs, or to such county or to any county for the reception of whose pauper lunatics into that asylum there is a subsisting contract, to be removed to that asylum from any other institution for lunatics in which he may be detained (*p*).

(*i*) On a fresh application to the Commissioners, the place originally specified may be altered or the time extended.

(*k*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 56 (3), (4); Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 10.

(*l*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 58. As to who can order a discharge, see p. 522, *post*.

(*m*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 59 (1), (3). A medical report from the officer of the institution left is generally required (Commissioners in Lunacy Rules, 1895, r. 21).

(*n*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 59 (2).

(*o*) *Ibid.*, s. 63.

(*p*) *Ibid.*, s. 64. These provisions do not extend to the removal of lunatics chargeable (1) to a borough not being a county borough; (2) to a union within a county for the reception of whose pauper lunatics there is a subsisting contract. The clerk of every asylum, the superintendent of every hospital, and the resident licensee of every licensed house must, within two clear days after the removal, discharge, death, or transfer from the private to the pauper class, or *vice versâ*, of any patient, make entries in the register of patients, and of removals, discharges, and deaths (Commissioners in Lunacy Rules, 1895, r. 22), and within the like time in the case of a private patient send notice to the

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Removal of pauper from asylum.

1089. Any two visitors of an asylum may order the removal of a pauper lunatic therein to some other institution for lunatics (*q*). But a lunatic must only be removed under this provision (except with the written consent of two Commissioners) to one of the following:—

(1) an asylum within or belonging wholly or in any part to the county within which the asylum from which the lunatic is removed is situate, or to the county in some parish of which the lunatic may have been adjudged to be settled;

(2) a hospital or licensed house within any such county; or

(3) an institution for lunatics into which the lunatic can be received under a subsisting contract (*r*).

Execution of order.

The visitors ordering the removal of a pauper lunatic may by the order require any relieving officer or other officer of the union, county, or borough to which he is chargeable, or may authorise any other person, to execute the order (*s*).

Certificate of fitness for removal.

No pauper lunatic may be removed under any removal order of two visitors without a medical certificate of the medical officer of the institution for lunatics from which the patient is to be removed certifying that he is in a fit condition of bodily health to be removed (*t*).

Removal from workhouse on order of Commissioners.

1090. If any two or more Commissioners on visiting a workhouse consider that any lunatic or alleged lunatic therein is not a proper person to be allowed to remain there, they may order his removal to an institution for lunatics. Such order will have the same effect as a summary reception order (*u*). The guardians of the union to which the workhouse belongs have a right of appeal against such an order within one month to a Secretary of State, who will thereupon send some person to visit the workhouse and report. The decision of the Secretary of State on such report is conclusive (*a*).

Removal where union is in more than one county.

Where a union is in more than one county, and the workhouse of the union is in one county and the place from which a lunatic was sent to the workhouse is in another county, an order may be made by a justice for either county for the lunatic's removal to the asylum of either county, notwithstanding that there may be an asylum of the county in which the workhouse is and there may not be any special reason why the lunatic cannot be taken there (*b*).

Commissioners, and in the case of a lunatic so found to the Chancery visitors (Commissioners in Lunacy Rules, 1895, r. 23).

(*q*) Before transferring a pauper lunatic from one county asylum to another in a different county it is essential that an order of adjudication of settlement should be obtained (see p. 495, *ante*), and the union in which the lunatic is adjudicated to be settled must be notified so that it may have an opportunity of appealing.

(*r*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 65.

(*s*) *Ibid.*, s. 66. As to entries and notices on removal, see Commissioners in Lunacy Rules, 1895, rr. 22, 23, and note (*p*), p. 519, *ante*.

(*t*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 67.

(*u*) See p. 505, *ante*.

(*a*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 60.

(*b*) *Ibid.*, s. 68. An order sending a lunatic to the asylum of the county from which the lunatic was sent to the workhouse seems to require indorsement by a visitor of that asylum (*ibid.*, s. 27 (3); and see p. 508, *ante*). For

Except under the provisions last mentioned, a pauper lunatic must not be removed under a removal order to any institution for lunatics into which he could not have been received under a reception order (*c*).

Removal of pauper from hospital or licensed house to workhouse.

1091. The authority liable for maintenance of a pauper lunatic in a hospital or licensed house may order his removal to the workhouse of the union to which he is chargeable, or if he is chargeable to a county or borough, to the workhouse of the union from which he was sent to the hospital or licensed house, and may direct the mode of removal (*d*).

Where a lunatic in a hospital or licensed house becomes a pauper, the manager may, after notice to the authority liable for maintenance, apply to a justice for an order for removal of the lunatic to an institution to which pauper lunatics for whose maintenance the authority is liable may legally be sent. The original reception order continues in force and authorises the classification of the lunatic as a pauper lunatic in the institution to which he is removed (*e*).

Orders etc. must be in duplicate.

1092. Every removal order, both from institutions for lunatics and from private charge, and any consent of Commissioners, must be in duplicate. One copy must be delivered to the manager of the institution or the person from whose care the lunatic is being removed, and the other to the manager of the institution or the person into whose care the lunatic is removed. This order and consent, where required, is sufficient authority for the lunatic's removal and reception in accordance with it.

Delivery of copies of reception order etc.

The manager of the institution from which or the person from whose care the lunatic is removed must deliver free of expense a copy of the reception order and documents accompanying it to the person executing the removal order, and these must be delivered by him to the manager of the institution into which or to the person into whose charge the lunatic is removed, and must be certified under the hand of the person whose duty it is to deliver them (*f*).

Removal of alien.

1093. Where an alien is detained as a lunatic and his family or friends desire his removal to the country whose subject he is, the Commissioners, upon application by any member of his family or by a friend, may inquire and report to a Secretary of State, who may by warrant direct delivery of the alien to the person named in the warrant. Every such warrant must be obeyed by the person or authority under whose charge the lunatic is, and is a sufficient authority for the master of any vessel to receive and detain the lunatic on board, and to convey him to his destination (*g*).

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the case where a union is situate in a county to which it does not belong, see Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 6, and p. 510, *ante*.

(*c*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 69; see *ibid.*, s. 27, and p. 510, *ante*.

(*d*) Lunacy Act, 1890 (53 & 54 Vict. c. 5) s. 61, as amended by Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 11.

(*e*) Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 19 (1).

(*f*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 70.

(*g*) *Ibid.*, s. 71. It seems to be an offence against the common law forcibly

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Person to direct discharge.

1094. A private patient detained in an institution or under care as a single patient must be discharged if the petitioner for the reception order or his duly appointed substitute so directs in writing (*h*). Where such person is dead or, by reason of his own lunacy, absence from England, or otherwise, incapable of signing such an order, or where a patient originally classified as a pauper is afterwards classified as a private patient, the person who made the last payment on his account, or the husband or wife, or if neither exist or either is incapable as aforesaid, the father, or in his place for a similar reason the mother, or in her place for a like reason any one of the next of kin, of the patient, may give the direction for discharge. If none of the persons so qualified to direct discharge exists or is able or willing to act, the Commissioners may order discharge (*i*).

By authority liable for maintenance of pauper.

1095. The authority liable for the maintenance of a pauper lunatic in a hospital or licensed house may direct his discharge and the mode thereof, and on production to the manager of a copy of the order he must forthwith discharge the patient or suffer him to be discharged (*k*).

Medical certificate preventing discharge.

1096. A patient must not be discharged under the provisions stated in the last two paragraphs if the medical officer, or in the case of a single patient his medical attendant, certifies, with the grounds for his opinion, that the patient is dangerous and unfit to be at large, unless, after production of such certificate, two of the visitors of an asylum or the Commissioners visiting the hospital or house, or the visitors of the house or one Commissioner in the case of a single patient, in writing consent to such discharge (*l*).

By order of two Commissioners.

1097. Two Commissioners, one medical and one legal, may visit a patient detained in any hospital or licensed house or as a single patient, and may within seven days, if they think the detention is without sufficient cause, direct his discharge (*m*).

Discharge on medical certificates.

1098. Anyone may apply to the Commissioners to have any person detained as a lunatic in an institution for lunatics or as a

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to remove a British subject who has not been certified as a lunatic in this country to an asylum abroad with a view to certification there as a person of unsound mind, or forcibly to remove from this country a person of unsound mind who has been so certified, but not such an offence to induce by misrepresentation a person of unsound mind, whether under certificate or not, to leave this country with a view to placing such person in an asylum abroad, though in the latter case an indictment might lie for a conspiracy by several persons to induce by misrepresentation a lunatic to go abroad with a view to having him confined in an asylum there (Commissioners' 52nd Report, p. 53).

(*h*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 72 (1). As to a substitute, see *ibid.*, s. 48, and p. 505, *ante*. A letter directing the keeper of the asylum to discharge a patient "as soon as you think it advisable" is not an order of discharge (*Lowe* v. *Fox* (1887), 36 W. R. 25, H. L.).

(*i*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 72 (2), (3).

(*k*) *Ibid.*, s. 73.

(*l*) *Ibid.*, s. 74.

(*m*) *Ibid.*, s. 75.

private patient examined by two doctors; and if the doctors after two visits at an interval of at least seven days certify that the patient may without risk be discharged, the Commissioners may order his discharge at the end of ten days (*n*).

Service and notice of order of Commissioners.

1099. The Commissioners, when they have ordered a discharge, must serve the order on the manager of the institution where the patient is detained or upon the person having charge of the patient as a single patient. They must further, in the case of a private patient, give notice thereof to the petitioner for the reception order or the person who made the last payment on account of the patient, and in the case of a pauper to the authority liable for maintenance. Anyone served with such order continuing to detain the patient after the appointed date for discharge is guilty of a misdemeanour (*o*).

By three visitors of an asylum or two visitors (on medical advice).

1100. Any three visitors of an asylum may discharge any person detained therein whether recovered or not, and any two such visitors, on the written advice of the medical officer, may discharge any person detained therein (*p*).

By two visitors (one medical) after two visits.

If after two visits, made at an interval of not less than seven days, by two visitors (one being a medical practitioner) to a licensed house it appears to them that any patient is detained without sufficient cause, they may make an order for his discharge. Seven days' notice of the second visit must be given by post or by entry in the patient's book to the manager, who must thereupon send by post a copy thereof, in the case of a private patient, to the petitioner for the reception order or the person making the last payment on the patient's behalf, and, in the case of a pauper, to the authority liable for maintenance, and to the clerk of the visitors of the house. If the medical officer offers to give an opinion on the patient's health, the visitors must examine him before making an order. If they make the order against the medical officer's opinion, they must at once send his statement to the clerk of the visitors. These provisions do not apply to lunatics so found by inquisition (*q*).

Delivery to custody of relative or friend of pauper.

1101. When application is made to the visiting committee of an asylum by a relative or friend of a pauper lunatic therein, requiring that he may be delivered over to the custody and care of such relative or friend, any two visitors may, if they think fit, discharge the lunatic upon an undertaking from the relative or friend that the lunatic shall no longer be chargeable to any union, county, or borough, and shall be properly taken care of and prevented from injuring himself and others (*r*).

(*n*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 49. The Commissioners, however, have discretion to refuse a discharge notwithstanding production of the two medical certificates (*R.* v. *Lunacy Commissioners*, [1897] 1 Q. B. 630).

(*o*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 76.

(*p*) *Ibid.*, s. 77.

(*q*) *Ibid.*, s. 78. Every order under these provisions must be signed by the visitors who make it (*ibid.*).

(*r*) *Ibid.*, s. 79. An application was made for a *habeas corpus* to obtain the release from an asylum of a person detained there as a pauper lunatic,

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Discharge of pauper by visitors of asylum.

Notice required.

Removal of pauper.

By guardians.

1102. When visitors of an asylum order the discharge of a pauper lunatic therein, except on the application of a relative or friend, they may, when they think fit, send a notice in writing signed by the clerk of the asylum of their intention to discharge to a relieving officer of the union, or to the clerk of the local authority liable for maintenance. On receipt of this notice, the relieving officer or clerk must have the lunatic, on his discharge, forthwith removed to the workhouse of the union to which he is chargeable, or, if chargeable to a county or borough, to the workhouse of the union from which he was sent to the asylum (*s*).

1103. Guardians can discharge any lunatic detained in their workhouse (*t*).

Documents to be furnished to discharged patient.

1104. The secretary to the Commissioners must, on the discharge of anyone who considers himself to have been unjustly detained, furnish him on request, free of expense, with a copy of the reception order and certificates on which he was confined. If the order was made on petition, he must also supply a copy of the petition and accompanying particulars (*a*).

SUB-SECT. 8.—*Recovery and Death.*

Recovery.

1105. The manager of every hospital and licensed house and anyone having charge of a single patient must forthwith, on his recovery, send notice, where the patient is not a pauper, to the petitioner for the reception order or the person making the last payment on the patient's behalf, and where the patient is a pauper to the guardians of his union, and if a local authority is liable, to the clerk of such local authority. The notice must state that, unless removed within seven days, the patient will be discharged. If not so removed, he is to be forthwith discharged (*b*).

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who was entitled to a pension, and also was possessed of property worth about £1,400. He had been placed in the asylum by guardians, and his release was sought by his sister, his only next of kin, that he might be put under her care. The medical superintendent said that they had no power to release him until certain preliminary proceedings had been taken under the Lunacy Acts, but it was decided that they could classify him under the Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 3 (see p. 506, *ante*), as a private patient and then release him, and the court (CAVE and WRIGHT, JJ.) therefore directed the writ to go if he was not released within twenty-four hours, holding that the medical officers ought to have communicated with the visiting committee on discovering the pecuniary position of the patient (*Re Steneult* (1894), 29 L. J. 345). The importance of this decision lay not so much in its effect on the patient's position as regards accommodation and treatment, as in his altered status with reference to discharge—a private patient being dischargeable under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 72, by the person who made the last payment for maintenance (or by various relatives or by the Commissioners) (see p. 522, *ante*), a pauper under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 77, only on the orders of the visitors of the asylum (see p. 522, *ante*) (Commissioners' 56th Report, p. 9).

(*s*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 80.

(*t*) *Ibid.*, s. 81.

(*a*) *Ibid.*, s. 82. Anyone applying to the Commissioners *bonâ fide*, or apparently *bonâ fide*, on the lunatic's behalf ought to be supplied with these documents (*Re Dell* (1891), 91 L. T. Jo. 375).

(*b*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 83.

Death.

1106. Every coroner must, on receiving notice of the death of a lunatic within his district, if he considers that any reasonable suspicion attends the cause and circumstances of the death, summon a jury to inquire into the same (*c*).

SUB-SECT. 9.—*Escape and Recapture.*

Persons authorised to retake possession.

1107. If any person lawfully detained as a lunatic escapes, he may, without a fresh order or certificate, be retaken at any time within fourteen days from his escape by the manager of the institution, or master of the workhouse in which he was detained, or any officer or servant thereof, or by the person in whose charge he was as a single patient, or by anyone authorised in writing by such manager, master, or person (*d*).

Escape to Scotland or Ireland.

Warrant.

Execution of warrant.

1108. If any person detained as a lunatic under lawful authority in England escapes into Scotland or Ireland, notice thereof must be given to the Commissioners as soon as practicable, who may, by writing under their seal, authorise an application by such person as they think fit to a justice having jurisdiction where the lunatic was so detained for a warrant authorising such person to retake the lunatic. The warrant is, in Scotland or Ireland, as well as in England, sufficient *primâ facie* evidence that the person stated therein to have escaped was detained as a lunatic, and of the fact of his escape, and is sufficient authority to a sheriff in Scotland or a justice in Ireland to countersign the same. Any warrant so countersigned may be executed in Scotland or Ireland by retaking and bringing the lunatic thence so that he may be restored to the custody whence he escaped (*e*). This warrant does not authorise the retaking of the lunatic after the expiration of the time during which he could have been retaken according to the law in force in the place where he was detained as a lunatic had he remained there after his escape (*f*).

SUB-SECT. 10.—*Miscellaneous.*

Statement and inquiries as to lunatic's property.

1109. On a recommendation of the Commissioners (*g*) the Lord Chancellor may, through a master in lunacy (*g*), require the petitioner for a reception order under which the lunatic is detained, or other person paying for his maintenance or managing his property, to forward to the Lord Chancellor a written statement containing particulars, to the best of his knowledge, of the lunatic's property

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(*c*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 84. As to notices of death of lunatics, see Commissioners in Lunacy Rules, 1895, r. 27; see also title CORONERS, Vol. VIII., p. 242.

(*d*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 85. If the fourteen days have expired without recapture, fresh proceedings must be taken, *e.g.*, on the ground that the lunatic is not under proper control or is wandering at large (see pp. 505, 508, *ante*). The retaking may be justified under an order and certificate in proper form, although the person named therein is not in fact a lunatic (*Norris* v. *Seed* (1849), 3 Exch. 782).

(*e*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 86. Similar provisions applicable to escape from Scotland into England or Ireland, and from Ireland into England or Scotland, are contained in *ibid.*, ss. 87 and 88 respectively.

(*f*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 89.

(*g*) For these officials, see pp. 414, 466, *ante*.

SECT. 2.
Care and Treatment of Lunatics.

and of its application. The Commissioners may also themselves make inquiries as to a lunatic's property (*h*).

Application for particulars of detention.

Search for returns.

1110. Application may be made to any Commissioner, or in the case of a licensed house to any visitor, as to whether any particular patient is or has been within the last twelve months confined as a lunatic within their respective jurisdictions, and such Commissioner or visitor, if he thinks fit, can order the secretary or clerk, as the case may be, to search the returns for such information. If the patient is or has been so confined, information both as to the place and the manager's name, with dates of admission and discharge, will, so far as possible, be given to the applicant on payment of a regulation fee not exceeding 7*s*. (*i*).

Residence of patients with single patients.

1111. The Commissioners, if satisfied that it is desirable and for the lunatic's interest that one or more patients should reside in the same house with a single patient, can so direct, the terms and conditions being in all respects the same as if each of them was a single patient (*j*).

SECT. 3.—*Reception and Care of Idiots.*

Non-application of Lunacy Acts.

1112. The provisions of the Lunacy Acts (*k*) as to registration and regulation of hospitals, asylums, and licensed houses for lunatics, reports, treatment, visitation and care of lunatics, and books to be kept do not apply to hospitals, institutions, or licensed houses registered under the Idiots Act (*l*), or to any idiot or imbecile received therein.

Requisites for reception.

1113. An idiot or imbecile from birth or from an early age (*m*) may, whether under or over age, be placed by his parents or guardians, or by any person standing towards him *in loco parentis*, in any hospital, institution, or licensed house (*n*), registered for the care, education, and training of idiots and imbeciles, upon the certificate of a duly qualified medical practitioner that the person is an idiot or imbecile capable of receiving benefit from the institution, together with a statement signed by the parent or guardian or person *in loco parentis* (*o*). Any idiot or imbecile who has whilst under age been so placed as above may, with the consent of the Commissioners, be retained therein after he is of full age (*p*).

Discharge.

Any person of full age so retained may be discharged by the

(*h*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 50.
(*i*) *Ibid.*, s. 51; and see note (*a*), p. 524, *ante*.
(*j*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 64.
(*k*) For these Acts, see note (*l*), p. 412, *ante*.
(*l*) Idiots Act, 1886 (49 & 50 Vict. c. 25), s. 11.
(*m*) These terms do not include lunatics (*ibid.*, s. 17).
(*n*) This does not include a lunatic asylum (*ibid.*).
(*o*) Idiots Act, 1886 (49 & 50 Vict. c. 25), s. 4. For forms of medical certificate and statement to accompany, see *ibid.*, Schedule, Forms 1, 2.
(*p*) Idiots Act, 1886 (49 & 50 Vict. c. 25), s. 5. Detention under the provisions of this Act will found jurisdiction to make administrative orders under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116 (1) (c) (see p. 428, *ante*) (*Re Whalley* (*Mark*) *and Re Whalley* (*W. R.*), [1906] 1 Ch. 565, C. A.).

Commissioners, whose order must specify the reasons of such discharge and the date thereof (*q*).

Notice of the reception of any idiot or imbecile into a hospital, institution, or licensed house registered as aforesaid must be sent to the Commissioners within fourteen days by the superintendent or principal officer (*r*).

Notice of reception.

1114. Notice of any idiot's or imbecile's death in or discharge from any hospital, institution, or licensed house registered as aforesaid must be sent forthwith by the superintendent or principal officer to the Commissioners (*s*).

Notice of death or discharge.

1115. Application must be made to the Commissioners to register every hospital, institution, or licensed house for the intended reception of idiots and imbeciles, and until the certificate of registration is obtained any such reception therein is illegal (*t*).

Registration of places for reception.

The Commissioners must once in every twelve months visit and inspect every such registered house (*u*), where a medical journal in the form directed by them must be kept (*a*). They may also direct that a duly qualified medical man shall reside on the premises (*b*).

Visitation and inspection.

1116. Nothing in the Idiots Act (*c*) is to deprive poor law guardians of the power (*d*) of sending pauper idiots or imbeciles to houses registered under the Act, or from receiving in respect of such idiots or imbeciles such parliamentary grants (*e*) as may be made towards the maintenance and care of pauper lunatics as if such idiots and imbeciles were pauper lunatics (*f*).

Powers of poor law guardians.

Part XIII.—Penalties, Misdemeanours, and Proceedings.

1117. The following offences are misdemeanours (*g*) :—

(1) detention of a lunatic or alleged lunatic in an institution otherwise than in accordance with the Lunacy Acts (*h*);

Offences being misdemeanours.

(*q*) Idiots Act, 1886 (49 & 50 Vict. c. 25), s. 6.
(*r*) *Ibid.*, s. 9. For form of the notice, see *ibid.*, Schedule, Form 3.
(*s*) *Ibid.*, s. 10.
(*t*) *Ibid.*, s. 7. Provision was made with regard to hospitals, institutions, and licensed houses existing at the passing of the Act (*ibid.*, s. 8). As to superannuation allowances to officers and servants, see *ibid.*, s. 16.
(*u*) *Ibid.*, s. 12.
(*a*) *Ibid.*, s. 13.
(*b*) *Ibid.*, s. 14.
(*c*) 49 & 50 Vict. c. 25.
(*d*) The power referred to is given by the Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 13.
(*e*) As to such grants, see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 24 (2) (f); and p. 490, *ante*.
(*f*) Idiots Act, 1886 (49 & 50 Vict. c. 25), s. 15.
(*g*) In the absence of special provision the punishment for a misdemeanour is either imprisonment without hard labour or fine; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 410, 411.
(*h*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 315 (1); as to the Lunacy Acts, see note (*l*), p. 412, *ante*.

PART XIII. Penalties etc.

(2) taking charge of, boarding, or lodging a lunatic or alleged lunatic in an unlicensed house for payment (*i*);

(3) reception or detention, except under the provisions of the Lunacy Act, 1890 (*k*), of two or more lunatics in any house other than an institution or workhouse (*l*);

(4) neglect on the part of the manager of a hospital or licensed house or any person having charge of a single patient to send to the Commissioners or others the prescribed notices on admission, removal, discharge, or death of a lunatic (*m*);

(5) wilful misstatements of any material fact in (i.) any petition, statement of particulars, or reception order; (ii.) any medical or other certificate or any report as to mental or bodily health (*n*);

(6) false entries made knowingly in any book, statement, or return required under the Lunacy Act, 1890 (*k*), or Rules in Lunacy (*o*);

(7) omission by the manager of an institution or person having charge of a single patient (*a*) to send within the prescribed time to the coroner notice of death;

(8) failure to comply with the Lunacy Act, 1890 (*b*), or rules as to making returns or giving information in pursuance thereof to the Commissioners or others (*b*);

(9) obstruction of any Commissioner or Chancery or other visitor in the exercise of his statutory powers (*c*);

(10) obstruction of any person authorised by the Lord Chancellor or Secretary of State to visit any lunatic or inspect any institution

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(*i*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 315 (1). Penalty not exceeding £50. It does not matter at all whether the fact of the boarder's insanity is known to the defendant or not. If the jury find that the boarder was in fact a lunatic the defendant must be convicted (*R.* v. *Irving* (1898), 62 J. P. 459; *R.* v. *Bishop* (1880), 5 Q. B. D. 259, C. C. R.). The tendency seems to be towards holding that the offence is committed when persons capable of being dealt with under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116 (1) (d) (see p. 429, *ante*), are boarded or lodged for payment (compare *R.* v. *Shaw* (1868), 11 Cox, C. C. 109, C. C. R.). A medical man in 1908 was convicted and fined the maximum amount for aiding, abetting, counselling, and procuring the commission of the offence; see *R.* v. *Lascelles*, *R.* v. *Winslow* (1908), 72 J. P. (Journal), 125. A defendant, who failed to forward copies of the order and medical certificates under which a lunatic was detained to the Commissioners, was prosecuted for unlawfully detaining the lunatic. On proof by the prosecution that no copies of the order and medical certificates had been received by the Commissioners; that no entries were to be found in their books or registers of the receipt of such copies; and that notice to produce the documents had been given to the defendant and had not been complied with, it was held that there was evidence to go to the jury (*R.* v. *Harris* (1867), 10 Cox, C. C. 541).

(*k*) 53 & 54 Vict. c. 5.

(*l*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 315 (2), (3).

(*m*) *Ibid.*, s. 316. In the case of a single patient a penalty not exceeding £50

(*n*) *Ibid.*, s. 317. Prosecutions in either of these cases must be ordered by the Commissioners or by direction of the Attorney-General or Director of Public Prosecutions (*ibid.*, s. 317 (3)).

(*o*) *Ibid.*, s. 318. For form of indictment against a medical man for making false entries in the "Medical Visitation Book," see 5 Cox, C. C., Appendix, p. x.

(*a*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 319.

(*b*) *Ibid.*, s. 320. Daily penalty so long as the default continues not exceeding £10. Cumulative penalties may be remitted by the court.

(*c*) *Ibid.*, s. 321 (1). Penalty not exceeding £50. For a conviction under the section, see *R.* v. *Jones* (1894), cited in Commissioners' 48th Report, p. 104.

or gaol or place where any person represented to be a lunatic is confined or of any person authorised by the Commissioners to visit or inquire (*d*);

(11) illtreatment or wilful neglect of a lunatic by the manager or any person employed in an institution or by any person having charge of a lunatic, whether by contract or by relationship (*e*);

(12) assisting or conniving at the escape or attempted escape of a patient or the secretion of a patient (*f*);

(13) abuse of a female lunatic by a manager or employee in an institution, criminal lunatic asylum, or workhouse, or by any person having charge of a single patient. Consent is no defence (*g*).

By whom proceedings may be taken.

1118. In the absence of special provision, proceedings for offences may be taken (1) by the secretary of the Commissioners on their order, (2) by the clerk of visitors of a licensed house where the offence is within their jurisdiction, (3) by the clerk of the visiting committee of an asylum where the offence is committed by any person employed therein; but except as otherwise provided such proceedings can only be taken by order of the Commissioners or visitors, having jurisdiction where the offence was committed, or with the consent of the Attorney-General or Solicitor-General (*h*). A Secretary of State on the report of the Commissioners or visitors may direct the Attorney-General to prosecute in the case of a misdemeanour (*i*).

Recovery of penalties.

1119. All penalties are recoverable summarily and are payable either to the secretary of the Commissioners, the clerk of the peace, the asylum treasurer, or county or borough treasurer, as the case may be (*k*).

Appeals.

1120. Appeals by any person aggrieved by any order of justices, except adjudication or maintenance orders, lie to quarter sessions (*l*).

(*d*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 321 (2). Penalty, in addition to any punishment to which the offender is otherwise subject, for every offence not exceeding £20.

(*e*) *Ibid.*, s. 322. Penalty, if indicted, fine or imprisonment or both; if summarily convicted, not exceeding £20 nor less than £2. The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 4, empowers justices to mitigate a fine on a first offence, but this power does not extend to fines imposed by an Act subsequent thereto (*i.e.*, passed after 1st January, 1880) expressly providing a minimum fine in the case of a first offence (*Osborn* v. *Wood Brothers*, [1897] 1 Q. B. 197; and see title MAGISTRATES). The minimum fine of £2 imposed by this provision can therefore be reduced in the case of a first offence. On a prosecution for illtreating a lunatic by neglecting him it is necessary to show that the defendant owes a duty to the lunatic and that his conduct has or must have occasioned actual injury (*R.* v. *Pelham* (1846), 8 Q. B. 959).

(*f*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 323. Penalty not exceeding £20 nor less than £2; and see title CRIMINAL LAW AND PROCEDURE, Vol IX., p. 510.

(*g*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 324. Penalty not exceeding two years' hard labour; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 613, 614.

(*h*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 325.

(*i*) *Ibid.*, s. 328.

(*k*) *Ibid.*, s. 326.

(*l*) *Ibid.*, s. 327.

PART XIII. Penalties etc.

Burden of proof.

1121. In a prosecution for failure to send any prescribed document the burden of proof is on the defendant, but the testimony of one witness proving that the document was in fact duly posted or delivered is conclusive. Where the question is as to whether a house is or is not a licensed house or registered hospital, the burden of proof is on the defendant to prove its status by production of the licences or evidence of its being still in force (*m*).

Proceedings against person acting under statutory powers.

1122. Neither civil nor criminal proceedings can be taken against any person putting the Lunacy Act, 1890 (*n*), in force either as petitioner for a reception order or as giving a medical certificate, or as doing anything in pursuance of the Act, if such person has acted in good faith and with reasonable care. Should any such proceedings be taken they may, on summary application to the High Court, be stayed if the judge is satisfied that there is no reasonable ground for alleging want of good faith or reasonable care (*n*).

Witnesses.

1123. The Commissioners or visitors of any licensed house may summon witnesses (*o*), and may pay the witnesses reasonable expenses of appearance and attendance (*p*).

(*m*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 329. As to staying a prosecution on the ground that the consent of the Commissioners had not been obtained before the prosecution was instituted, see *R.* v. *Burnby* (1843), 5 Q. B. 348.

(*n*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 330. For actions stayed under the terms of this provision, see *Stevenson* v. *Potter* (1894), 29 L. J. 200; *Williams* v. *Beaumont and Duke* (1894), 10 T. L. R. 489, 543, C. A.; *Harwood* v. *Hackney Union* (1898), 62 J. P. 227. A medical practitioner is not liable for signing a certificate in support of a reception order. But if, not being satisfied with his own personal examination of the patient, he signs without due care and without making due inquiries, he is liable for the consequences which ensue, and none the less because he acted *bonâ fide* (*Hall* v. *Semple* (1862), 3 F. & F. 337). At common law a medical practitioner cannot justify the taking charge of and confining an individual whom he has never seen merely upon statements made by relations unless such statements satisfy him that his intervention is necessary to prevent the individual from doing immediate injury to himself or others (*Anderdon* v. *Burrows* (1830), 4 C. & P. 210). But restraint of a dangerous lunatic is justifiable both at the moment of the original danger and also until there is reasonable ground for believing that the original danger is over (*Scott* v. *Wakem* (1862), 3 F. & F. 328; and see *Symm* v. *Fraser* (1863), 3 F. & F. 859).

(*o*) Penalty for non-appearance or refusal to be sworn, not exceeding £50.

(*p*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 332.

MACHINERY.

See DISTRESS; FACTORIES AND SHOPS; RATES AND RATING.

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Local Courts - - - ,, COURTS.
Local Government - ,, LOCAL GOVERNMENT.
Lunatics; Pauper Lunatics ,, LUNATICS AND PERSONS OF UNSOUND MIND.
Malicious Prosecution - ,, MALICIOUS PROSECUTION AND PROCEDURE.
Pauper Settlements; Removal - - - - ,, POOR LAW.
Police - - - - ,, POLICE.
Poor Law - - - ,, POOR LAW.
Prisons - - - - ,, PRISONS.
Rating - - - - ,, RATES AND RATING.
Reformatories - - - ,, EDUCATION.
Revenue Authorities - - ,, REVENUE.
School Attendance etc. Orders ,, EDUCATION.
Seamen - - - - ,, ADMIRALTY; SHIPPING AND NAVIGATION.
Search Warrants - - ,, CRIMINAL LAW AND PROCEDURE.
Separation Order - - ,, HUSBAND AND WIFE.
Sheriffs - - - - ,, SHERIFFS AND BAILIFFS.

NOTE.—For Criminal Law generally and the procedure upon inquiry into indictable offences, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 229 *et seq.* For particular offences triable summarily, reference is directed to the titles throughout the work which deal with the subject-matter of the offences.—EDS.

Part I.—The Office of Magistrate: Appointment and Qualification.

SECT. 1.—*Definition.*

SECT. 1. Definition

"Magistrate."

1124. "Magistrate" is the common denomination under which are included all those who are entrusted, whether by commission or appointment, or by virtue of their office, with the conservation of the peace and the hearing and determination of charges in respect of offences against it.

The name "Justice" was first given to the office in the year 1360 (*a*).

SECT. 2.—*History and Development of the Office.*

Origin of office.

1125. The duty of conservation of the peace lay, in ancient times, primarily with the holders of certain offices by virtue of appointment or election (*b*).

Right of appointment assumed by Crown.

The right of appointing such persons was assumed by King Edward III (*c*) in 1327, and has since been exercised continuously by the Crown. In 1344 it was enacted that "two or three of the best reputation in the Counties shall be assigned keepers of the Peace by the King's Commission, and, at what time need shall be, the same with other wise and learned in the law shall be assigned by the King's Commission to hear and determine felonies and trespasses done against the peace in the same counties, and to inflict punishment reasonably according to [law and reason and] the manner of the deed" (*d*).

Number and authority of justices regulated.

Other statutes followed by which the number and authority of justices were regulated (*e*), and in 1535 it was again enacted that no

(*a*) Stat. (1360-1) 34 Edw. 3, c. 1.

(*b*) Some of these were appointed by the King, while others were elected by the people, and the limits of their authority varied according to the nature of their office. Thus the Lord Chancellor, the Lord Steward, the Lord Marshal, and the justices of the King's Bench were conservators of the peace of the whole kingdom. Other judicial officers were peace conservators within narrower limits: justices of the Common Pleas and barons of the Exchequer within the limits of their courts, justices of assize and gaol delivery within the limits of their commission. Of elected officers, sheriffs and coroners were peace conservators within the limits of their counties, and constables, headboroughs, tithing men and borsholders within the limits of their township or hundred. In addition to these, other persons, who did not hold any office, were elected by the general body of freeholders of each county to act as peace conservators for that county (Lambard, Eirenarcha (ed. 1619), 16).

(*c*) Stat. (1326-7) 1 Edw. 3, stat. 2, s. 16. "The King will that in every county good men and lawful, which be no maintainers of evil [or] barretors in the county, shall be assigned to keep the peace"; and see 1 Bl. Com. 349 *et seq.*

(*d*) Stat. (1344) 18 Edw. 3, stat. 2, c. 2.

(*e*) Stat. (1360) 34 Edw. 3, c. 1, further defined their duties; and by stat. (1388) 12 Ric. 2, c. 10, it was provided that there should be six justices in each county and that they should sit once a quarter. By stat. (1390) 14 Ric. 2, c. 11, eight justices were provided for and payment for their services allowed. By stat. (1403-4) 5 Hen. 4, c. 10

SECT. 2. History and Development of the Office.

person or persons, of what estate, degree, or condition soever they be, should have any power or authority to make justices of the peace; but that all such offices should be made by letters patent under the King's Great Seal in the name and by the authority of the King and his heirs (*f*).

Appointment in boroughs and in London.

1126. In boroughs the practice to make the mayor and aldermen justices by grant or charter (*g*) was superseded in 1835 (*h*), when it was provided that the Crown should assign justices to a commission of the peace, and that the justices should sit under that commission only. In the City of London alone the Lord Mayor and aldermen have the prescriptive right of acting as justices of the peace (*i*).

Right of appointment cannot be delegated.

The right of appointment which has thus been vested in the Crown cannot, without legislation directed to that end, be delegated to any other authority (*j*).

SECT. 3.—*The Commission of the Peace.*

The commission.

1127. Apart from the case of the City of London (*k*), and with the addition of those who have been authorised by statute to act as justices by virtue of their office (*l*), the justices of the peace consist now of such persons as are assigned by the Crown to the commission of the peace. Their names are enrolled in a document prepared by the Clerk of the Crown in Chancery, issued by the Crown under the Great Seal (*m*), and setting out the authority conferred upon them (*n*).

Separate commissions.

A separate commission is issued for each county or riding of

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they were directed to imprison no one except in the common gaol. By stat. (1414) 2 Hen. 5, stat. 1, c. 4, justices were obliged to be resident in their counties; and this was confirmed by another statute of the same year, stat. (1414) 2 Hen. 5, stat. 2, c. 1. In 1487 it was enacted that justices taking recognisances must report the same (stat. (1487) 3 Hen. 7, c. 2), and that they might admit prisoners to bail (*ibid.*, c. 3).

(*f*) Stat. (1535–6) 27 Hen. 8, c. 24, s. 2; and see, further, title CONSTITUTIONAL LAW, Vol. VI., pp. 399 *et seq.*

(*g*) This custom was recognised by stats. (1439) 18 Hen. 6, c. 11, and (1535–6) 27 Hen. 8, c. 24. s. 6.

(*h*) Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), now repealed and replaced by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 260.

(*i*) Royal Charter of 1742; and see p. 575, *post*, and title METROPOLIS.

(*j*) *Jones* v. *Williams* (1825), 3 B. & C. 762, *per* BAYLEY, J., at p. 767; *Arnold* v. *Gaussen* (1853), 8 Exch. 463.

(*k*) See p. 575, *post*.

(*l*) See p. 537, *post*.

(*m*) Crown Office Act, 1877 (40 & 41 Vict. c. 41), s. 5 (1).

(*n*) The form of document now used was settled by Order in Council in 1878 under powers conferred by the Crown Office Act, 1877 (40 & 41 Vict. c. 41) (Stat. R. & O. Rev., Vol. II., Clerk of the Crown in Chancery, pp. 9 *et seq*). The original form of commission was revised in 1590, and the revised form with very slight alteration remained in use till 1878. It may be found set out in 3 Burn's Justice of the Peace (1845 ed.), 988. Formerly certain selected justices were said to be of the quorum, and the presence of one of them was necessary to the valid holding of quarter or general sessions. The present form of commission omits all reference to the quorum. See, further, titles CONSTITUTIONAL LAW, Vol. VII., p. 13, note (*h*); COURTS, Vol. IX., p. 82.

SECT. 3. The Commission of the Peace.

a county (*o*), and for each borough entitled thereto (*p*), the form of the document for a county differing somewhat from that for a borough (*q*).

New commission.

A new commission of the peace may be issued by the Crown at any time (*r*), but is not required even upon a demise of the Crown (*s*). The names of newly-appointed justices are added to the commission by the Clerk of the Crown in Chancery, to whom clerks of the peace in counties and town clerks in boroughs must send a statement, in January of each year, containing the names of all justices assigned to the commission of the peace for their counties or boroughs who have qualified, and, so far as they know, of those who have died during the preceding year (*t*).

Annual return.

SECT. 4.—*Justices ex officio.*

Persons named in every commission.

1128. In every commission of the peace for a county the following are named:—the Lord Chancellor (*u*) and Lord President of the Council (*v*), Lord Privy Seal (*w*) and other members of the Privy Council (*v*), the *Custos Rotulorum* for the particular county (*x*), the Lord Chief Justice, the Master of the Rolls, the lords justices of the Court of Appeal, the justices of the High Court of Justice (*y*), and the Attorney-General (*a*) and Solicitor-General (*b*).

(*o*) The North, East, and West Ridings of Yorkshire have always had a separate commission of the peace, as also have the "parts" of Lincolnshire—Kesteven, Lindsey, and Holland—and the Isle of Ely and the Soke of Peterborough also have separate commissions; see *R.* v. *Isle of Ely* (*Inhabitants*) (1850), 15 Q. B. 827.

(*p*) For a list of the boroughs having a separate commission of the peace, see note (*f*), p. 540, *post*. The number may from time to time be increased, as the Crown may grant any borough a separate commission on its council making application for one (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 162).

(*q*) The reason is that in counties two assignments are required: one for the justices as peace conservators, the other to give them jurisdiction at quarter sessions (see p. 563, *post*). In the case of borough justices (see p. 540, *post*) the second assignment is not needed, as they may not act as justices at any court of gaol delivery or quarter sessions (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 158 (1).

(*r*) Compare the Justices' Qualification Act, 1760 (1 Geo. 3, c. 13), s. 1. As to the effect of a new commission upon tenure of office, see p. 549, *post*.

(*s*) Demise of the Crown Act, 1901 (1 Edw. 7, c. 5), s. 1 (1). Upon his accession His late Majesty King Edward VII., by letters patent, dated 15th February, 1901, appointed and declared that the several commissions of the peace issued by her late Majesty Queen Victoria for the several counties, boroughs, and places mentioned in the same should continue to be of full force and effect, and that the persons thereby assigned or hereafter added should be His Majesty's justices of the peace. Before 1901 justices continued to hold office for six months after the demise of the Crown under stat. (1702) 1 Ann. c. 2, s. 5; and see title CONSTITUTIONAL LAW, Vol. VI. pp. 384, 385; and see also p. 549, *post*.

(*t*) Rules made under the Crown Office Act, 1877 (40 & 41 Vict. c. 41) (Stat. R. & O. Rev., Vol. II., Clerk of the Crown in Chancery, p. 16), r. 2.

(*u*) As to whom, see title CONSTITUTIONAL LAW, Vol. VII., pp. 55—65.

(*v*) See *ibid.*, pp. 51—53.

(*w*) See *ibid.*, p. 65.

(*x*) See p. 624, *post*.

(*y*) See title COURTS, Vol. IX., pp. 60—64.

(*a*) See title CONSTITUTIONAL LAW, Vol. VII., p. 74.

(*b*) *Ibid.*

SECT. 4.
Justices ex officio.

Chairmen of local authorities.

1129. The chairman of a county council is a justice of the peace for his county (*c*), and the chairman of a district council, whether rural or urban, unless personally disqualified by any Act, is a justice of the peace for the county of which the district forms part (*d*).

Mayor of borough.

The mayor of a borough is a justice of the peace for the borough during his year of office, and for the next succeeding year also, unless he would in that year be disqualified to hold the office of mayor (*e*). But a woman who becomes chairman of a county or district council, or mayor of a borough, is not thereby entitled to act as a justice (*f*).

Recorder.

Stipendiary magistrate.

The recorder of a borough having a separate commission of the peace is a justice of the borough (*g*); and a stipendiary magistrate is a justice for the borough to which he is appointed (*h*). The chief magistrate of the Metropolitan Police Court at Bow Street becomes a justice of the peace for the county of Berks upon his name being inserted in the commission for that county (*i*).

Judge of county court.

The judge of a county court may be included in the commission of the peace of the county or borough where the court is situated (*j*).

Ecclesiastical persons.

1130. Certain ecclesiastical persons have a right by statute to act as justices in their counties. Thus, the Archbishop of York and his temporal chancellor are justices for the shire of Hexham (*k*), the Bishop of Durham and his temporal chancellor for the county of Durham (*l*), and the Bishop of Ely and his temporal steward for the Isle of Ely (*m*). The Vice-Chancellor of the University of Cambridge for the time being may be assigned as a justice of the borough of Cambridge (*n*).

SECT. 5.—*County Justices.*

SUB-SECT. 1.—*Appointment and Qualification.*

Practice on appointment.

1131. Justices of the peace for the counties are assigned on the nomination of the Lord Chancellor, who may select them either

(*c*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 2 (5) (b); and see title LOCAL GOVERNMENT, p. 342, *ante*.

(*d*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 22; and see title LOCAL GOVERNMENT, pp. 262, 330, *ante*. The phrase "unless personally disqualified by any Act" appears to refer to the disqualification of solicitors to be appointed justices in any county where they practised, imposed by the Justices Qualification Act, 1871 (34 & 35 Vict. c. 18), but now repealed by the Justices of the Peace Act, 1906 (6 Edw. 7, c. 16); see p. 551, *post*.

(*e*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 155 (1); and see title LOCAL GOVERNMENT, p. 309, *ante*.

(*f*) Qualification of Women (County and Borough Councils) Act, 1907 (7 Edw. 7, c. 33), s. 1 (1). See title LOCAL GOVERNMENT, pp. 262, 330, *ante*.

(*g*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 163 (1), (3). As to such boroughs, see note (*f*), p. 540, *post*.

(*h*) Municipal Corporations Act, 1882 (45 & 46 Vict. 50), s. 161 (3); and as to such magistrates, see p. 545, *post*.

(*i*) Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 31; but he has no powers other than those of a county justice in such circumstances.

(*j*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 17; see the Justices of the Peace Act, 1906 (6 Edw. 7, c. 16), ss. 1, 5 (2), and Schedule.

(*k*) Stat. (1535-6) 27 Hen. 8, c. 24, s. 22.

(*l*) *Ibid.*, s. 21.

(*m*) *Ibid.*, s. 20.

(*n*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 249.

upon his own responsibility or upon the recommendation of the lords-lieutenant of the counties or of other persons. It was the custom during the last century to make the great majority of selections from the names recommended by the Lords Lieutenant(*o*): but advisory committees have recently been appointed for the various counties by the Lords Lieutenant with the approval of the Lord Chancellor, and charged with the duty of recommending suitable persons (*p*). Formerly a property qualification was required (*q*), but this is no longer the case (*r*). Any person who resides within a county or within seven miles of it is eligible as a justice of that county if not personally disqualified (*s*).

SUB-SECT. 2.—*Oaths of Office.*

How taken.

1132. As soon as may be after accepting office, and before exercising his powers, a newly-appointed justice is required to take the oath of allegiance and judicial oath (*t*). These oaths may be taken before the Lord Chancellor, or in open court before one or more judges in the King's Bench or Chancery Division of the High Court, or in open court at the general or quarter sessions of the peace for the county in which the newly-appointed justice of the peace is to act (*a*).

(*o*) This custom is "certainly 100 years old and I think it is not more than 150 years old . . . I think very likely the custom originated from the Lord Chancellor asking assistance of the Lords Lieutenant because of his inability to overtake the work in all the counties of Great Britain without local knowledge. From this practice there appears to have grown up in some quarters an impression that the Lords Lieutenant are the only persons to be heard upon the subject, and many Lord Chancellors have confined themselves to acting solely upon the recommendation of the Lord Lieutenant: but this has certainly not been universal" (evidence of Lord LOREBURN, L.C., before the Royal Commission on the Appointment of Justices, 1910, *Times*, 3rd March, p. 6). In some cases the Lord Chancellor has even acted in opposition to the recommendation of the Lord Lieutenant. A resolution of the House of Commons in 1893 was passed "that in the opinion of this House it is expedient that the appointment of County Magistrates should no longer be made by the Lord Chancellor of Great Britain and Ireland for the time being only on the recommendation of the Lords Lieutenant"; see title CONSTITUTIONAL LAW, Vol. VII., p. 61.

(*p*) This has been done in accordance with the recommendations in the Report of the Royal Commission, dated September, 1910.

(*q*) See the Justices Qualification Acts, 1731 (5 Geo. 2, c. 18), 1744 (18 Geo. 2, c. 20), and 1875 (38 & 39 Vict. c. 54), all of which are repealed by the Justices of the Peace Act, 1906 (6 Edw. 7, c. 16), s. 5 (2), and Schedule.

(*r*) *Ibid.*, s. 1.

(*s*) *Ibid.*, s. 2. As to the method of calculating the distance, see Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 34; title STATUTES; compare Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 231, and see note (*h*), p. 543, *post*. As to disqualifications, see p. 550, *post*.

(*t*) Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 6. For forms of the oaths, see *ibid.*, ss. 2 and 4 respectively. As to affirmation in lieu of oath, see title EVIDENCE, Vol. XIII., pp. 520 *et seq.* Formerly an oath as to qualification was also required (Justices Qualification Act, 1744 (18 Geo. 2, c. 20)), but this is no longer the case; see note (*r*), *supra*.

(*a*) Promissory Oaths Act, 1871 (34 & 35 Vict. c. 48), s. 2. The fee to be paid by county justices, other than justices *ex officio*, under any Act of Parliament, on qualifying as such (to include oaths, Crown Office fee, correspondence, and every other expense connected therewith) is £2. The fee to be paid on administering the oath of office to a justice *ex officio*

SECT. 5. **County Justices.**

Oaths of chairmen of local authorities.

The chairman of a county or district council before acting as a justice is required to take the same oaths as a county justice unless he has already done so (*b*). The former must take the oaths in the same manner as a county justice: but the chairman of a district council may take them before any two justices of the peace for the county in which the district is situate sitting in petty sessions (*c*); and, if he has been re-elected to that office on the expiration or other determination of a previous term of office, he is not required to take the oaths again (*d*).

SUB-SECT. 3.—*Precedence.*

Precedence.

1133. Subject to any established rule or custom affecting a particular bench, precedence among county justices should be determined by seniority according to the order of the names on the commission of the peace (*e*).

SECT. 6.—*Borough Justices.*

SUB-SECT. 1.—*Classification of Boroughs.*

Classification of boroughs.

1134. Boroughs outside the metropolis are divisible into three classes: those which have a separate commission of the peace, those which have also a separate court of quarter sessions, and those which have neither (*f*).

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under any Act of Parliament on qualifying as such and to all other persons is 5*s*. (Letter of Secretary of State, July, 1894). Where the oaths are taken at quarter sessions it has been customary for the clerk of the peace to charge a separate fee, which varies in different counties, but except in so far as the fee above authorised is concerned this is merely an honorarium which cannot be recovered at law (*Maule* v. *White*, *Maule* v. *Herbert*, *Maule* v. *Green* (1896), 60 J. P. 567 (county court); see 71 J. P. (Journal) 519).

(*b*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 2 (5) (b); Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 22. The fee for administering the oath is 5*s*.; see note (*a*), p. 539, *ante*. As to the offices of chairmen of rural districts, urban districts, and county councils, see title LOCAL GOVERNMENT, pp. 262, 330, 341, *ante*.

(*c*) This is so by special permission of the Crown (Secretary of State's Circular to Chairmen of District Councils, 20th February, 1895, B. 17111 (23); see 59 J. P. (Journal) 185). The fee to be charged by the clerk to the justices for administering the oath should be the same as the fee for administering an oath in any kind of business according to the table of justices' clerks' fees for the time being in force (Advice of Secretary of State, 12th March, 1895; see 59 J. P. 185, and 71 J. P. (Journal) 519).

(*d*) Chairmen of District Councils Act, 1896 (59 & 60 Vict. c. 22), s. 1. If, however, there were an interval between the two occasions on which he filled the office he would be required to take the oaths again; and so, it would seem, would a chairman of a county council who was only a justice of the peace by virtue of his office. There is some doubt whether a chairman of a county or district council who, after the expiration of his term of office, is permanently assigned to the commission of the peace, need take the oaths again, but it is safer for him to do so.

(*e*) Home Office Circular, 16th October, 1907.

(*f*) See title LOCAL GOVERNMENT, pp. 300, 301, *ante*. Certain boroughs are denominated counties of a city, or counties of a town, and have the right to appoint a sheriff (see Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 170; Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 36). They are Berwick-upon-Tweed, Bristol, Canterbury, Carmarthen, Chester, Exeter, Gloucester, Haverfordwest, Kingston-upon-Hull, Lichfield, Lincoln, Newcastle-upon-Tyne, Norwich, Nottingham, Poole, Southampton, Worcester, and York. Of these Haverfordwest is a county by Act of Parliament

(stat. (1542-3) 34 & 35 Hen. 8, c. 26, s. 61), and has a Lord Lieutenant, *Custos Rotulorum* and court of quarter sessions similar to that of other counties. Boroughs which are county boroughs, *i.e.*, boroughs having more than 50,000 inhabitants (see title LOCAL GOVERNMENT, p. 300, *ante*), either maintain their own quarter sessions or, where they have not a separate court, contribute an amount fixed by agreement or arbitration and raised by their own rates towards the costs of the sessions of the county in which they are deemed to be (see Local Government Act, 1888 (51 & 52 Vict. c. 41), Sched. III.; and generally, as to adjustment of finances between such boroughs and the county, see title LOCAL GOVERNMENT, p. 353, *ante*). Boroughs with more than 10,000 inhabitants are assessed to the county rate (see *ibid.*, p. 355, *ante*) for the purpose of costs of assizes and quarter sessions, which are payable out of the county fund (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 35 (5)), but may raise their own rate for their own sessions, and are *pro tanto* exempt from contribution to the expenses of county sessions if they have a separate court of quarter sessions (*Ex parte Kent County Council and Dover Council*, [1891] 1 Q. B. 389). Boroughs with less than 10,000 inhabitants are assessable to county rates for all purposes, and the expenses of their sessions (if any) are not payable out of the county fund (Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 35—38); see *Thetford Corporation* v. *Norfolk County Council*, [1898] 2 Q. B. 468, C. A. The Cinque Ports and two ancient towns, namely, Dover, Hastings, Hythe, Romney, Sandwich, Rye, and Winchelsea, together with their members and liberties, enjoy a separate commission of the peace, the justices assigned to which have jurisdiction out of sessions throughout the places named. With the exception of Romney and Winchelsea each town has a separate court of quarter sessions with a recorder and clerk of the peace, and with jurisdiction in its own borough, and in such other parts of the area covered by the commission of the peace of the Cinque Ports as have not a separate court of quarter sessions (Cinque Ports Act, 1811 (51 Geo. 3, c. 36), ss. 1—4; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 248). The administrative duties of quarter sessions in the Cinque Ports have been transferred to the Kent County Council (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 48 (4)). See, further, titles COURTS, Vol. IX., p. 127; LOCAL GOVERNMENT, pp. 299 *et seq.*, 353 *et seq.*, *ante*. The following is a list of the boroughs having a separate commission of the peace, those with the addition of the letters Q. S. having also a separate court of quarter sessions:—

Aberavon.
Aberystwith.
Abingdon (Q. S.)
Accrington.
Andover (Q. S.).
Ashton-under-Lyne.
Banbury (Q. S.).
Barnsley.
Barnstaple (Q. S.).
Barrow-in-Furness.
Basingstoke.
Bath (Q. S.).
Batley.
Bedford (Q. S.).
Berwick-upon-Tweed (Q. S.).
Beverley.
Bewdley.
Bideford (Q. S.).
Birkenhead (Q. S.).
Birmingham (Q. S.).
Blackburn (Q. S.).
Blackpool.
Bodmin.
Bolton (Q. S.).
Bootle-cum-Linacre.
Boston.
Bournemouth (Q. S.).
Bradford (Q. S.).
Brecon.
Bridgnorth (Q. S.).
Bridgwater (Q. S.).
Bridport.
Brighouse.
Brighton (Q. S.).
Bristol (Q. S.).
Buckingham.
Burnley (Q. S.).
Burton-upon-Trent.
Bury.
Bury St. Edmunds (Q. S.).
Cambridge (Q. S.).
Canterbury (Q. S.).
Cardiff (Q. S.).
Cardigan.
Carlisle (Q. S.).
Carmarthen (Q. S.).
Carnarvon.
Chester (Q. S.).
Chesterfield.
Chichester (Q. S.).
Clitheroe.
Colchester (Q. S.).
Colne.
Congleton.
Coventry.
Crewe.
Croydon (Q. S.).
Darlington.
Dartmouth.
Darwen.
Deal (Q. S.).
Denbigh.
Derby (Q. S.).
Devizes (Q. S.).
Devonport (Q. S.).
Dewsbury.
Doncaster (Q. S.).
Dorchester.
Dover (Q. S.), Cinque Port.
Droitwich.
Dudley (Q. S.).
Dunstable.
Durham.
Eastbourne.
East Ham.

SECT. 6.
Borough Justices.

Eccles.
Evesham.
Exeter(Q. S.).
Eye.
Falmouth.
Faversham (Q. S.).
Flint.
Folkestone (Q. S.).
Gateshead.
Glossop.
Gloucester (Q. S.).
Godalming.
Grantham (Q. S.).
Gravesend (Q. S.).
Grimsby (Q. S.).
Guildford (Q. S.).
Halifax.
Harrogate.
Hartlepool.
Harwich.
Hastings (Q. S.), Cinque Port.
Haverfordwest.
Helston.
Henley-on-Thames.
Hereford (Q. S.).
Hertford.
Heywood.
High Wycombe.
Hove.
Huddersfield (Q. S.).
Hull (Q. S.).
Hyde.
Hythe (Q. S.), Cinque Port.
Ipswich (Q. S.).
Jarrow-on-Tyne.
Keighley.
Kendal.
Kidderminster.
King's Lynn (Q. S.).
Kingston-on-Thames.
Lancaster.
Leamington.
Leeds (Q. S.).
Leicester (Q. S.).
Leigh.
Leominster.
Lichfield (Q. S.).
Lincoln (Q. S.).
Liskeard.
Liverpool (Q. S.).
Louth.
Ludlow (Q. S.).
Luton.
Lydd.
Lyme Regis.
Lymington.
Macclesfield.
Maidenhead.
Maidstone (Q. S.).
Maldon (Q. S.).
Manchester (Q. S.).
Mansfield.
Margate (Q. S.).
Marlborough.
Merthyr Tydfil (Q. S.).
Middlesbrough.
Middleton.
Monmouth.
Morley.
Mossley.
Neath.
Nelson.
Newark (Q. S.)
Newbury (Q. S.).
Newcastle-under-Lyme (Q. S.).
Newcastle-upon-Tyne (Q. S.).
Newport (Isle of Wight).
Newport (Monmouth).
New Romney.
Northampton (Q. S.).
Norwich (Q. S.).
Nottingham (Q. S.).
Oldham (Q. S.).
Ossett.
Oswestry (Q. S.).
Oxford (Q. S.).
Pembroke.
Penryn.
Penzance (Q. S.).
Plymouth (Q. S.).
Pontefract (Q. S.).
Poole (Q. S.).
Portsmouth (Q. S.).
Preston.
Ramsgate.
Reading (Q. S.).
Reigate.
Retford (Essex).
Richmond (Surrey).
Richmond (Yorks.) (Q. S.).
Ripon.
Rochdale.
Rochester (Q. S.).
Rotherham (Q. S.).
Ryde.
Rye (Q. S.), Cinque Port.
Saffron Walden (Q. S.).
St. Albans.
St. Helens.
St. Ives (Cornwall).
Salford (Q. S.).
Salisbury (Q. S.).
Sandwich (Q. S.), Cinque Port.
Scarborough (Q. S.).
Sheffield (Q. S.).
Shrewsbury (Q. S.).
Smethwick.
Southampton (Q. S.).
Southend-on-Sea.
South Molton (Q. S.).
Southport.
South Shields.
Southwold.
Stafford.
Staleybridge.
Stamford (Q. S.).
Stockport.
Stockton.
Stoke-upon-Trent (Q. S.).
Stratford-upon-Avon.
Sudbury (Q. S.).
Sunderland (Q. S.).
Sutton Coldfield.
Swansea (Q. S.).
Swindon.
Tamworth.
Taunton.
Tenby.
Tenterden (Q. S.).
Tewkesbury (Q. S.)
Thetford (Q. S.).
Tiverton (Q. S.).
Torquay.
Torrington (Great).
Totnes.
Truro.
Tynemouth.
Wakefield.
Wallingford.
Walsall (Q. S.).
Warrington (Q. S.).
Warwick (Q. S.).
Wednesbury.
Wells (Somerset).
Welshpool.
Wenlock (Q. S.).
West Bromwich (Q. S.).
West Ham (Q. S.).
West Hartlepool.
Weymouth.
Wigan (Q. S.).
Winchester (Q. S.).
Windsor (Q. S.).
Wisbech.
Wolverhampton (Q. S.).
Worcester (Q. S.).
Wrexham.
Yarmouth (Great) (Q. S.).
Yeovil.
York (Q. S.).

As from 1st November, 1911, Aston Manor is merged in Birmingham (Local Government Board Provisional Order (1910) Confirmation (No. 13) Act, 1911 (1 & 2 Geo. 5, c. xxxvi.)).

SUB-SECT. 2.—*Appointment and Qualification.*

SECT. 6. Borough Justices.

1135. In all classes of boroughs the method of appointment of justices is the same: they are assigned by the Crown on the nomination of the Lord Chancellor, who may in his discretion adopt recommendations made to him by the borough council.

Method of appointment.

The only qualification required is that the prospective justice should reside in the borough (*g*), or within seven miles of it, or occupy a house, warehouse, or other property within it (*h*).

Qualification.

SUB-SECT. 3.—*Oaths of Office.*

1136. A newly-appointed justice, before acting as such, must take the oath of allegiance and the judicial oath (*i*), which he may do in the same manner as a county justice (*k*), or, if he prefers, before the mayor, and he must make a declaration before the mayor (*l*) or two other members of the borough council (*m*). The mayor may take the oaths before two justices of the borough, or, where there are no justices, before two councillors (*n*).

Oaths of office.

SUB-SECT. 4.—*Precedence.*

1137. In every borough having a separate commission of the peace the mayor takes precedence over all other justices acting in and for the borough, and is entitled to take the chair at all meetings of the justices held in the borough at which he is present by virtue of his office as mayor (*o*); but he does not take precedence of county justices, except

Precedence.

(*g*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 157 (3).

(*h*) *Ibid.* The seven miles are to be computed by measuring in a straight line on a horizontal plane, for which the use of the ordnance survey maps is authorised (*ibid.*, s. 231); compare the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 34, and title LOCAL GOVERNMENT, p. 303, *ante;* and see note (*s*), p. 539, *ante.*

(*i*) Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 6. For forms of the oaths, see *ibid.*, ss. 2 and 4 respectively; see note (*t*), p. 539, *ante.* As to affirmation in lieu of oath, see title EVIDENCE, Vol. XIII., pp. 590 *et seq.*

(*k*) Promissory Oaths Act, 1871 (34 & 35 Vict. c. 48), s. 2; see p. 539, *ante.*

(*l*) Permission to take the oaths thus was granted by ordinance of the Crown in 1882 (4 Municipal Corporations Chronicle, 207).

(*m*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 157 (2). The terms of the declaration are: "I, A. B., hereby declare that I will faithfully and impartially execute the office of Justice of the Peace for the borough of —— according to the best of my judgment and ability" (*ibid.*, Sched. VIII., Part I., Form B).

(*n*) 4 Municipal Corporations Chronicle, 15th December, 1882, 207. In boroughs which have no separate commission of the peace the mayor is not authorised to take the oaths before two justices of the county in which the borough is situated, but should take them before two members of the borough council (see title LOCAL GOVERNMENT, p. 302, *ante*), other than aldermen (Letter of Secretary of State, 7th November, 1892; 14 Municipal Corporations Circular, 387). When an ex-mayor is permanently assigned to the commission of the peace for the borough in the year succeeding his year of office there is doubt whether it is necessary for him to take the oaths again, but it is safer for him to do so.

(*o*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 155 (2). But though he continues to act as a justice for the year succeeding his year of office he does not then retain his right of precedence. As to the precedence of the mayor as mayor, see title LOCAL GOVERNMENT, p. 309, *ante.*

SECT. 6. **Borough Justices.**

when acting in relation to the business of the borough, or of a stipendiary magistrate engaged in administering justice (*p*).

SUB-SECT. 5.—*The Recorder.*

Precedence.

1138. In boroughs which have a separate court of quarter sessions (*q*) the recorder takes precedence next after the mayor in all places within the borough (*r*), and is the sole judge of the court of quarter sessions (*s*). The office of recorder is filled by the Crown upon the recommendation of the Home Secretary (*t*); the qualification being five years' standing at the bar (*u*).

Qualification.

Tenure of office.

Salary.

A recorder holds office during his good behaviour (*a*), and receives a salary determined by the Crown, but not greater than that stated in the petition asking for the grant of a separate court of quarter sessions (*b*).

Capacity to hold other offices.

The recorder may not serve in Parliament for the borough, nor be an alderman, councillor, or stipendiary magistrate of the borough, but he may act as revising barrister for the borough or sit in Parliament for another constituency (*c*); and the same person may fill the office of recorder in two or more boroughs conjointly (*d*).

Oaths of office.

Before acting either in the capacity of recorder or of justice of the peace he must take the oath of allegiance and the judicial oath, and make the required declaration in the same manner as a borough justice (*e*).

SUB-SECT. 6.—*Jurisdiction of County Justices within the Borough.*

Jurisdiction in boroughs having no separate commission of the peace

1139. Where a borough has no separate commission of the peace the justices of the county in which it is situate exercise jurisdiction in it (*f*). The position as between the borough justices and the county justices that thus ensues is that they have exactly the same powers and authorities within the borough, but the ambit of the

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(*p*) Municipal Corporations Act, 1882 (45 & 45 Vict. c. 50), s. 155 (2); and see, further, p. 545, *post.*

(*q*) For a list of the boroughs having a separate court of quarter sessions, see note (*f*), p. 540, *ante.* The Crown, on the petition to the Crown in Council of a borough council, may grant a borough a separate court of quarter sessions and appoint a recorder (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 162 (1)).

(*r*) *Ibid.*, s. 163 (5).

(*s*) *Ibid.*, s. 165 (2); and see, further, title COURTS, Vol. IX., p. 84. As to the power of the mayor to adjourn the court, respiting all recognisances until such day as he shall then and there and so from time to time cause to be proclaimed, see Municipal Corporations Act, 1883 (45 & 46 Vict. c. 50), s. 167 (1); but he may not act as a judge or do any other act in the character of a judge of the court (*ibid.*, s. 167 (2)).

(*t*) As to whom, see title CONSTITUTIONAL LAW, Vol. VII., pp. 65, 82.

(*u*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 163 (1); and see title BARRISTERS, Vol. II., p. 382.

(*a*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 163 (2).

(*b*) *Ibid.*, s. 163 (7).

(*c*) *Ibid.*, s. 163 (6); and see title LOCAL GOVERNMENT, p. 307, *ante.*

(*d*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 163 (8).

(*e*) *Ibid.*, s. 163 (4), and Sched. VIII., Part I., Form B; and see notes (*i*) and (*m*), p. 543, *ante.*

(*f*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 154 (1).

SECT. 6. Borough Justices.

exercise of such powers is different: that of the county justices includes, while that of the borough justices is limited to, offences committed within the borough (*g*); and, although the mayor is entitled to precedence over all the justices whenever he acts in the borough as a justice of the peace for the borough when the matter to be adjudicated on is borough business, whether it arises under the general law or under some local Act or bye-law (*h*), this is not the case where the matter has once been allocated as county business by the issue of a proper summons to appear before the county justices (*i*). If the offence was committed in the borough, the borough justices are entitled to sit and act with the county justices, but they cannot intercept the case and deal with it themselves (*j*).

Mayor and ex-mayor holding special sessions.

The mayor and ex-mayor of a borough not having a separate commission of the peace can hold special sessions and adjudicate summarily on indictable cases when sitting in a petty sessional court-house (*k*); but they cannot appoint days for holding sessions. Such days must be fixed by the justices for the division of the county in which the borough is situate (*l*).

SECT. 7.—*Stipendiary Magistrates.*

SUB-SECT. 1.—*Appointment, Qualification, and Salary.*

Where appointed.

1140. In boroughs, and in urban districts with a population of 25,000 persons, stipendiary magistrates may be appointed and act in place of or in addition to the local justices of the peace (*m*).

(*g*) *Lawson* v. *Reynolds*, [1904] 1 Ch. 718, *per* FARWELL, J., at p. 723; see *R.* v. *Amos* (1819), 2 B. & Ald. 533, and *Reigate Corporation* v. *Hart* (1868), L. R. 3 Q. B. 244.

(*h*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 155; Advice of Law Officers, 1889 (see 53 J. P. 831). See also Home Office Circular, 16th October, 1907, Stone's Justices' Manual, 1911, p. 655.

(*i*) *Lawson* v. *Reynolds*, *supra*; and see *R.* v. *Sainsbury* (1791), 4 Term Rep. 451.

(*j*) *Ibid.*; *R.* v. *Williamson* (1891), 7 T. L. R. 534.

(*k*) As to powers of justices sitting in a petty sessional court-house, see p. 565, *post*; but as to licensing sessions, see title INTOXICATING LIQUORS, Vol. XVIII., p. 21.

(*l*) Opinion of the Law Officers, June, 1890; see 12 Municipal Corporations Chronicle, 231.

(*m*) In the case of boroughs the authority is given by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 161 (1), and in the case of urban districts (as to which see title LOCAL GOVERNMENT, pp. 262 *et seq.*, *ante*) by the Stipendiary Magistrates Act, 1863 (26 & 27 Vict. c. 97), s. 3; the "cities or places" as defined therein being now known as urban districts under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 6, and the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 21. The areas to which the Stipendiary Magistrates Act, 1863 (26 & 27 Vict. c. 97), applies are, by *ibid.*, s. 2, exclusive of places already incorporated or which become so under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), which repealed and re-enacted the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), and of certain areas in which the appointment of a stipendiary magistrate is regulated by special statute. Such special areas and the statutes applicable thereto are the Staffordshire Potteries (Staffordshire Potteries Stipendiary Justice Act, 1839 (2 & 3 Vict. c. 15), amended by the Staffordshire Potteries Stipendiary Justice Act, 1871 (34 & 35 Vict. c. xc.), and Staffordshire Potteries Stipendiary Justice Act, 1895 (58 & 59 Vict. c. cvii.); Local Government Board Provisional Orders Confirmation (No. 3) Act, 1908 (8 Edw. 7, c. clxiv.), art. 5 (4); Manchester and

SECT. 7. Stipendiary Magistrates.

How appointed.

The appointment is made by the Crown through the Home Secretary on application being made to him by the council of the borough or urban district (*n*). More than one may be appointed for a borough (*o*); but upon a vacancy occurring a new appointment may not be made, either in a borough or an urban district, except upon application being made by the council as in the first instance (*p*).

Who may be appointed.

The appointment is confined to barristers of seven years' standing in the case of boroughs (*q*) and five years' standing in the case of urban districts (*r*), and the tenure of office is during His Majesty's pleasure (*s*).

Salary.

1141. The salary attached to the office is fixed by the Crown, but may not exceed the sum mentioned in the application except in the case of a borough, and then only with the borough council's consent (*t*).

SUB-SECT. 2.—*Jurisdiction.*

Powers of stipendiary.

1142. A stipendiary magistrate is *ex officio* a justice of the peace (*a*). He may sit alone and act within his jurisdiction either alone or together with any other justice or justices of the city or place wherein his jurisdiction is situate (*b*). When sitting at a police court or other place appointed in that behalf he has power to do

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Salford (stat. (1844) 7 & 8 Vict. c. 30, amended by stat. (1854) 17 & 18 Vict. c. 20); Wolverhampton and district (stat. (1846) 9 & 10 Vict. c. 65); Chatham and Sheerness (Chatham and Sheerness Stipendiary Magistrate Act, 1867 (30 & 31 Vict. c. 63)).

(*n*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 161 (1); Stipendiary Magistrates Act, 1863 (26 & 27 Vict. c. 97), s. 3. But in the case of an urban district the resolution for the application must be carried by a majority of two-thirds of the number of the council (*ibid.*). In both cases the decision whether any appointment shall be made is in the discretion of the Home Secretary (*ibid.*). The boroughs or areas for which stipendiary magistrates are appointed under the above Acts are:—

Birmingham, Bradford, Cardiff, Chatham and Sheerness, East Ham, Grimsby, Kingston-on-Hull, Leeds, Liverpool, Manchester City, Manchester Division, Merthyr Tydfil, Middlesbrough, Pontypridd, Salford, Sheffield, South Staffordshire (West Bromwich, Wolverhampton), Staffordshire Potteries (Stoke-upon-Trent), West Ham, Wolverhampton. The appointment in Manchester and Salford is made through the Chancellor of the Duchy of Lancaster (stat. (1854) 17 & 18 Vict. c. 20, s. 4).

(*o*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50). s. 161 (7).

(*p*) *Ibid.*, s. 161 (6); Stipendiary Magistrates Act, 1863 (26 & 27 Vict. c. 97), s. 3.

(*q*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 161 (1); see title BARRISTERS, Vol. II., p. 382.

(*r*) Stipendiary Magistrates Act, 1863 (26 & 27 Vict. c. 97), s. 3. In the case of the Potteries and Wolverhampton the necessary qualification is six years' standing; in that of Manchester and Salford four years'; and in that of Chatham and Sheerness five years' standing (see the statutes referred to in note (*m*), p. 545, *ante*).

(*s*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 161 (2); Stipendiary Magistrates Act, 1863 (26 & 27 Vict. c. 97), s. 3.

(*t*) *Ibid.*, s. 3; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 161 (4). The salary is payable by equal quarterly payments, and on the occasion of death or the holder of the office ceasing to act a proportionate sum is to be paid up to such event (*ibid.*, s. 161 (5)).

(*a*) *Ibid.*, s. 161 (3); Stipendiary Magistrates Act, 1863 (26 & 27 Vict. c. 97), s. 3; and see p. 538, *ante*.

(*b*) Stipendiary Magistrates Act, 1858 (21 & 22 Vict. c. 73), s. 5; and see p. 561, *post*. If he sits with other justices, the decision is that of the majority present.

alone any act, and to exercise alone any jurisdiction which may be done or exercised by two justices of the peace (*c*). All the provisions of any Act of Parliament auxiliary to the jurisdiction of justices of the peace are also applicable to his jurisdiction (*d*).

Thus he acts as a court of summary jurisdiction (*e*), and when sitting in a court-house or place appointed sits as a petty sessional court (*f*), the place where he is sitting being then deemed a petty sessional court-house (*g*).

He may not, however, act as a justice at any court of gaol delivery or general or quarter sessions (*h*).

SUB-SECT. 3.—*Deputy and Clerk.*

Appointment of deputy.

1143. The stipendiary may, with the approval of the Home Secretary, appoint a deputy to act for him for a period of time (*i*) which may not exceed a total of six weeks in any year, or, in the case of sickness or unavoidable absence, three calendar months at one time (*k*). The deputy, who must have practised as a barrister for not less than seven years in order to be eligible, has all the powers and may perform all the duties of the stipendiary magistrate whose place he fills during the time of his appointment (*l*).

If in the opinion of the Secretary of State a stipendiary magistrate is unable by reason of illness, absence, or any other cause to appoint or remove a deputy, the former may exercise those powers on the magistrate's behalf, and may assign out of the salary payable to him a suitable remuneration for the deputy (*m*).

Appointment of clerk.

1144. The stipendiary magistrate for an urban district with a population of more than 25,000 persons may appoint his own clerk, who must, however, be a solicitor in actual practice (*n*). The clerk is removable at the pleasure of the magistrate, who may appoint a successor on a vacancy occurring (*o*).

(*c*) Stipendiary Magistrates Act, 1858 (21 & 22 Vict. c. 73), s. 1; see also Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 33; Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 29; Stipendiary Magistrates Act, 1863 (26 & 27 Vict. c. 97), s. 5; Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 20 (10).

(*d*) Stipendiary Magistrates Act, 1858 (21 & 22 Vict. c. 73), s. 1.

(*e*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13 (11); and see Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 20 (10).

(*f*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13 (12); and see Stipendiary Magistrates Act, 1858 (21 & 22 Vict. c. 73), s. 2. As to petty sessional courts and court-houses, see pp. 565 *et seq.*, *post.*

(*g*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13 (13).

(*h*) Stipendiary Magistrates Act, 1858 (21 & 22 Vict. c. 73), s. 3; Stipendiary Magistrates Act, 1863 (26 & 27 Vict. c. 97), s. 5. As to acting at licensing sessions, see title INTOXICATING LIQUORS, Vol. XVIII., p. 35.

(*i*) Stipendiary Magistrates Act, 1869 (32 & 33 Vict. c. 34), s. 2.

(*k*) *Ibid.*

(*l*) *Ibid.*

(*m*) Recorders, Stipendiary Magistrates, and Clerks of the Peace Act, 1906 (6 Edw. 7, c. 46), s. 1 (1), (4). A deputy so appointed has the same powers as if he had been appointed by the magistrate himself (*ibid.*, s. 1 (3)). If the office becomes vacant, the deputy may continue to act until it is filled, up to a maximum of six months (*ibid.*, s. 1 (2)).

(*n*) Stipendiary Magistrates Act, 1863 (26 & 27 Vict. c. 97), s. 6.

(*o*) *Ibid.*; and see p. 617, *post.*

SECT. 8. Metropolitan Police Magistrates.

SECT. 8.—*Metropolitan Police Magistrates.*

SUB-SECT. 1.—*Appointment and Qualification.*

Metropolitan police magistrates.

Appointment.

Qualification.

Tenure.

Number.

1145. Salaried magistrates are appointed to execute the duties of justices of the peace at stated places within the Metropolitan Police District (*p*).

The appointment is made by the Crown by warrant under the sign manual (*q*), on the recommendation of the Home Secretary; the qualification is practice as a barrister during the seven years previous (*r*), or having filled the office of stipendiary magistrate in a borough or urban district (*s*); the tenure of office is during the pleasure of the Crown (*t*); the number of such magistrates is limited to twenty-seven (*a*).

SUB-SECT. 2.—*Extent of Jurisdiction.*

Commission.

1146. The commission under which they act is the same as that of county justices, except that they may not act as justices at general or quarter sessions (*b*).

Counties within jurisdiction.

The counties to which their jurisdiction may extend are London, Middlesex, Surrey, Hertford, Essex, and Kent, and all liberties therein (*c*).

Police court divisions.

Police court divisions are constituted within the Metropolitan Police District, and in each of them a police court is established (*d*)

(*p*) The amount of the salary, which is payable out of the Consolidated Fund, is £1,800 in the case of the chief metropolitan magistrate and £1,500 in the case of all the others. It accrues from day to day during the time of the continuance in office of the magistrate, and is payable at such intervals, not exceeding three months, as the Treasury Commissioners may determine (Metropolitan Police Magistrates Act, 1875 (38 & 39 Vict. c. 5), s. 1). As to the Metropolitan Police District, see titles METROPOLIS; POLICE.

(*q*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 1.

(*r*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 3; or practice for the four years then past as a barrister having previously practised as a certificated special pleader for three years below the bar (*ibid.*); and see title BARRISTERS, Vol. II., p. 382.

(*s*) Stipendiary Magistrates Act, 1858 (21 & 22 Vict. c. 73), s. 14; see p. 545, *ante.*

(*t*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 1.

(*a*) Metropolitan Police Courts Act, 1840 (3 & 4 Vict. c. 84), s. 2. The number appointed at present is twenty-five.

(*b*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 1; and see p. 563, *post.*

(*c*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 1; and see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 40.

(*d*) The Sovereign in Council has power to constitute such divisions and to establish courts (Metropolitan Police Courts Act, 1840 (3 & 4 Vict. c. 84), s. 2). The court originally established was that at Bow Street, which is still the chief metropolitan police court. Eight others were established before 1840—namely, those now called Clerkenwell, Great Marlborough Street, Lambeth, Marylebone, Old Street, Thames, Tower Bridge, and Westminster. At each of these a magistrate must attend daily except on Sundays, Christmas Day, and Good Friday (Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 12). The remaining courts—namely, North London, West London, South Western, and Greenwich and Woolwich—were established by Order in Council under the Metropolitan Police Courts Act, 1840 (3 & 4 Vict. c. 84), and at these courts attendance

to which particular magistrates are assigned (*e*), but this does not prevent the magistrates so assigned from acting in all places within the limits of their commission (*f*).

SUB-SECT. 3.—*Appointment of Deputy.*

Deputy.

1147. A metropolitan police magistrate is authorised to appoint a deputy, with the approval of the Home Secretary, to act for him for a time not exceeding in the aggregate six weeks in any year, or, in the event of sickness or unavoidable absence, three months at one time (*g*).

Qualification and powers.

The deputy, who must be a barrister who has practised as such for seven years, has all the powers and may perform all the duties of the magistrate whose place he fills (*h*).

SECT. 9.—*Tenure of Office and Salary of Justices.*

Tenure of office.

1148. A justice who has been assigned to the commission of the peace either for a county or borough, and who has taken the oaths, enters upon office and, except in the event of removal for misconduct, retains office for life or until the commission to which he is assigned is superseded. Stipendiary magistrates and metropolitan police magistrates retain office during the pleasure of the Crown (*i*).

Effect of not taking oaths.

1149. A justice who declines or neglects to take the requisite oaths when duly tendered vacates his office if he has already attempted to enter on it; and, if he has not entered on it, he is disqualified from doing so (*k*). Anything, however, that he may have done as a justice before being duly qualified is not void, as the public interest requires that it should be sustained (*l*).

Effect of new commission.

1150. Upon the issue of a new commission by a Sovereign who has already issued a commission of the peace, it is not necessary for justices who were assigned to the old commission to take the oaths again (*m*), but they are required to sign a roll with the oaths annexed (*n*). When, however, a new commission is issued for the

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may be either daily or on such days and times as the Sovereign in Council may direct (Metropolitan Police Courts Act, 1840 (3 & 4 Vict. c. 84), s. 4). Orders in Council constituting or altering police court divisions must be published in the *London Gazette;* and they take effect from the date named in the order for that purpose (*ibid.*, s. 5); see title POLICE.

(*e*) Metropolitan Police Courts Act, 1840 (3 & 4 Vict. c. 84), s. 2.

(*f*) *Ibid.* As to the varying extent of their jurisdiction within or without the area comprised in the police court districts, and the extent to which the ordinary justices of the peace have concurrent jurisdiction, see p. 562, *post.*

(*g*) Stipendiary Magistrates Act, 1869 (32 & 33 Vict. c. 34), s. 2.

(*h*) *Ibid.*

(*i*) See pp. 546, 548, *ante.*

(*k*) Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 7. Formerly, under the Justices Qualification Act, 1744 (18 Geo. 2, c. 20), a justice who acted without taking the required oath as to property qualification was liable to a fine of £100; but that statute was repealed by the Justices of the Peace Act, 1906 (6 Edw. 7, c. 16), s. 5 (2), and Schedule.

(*l*) *Margate Pier Co.* v. *Hannam* (1819), 3 B. & Ald. 266; *R.* v. *Herefordshire Justices* (1819), 1 Chit. 700.

(*m*) Justices Oaths Act, 1766 (7 Geo. 3, c. 9).

(*n*) Justices' Qualification Act, 1760 (1 Geo. 3, c. 13), s. 2.

SECT. 9. Tenure of Office and Salary of Justices.

first time by a Sovereign, justices must take the oaths, as they include a reference to the Sovereign by name (*o*).

Removal.

1151. A justice of the peace may be removed from the commission of the peace by a writ of discharge or of *supersedeas* issued under the Great Seal (*p*); and a person who is a justice *ex officio* may be removed in the same manner (*q*).

General rule as to remuneration.

1152. Justices, other than stipendiary or police magistrates (*r*), whether of a county or of a borough, are unpaid for their services as such (*s*), though some of the offices which entitle the holder to be a justice may have a salary attached to them (*t*).

Part II.—Disqualification to be or act as a Magistrate.

SECT. 1.—*General Disqualifications.*

SUB-SECT. 1.—*By Profession or Office.*

General rule.

1153. No one is disqualified at the present day for the office of justice of the peace on the ground of his profession (*a*); but, if a

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(*o*) Justices' Qualification Act, 1760 (1 Geo. 3, c. 13), s. 1; Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), ss. 2, 4, 10; compare p. 537, *ante*.

(*p*) 1 Bl. Com., 18th ed., 353. Should it be desired to petition the Crown to remove a justice the memorial should be addressed to the Lord Chancellor. Where, however, one who was an elector and an inhabitant of a borough addressed such a memorial to the Home Secretary, praying for an inquiry into the conduct of a justice with a view to his removal owing to his alleged misconduct at an election, it was held that the memorial was a privileged communication (see title LIBEL AND SLANDER, Vol. XVIII., pp. 687, note (*i*), 690, note (*n*), (2) (i.) (b)), the elector having both an interest and a duty in the subject-matter thereof, and that, the memorial being substantially a petition to the Crown, the Secretary of State had a corresponding duty to cause the inquiry to be made (*Harrison* v. *Bush* (1855), 5 E. & B. 344); and see title CONSTITUTIONAL LAW, Vol. VII., p. 68.

(*q*) Justices of the Peace Act, 1906 (6 Edw. 7, c. 16), s. 4.

(*r*) For the salary of these, see pp. 546, note (*p*), 548, *ante*.

(*s*) Provision was made by the stats. (1388) 12 Ric. 2, c. 10, and (1390) 14 Ric. 2, c. 11, for the payment of wages to justices, but this provision has been repealed by the Criminal Justice Act, 1855 (18 & 19 Vict. c. 126), s. 21).

(*t*) As to the remuneration of a mayor, see title LOCAL GOVERNMENT, p. 309, *ante*; and as to a recorder's salary, see p. 544, *ante*.

(*a*) With regard to the appointment of clergy as justices it was stated by Lord CAIRNS, L.C., in the House of Lords that he "had found that the rule was that where the Lord Lieutenant recommended a clergyman to be appointed to the bench, the holder of the Great Seal requested the lord lieutenant to consider whether there was any layman in the county qualified to be placed on the bench, and unless the Lord Lieutenant said it was quite impossible to discover a layman so qualified, the holder of the Great Seal declined to appoint a clergyman" (19 Sol. Jo. 896). "It is a well-known rule that ministers of religion are not appointed except in very special circumstances" (evidence of Lord LOREBURN, L.C., before the Royal Commission on the Appointment of Justices, 1910, *Times*, 3rd March, p. 6).

SECT. 1. General Disqualifications.

solicitor is assigned to the commission of the peace for any county, neither he nor any partner of his may practise directly or indirectly before the justices for that county or any borough within it (*b*).

Solicitors.

The sheriff of a county may not while he fills that office act as a justice of the peace for that county (*c*), and if he does so all his acts done in the capacity of justice during his shrievalty are void (*d*).

Sheriffs.

A justice of the peace who is elected coroner for the county or division to the commission of the peace of which he is assigned may continue to act as a justice (*e*); but the offices of justice and of clerk to the justices in the same county or division are incompatible (*f*), and if the clerk becomes a justice he thereby vacates his office as clerk (*g*). If, however, a justice is appointed clerk of the peace or clerk to the justices he does not, apparently, vacate the office of justice, because he cannot resign that office without the consent of the Crown (*h*).

Coroner.

Clerk of the peace, or to justices.

SUB-SECT. 2.—*By Bankruptcy or Crime.*

1154. A bankrupt is disqualified from being appointed or acting as a justice of the peace (*i*), and if a magistrate is convicted of treason or felony (*k*), or of any corrupt practice at a parliamentary or municipal election (*l*), his office is vacated, and in the case of the latter conviction, whether previously a justice or not, he is incapable of holding the office for seven years from the date of conviction (*l*).

Bankruptcy.

Treason or felony.

Corrupt practice.

SUB-SECT. 3.—*By Interest or Bias.*

1155. The principle *nemo debet esse judex in causâ propriâ suâ* precludes a justice, who is interested in the subject-matter of a dispute, from acting as a justice therein (*m*).

Disqualification by interest.

(*b*) Solicitors could not formerly be justices for the county in which they practised (see Justices Qualification Act, 1871 (34 & 35 Vict. c. 18), now repealed), but this disability was removed by the Justices of the Peace Act, 1906 (6 Edw. 7, c. 16), s. 3. There has never been any statutory prohibition of the appointment of solicitors as borough justices; but where a solicitor or his partner practises before a borough bench there would be a practical objection to his being on that bench. Accordingly it is the custom to require solicitors who are appointed borough justices to give an undertaking similar to the above enactment relating to county justices; and see title SOLICITORS.

(*c*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 17.

(*d*) *Ibid.*; and see title SHERIFFS AND BAILIFFS.

(*e*) *Davis* v. *Pembrokeshire Justices* (1881), 7 Q. B. D. 513; and see title CORONERS, Vol. VIII., pp. 219, 251.

(*f*) *R.* v. *Patteson* (1832), 4 B. & Ad. 9; *R.* v. *Douglas*, [1898] 1 Q. B. 560.

(*g*) *R.* v. *Douglas, supra*; see also *R.* v. *Bangor Corporation* (1886), 18 Q. B. D. 349, C. A.

(*h*) So held in Ireland in *Forbes* v. *Lloyd* (1876), 10 I. R. C. L. 552, Ex. Ch., approving *R.* v. *Patteson, supra*; see also *Worth* v. *Newton* (1854), 10 Exch. 247.

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 32 (1) (c). This provision extends to an *ex officio* justice; see, further, and as to the removal of such disqualification, title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 88—90, 269.

(*k*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 2; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 428.

(*l*) Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 6 (3); Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70), s. 2 (2); see, further, title ELECTIONS, Vol. XII., pp. 484, 524, 528.

(*m*) *R.* v. *Farrant* (1887), 20 Q. B. D. 58; see also *Dimes* v. *Grand Junction*

SECT. 1. General Disqualifications.

If, however, the fact that a justice is interested in the subject-matter of a case is known to the parties, and objection to his acting is waived, the proceedings are not rendered void (*n*); and where the objection is thus waived at the hearing, it cannot afterwards be raised (*o*).

Distinction between pecuniary interest and prejudice.

1156. A distinction must be drawn between pecuniary interest and prejudice. The smallest pecuniary interest is, subject to any statutory authority to the contrary (*p*), a bar to the justice acting (*q*), but where the interest is not pecuniary the question arises whether the interest is of such a substantial character as to make it likely that he has a real bias in the matter (*r*).

The interest, if pecuniary, need not be confined to the justice himself to preclude his acting. Membership of a company (*s*) or association (*a*) which is interested is a bar, as also is a bare liability to costs, where the decision itself would involve no pecuniary loss (*b*).

Canal (*Proprietors*) (1852), 3 H. L. Cas. 759; *R.* v. *Cambridge* (*Recorder*) (1857), 8 E. & B. 637.

(*n*) *Wakefield Local Board of Health* v. *West Riding and Grimsby Rail. Co.* (1865), L. R. 1 Q. B. 84. In cases arising under the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), certain classes of persons are disqualified from acting, except with the consent of the parties (see p. 556, *post*). Otherwise it would appear that where a class of persons is definitely excluded from acting, a waiver of the objection would not make the proceedings valid. Where, however, an Act contains a provision that the justices shall mean the justices of the place where the matter requiring the cognisance of such justices shall arise and who shall not be interested in the matter, it has been held that the phrase is merely declaratory of the common law, and that the objection may be waived (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20); *Wakefield Local Board of Health* v. *West Riding and Grimsby Rail. Co.*, *supra*).

(*o*) *Ibid.*; compare *R.* v. *Antrim Justices*, [1895] 2 I. R. 603.

(*p*) *R.* v. *Rand* (1866), L. R. 1 Q. B. 230; *R.* v. *Farrant* (1887), 20 Q. B. D. 58: *R.* v. *Hammond* (1863), 9 L. T. 423.

(*q*) See the text, *infra*.

(*r*) *R.* v. *Sunderland Justices*, [1901] 2 K. B. 357, C. A.; *R.* v. *Handsley* (1881), 8 Q. B. D. 383; *R.* v. *Rand* (1866), L. R. 1 Q. B. 230; *R.* v. *Meyer* (1875), 1 Q. B. D. 173; *R.* v. *Farrant*, *supra*; compare *Eckersley* v. *Mersey Docks and Harbour Board*, [1894] 2 Q. B. 667, C. A., *per* Lord ESHER, M.R., at p. 671; *R.* (*Taverner*) v. *County Tyrone Justices*, [1909] 2 I. R. 763; also *R.* v. *Rochester* (*Dean and Chapter*) (1851), 17 Q. B. 1; and, as to bias, see, further, p. 553, *post*.

(*s*) *R.* v. *Hammond*, *supra*; see *Wakefield Local Board of Health* v. *West Riding and Grimsby Rail. Co.*, *supra*; and see the definition of "justices" in the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 3; title COMPANIES, Vol. V., p. 677. But the fact that justices are shareholders in shipping companies whose ships are insured by an association which is a member of another association of which one of the parties is agent is too remote to constitute a disqualifying interest (*R.* v. *McKenzie*, [1892] 2 Q. B. 519). See, further, title INTOXICATING LIQUORS, Vol. VIII., p. 53.

(*a*) *R.* v. *Henley*, [1892] 1 Q. B. 504; and see *R.* v. *Allan* (1864), 4 B. & S. 915; the ground for disqualification in which has now, however, been removed by statute affecting the particular kind of association (Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 61); see title FISHERIES, Vol. XIV., p. 640.

(*b*) *R.* v. *Rand*, *supra*, *per* BLACKBURN, J., at p. 233.

SECT. 1. General Disqualifications.

1157. Justices may, however, try offences against an Act which is being enforced by a local authority, notwithstanding any prospective loss or benefit to them in their character as ratepayers or members of a class liable to contribute to, or derive advantage from, the fund to which any fine to be imposed might be payable (*c*). Similarly, they may act as justices on appeals from an assessment to poor rate or highway rate, or on matters arising out of the administration of poor relief, notwithstanding that they may be pecuniarily interested as ratepayers (*d*); but they may not so act at quarter sessions (*e*), except on appeals against an assessment to poor rate in some parish other than their own (*f*); and, in general, where no statutory authority to the contrary exists, an objection on the ground of interest to a justice acting as such will be sustained, even if it is highly technical (*g*).

Effect of pecuniary interest as ratepayers.

1158. The question of bias may arise if a justice who is a member of a local authority acts as a justice in determining cases arising out of the action of the local authority.

Bias.

In some such cases there is express statutory permission to the justice to act as such (*h*); and then it is not sufficient for a party who alleges bias to show that the justice has, as a member of the local authority, a pecuniary interest in the result, or that the local authority is in fact prosecutor in the case; but it must be established that the particular justice is so interested in the decision that there is real likelihood of bias (*i*).

Evidence required when justice exercising statutory power.

In the absence of such a provision, the fact that a justice is a member of a local authority, and a party to the institution of proceedings by it, disqualifies him from acting (*k*), but where his

Effect of absence of statutory authority.

(*c*) Justices of the Peace Act, 1867 (30 & 31 Vict. c. 115), s. 2; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 258; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 122. As to proceedings under the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), see title GAS, Vol. XV., pp. 354, 375; and see, further, titles FISHERIES, Vol. XIV., pp. 639, 640; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 171.

(*d*) Poor Law (Rating) Act, 1742 (16 Geo. 2, c. 18), s. 1; *R.* v. *Essex Justices* (1816), 5 M. & S. 513; *R.* v. *Bolingbroke*, [1893] 2 Q. B. 347; *Ex parte Workington Overseers*, [1894] 1 Q. B. 416, C. A. But a justice who is himself an appellant against an assessment to poor rate at the same sessions must not sit and determine similar cases to his own (*R.* v. *Great Yarmouth Justices* (1882), 8 Q. B. D. 525). As to rating generally, see title RATES AND RATING. As to poor relief, see title POOR LAW.

(*e*) Justices Jurisdiction Act, 1742 (16 Geo. 2, c. 18), s. 3.

(*f*) Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), s. 6; *R.* v. *Bolingbroke*, [1893] 2 Q. B. 347, *per* WRIGHT, J., at p. 350; compare the cases cited in note (*m*), p. 554, *post*.

(*g*) *R.* v. *Gaisford*, [1892] 1 Q. B. 381.

(*h*) *E.g.*, the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 258; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 122; Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 61.

(*i*) *R.* v. *Handsley* (1882), 8 Q. B. D. 383 (where there was a private Act containing a clause similar to the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 258). The similar case of *R.* v. *Gibbon* (1880), 6 Q B. D. 168, in which there was an opposite decision, was, in *R.* v. *Handsley*, *supra*, cited and disapproved. Where, however, the justice is himself a party to the institution of proceedings, such a provision would not entitle him to act (*R.* v. *Lee* (1882), 8 Q. B. D. 394). See, further, title INTOXICATING LIQUORS, Vol. XVIII., p. 54.

(*k*) *R.* v. *London County Council, Ex parte Akkersdyk, Ex parte Fermenia*

SECT. 1. General Disqualifications.

action as member of a local authority is confined to adopting an Act of Parliament or issuing a notice authorised by an Act of Parliament, and the proceedings are in fact begun by a party other than the local authority, the justice is entitled to act as such (*l*).

The test, apart from institution of proceedings.

1159. Where, apart from the institution of proceedings, a justice has an interest as a member of a local authority in the result of the proceedings, the test is whether, in the circumstances of the particular case, there is any real likelihood of bias (*m*). The same rule applies where the justice is a member of a society which is a party to or is interested in the result of the proceedings (*n*). Mere subscription to the funds of a society which is a party to proceedings (*o*), or to a fund to enable an application to be heard, does not involve disqualification (*p*), nor does an expression of opinion, if not made in view of the particular proceedings (*q*).

Examples.

[1892] 1 Q. B. 190; see *R.* v. *Meyer* (1875), 1 Q. B. D. 173; *R.* v. *Milledge* (1879), 4 Q. B. D. 332; *R.* v. *Spedding* (1885), 49 J. P. 804; *R.* v. *Henley*, [1892] 1 Q. B. 504 (member of a board of conservators); *R.* v. *Griffiths* (1900), *Times*, 18th May (member of a school board).

(*l*) *R.* v. *Huntingdon Justices* (1879), 4 Q. B. D. 522; *R.* v. *Powell* (1884), 48 J. P. 740, 741; compare *Ex parte Pettitmangin* (1864), 33 L. J. (M. C.) 99, n. (more fully reported 28 J. P. 87).

(*m*) *R.* v. *Sunderland Justices*, [1901] 2 K. B. 357, C. A.; see *R.* v. *Meyer*, *supra*. Where the interest is remote it has in many recent cases been decided that there is no real likelihood of bias; see *Leeds Corporation* v. *Ryder*, [1907] A. C. 420; *R.* v. *Stockport Justices* (1896), 60 J. P. 552, which was, however, disapproved in *R.* v. *Sunderland Justices*, *supra*; *R* v. *Tempest* (1902), 66 J. P. 47; *R.* v. *Middlesex Justices*, *Ex parte Hendon Union Assessment Committee* (1908), 72 J. P. 251. The fact that on a rating appeal against an assessment in one union one of the justices was chairman of the assessment committee of another union did not disqualify him from acting (*R.* v. *London Justices*, *Ex parte South Metropolitan Gas Co.* (1908), 72 J. P. 137, C. A.).

(*n*) *R.* v. *Burton*, *Ex parte Young*, [1897] 2 Q. B. 468. In this case proceedings had been taken by the council of the Incorporated Law Society against a solicitor, and one of the justices, who was a member of that society, though not of the council, was held not to be disqualified from acting; see also *R.* v. *Price* (1880), 42 L. T. 439; compare *Leeson* v. *General Council of Medical Education and Registration* (1889), 43 Ch. D. 366, C. A.; *Allinson* v. *General Council of Medical Education and Registration*, [1894] 1 Q. B. 750, C. A. But where the justice was a member of a small class of persons in whose interest proceedings were instituted he was held to be disqualified (*R.* v. *Huggins*, [1895] 1 Q. B. 563; compare *R.* v. *Henley*, [1892] 1 Q. B. 504).

(*o*) *Goodall* v. *Bilsland*, [1909] S. C. 1152; see *R.* v. *Deal Justices*, *Ex parte Curling* (1881), 45 L. T. 439. In Ireland this principle has been extended to the length that a justice may subscribe to a temperance association and even assent to its opposing, or retaining a solicitor to oppose, a licensing application, without becoming thereby disqualified from sitting to hear and determine the application (*R.* (*Findlater*) v. *Dublin Justices*, [1904] 2 I. R. 75; but see *R.* v. *Fraser* (1893), 57 J. P. 500, where a justice who attended a temperance meeting at which allusion was made to a licensing application, but left the meeting before a resolution was passed to oppose the application, was held to be disqualified from acting); see also *R.* v. *Hain* (1896) 12 T. L. R. 323, and titles FISHERIES, Vol. XIV., p. 640; INTOXICATING LIQUORS, Vol. XVIII., pp. 53, 54.

(*p*) *R.* v. *Norfolk Justices*, *Ex parte Chamberlain* (1870), 34 J. P. 773.

(*q*) Thus, a justice was held not to be disqualified, although in an affidavit in civil proceedings he had expressed an opinion adverse to the claim of a party in a matter in respect of which he sat to hear and determine

SECT. 1. General Disqualifications.

A request, addressed by the chairman of a bench of justices to all the justices of the county, to attend the hearing, at quarter sessions, of an appeal from the decision of his bench, with an intimation that the justices of the petty sessional division attached such importance to their decision that they had instructed counsel to appear in support of it, is not such an attempt to influence the decision of the justices of the county as to render them biassed at the hearing (*r*), but justices whose decision is the subject of an appeal must not be present upon the bench at the hearing of the appeal (*s*).

Justice as a witness.

A justice is not precluded from acting by being called as a witness at the hearing, unless he is interested in the matter (*t*), nor by his having suggested a settlement out of court in a case where he has been in relation with the parties (*a*).

Allegations of bias.

1160. Allegations of bias should not be lightly made (*b*), but if any reasonably probable ground for alleging bias exists a justice should not act, but should withdraw from the bench during the hearing (*c*). If he does not do so, the result of the proceedings is void upon proof of his presence at the hearing and of there being such reasonably probable ground (*d*).

SECT. 2.—*Special Statutory Disqualifications.*

Classes of persons disqualified.

1161. Certain classes of persons are disqualified by statute from acting as justices in specified cases (*e*); the following examples may be mentioned here:—

The master, or father, son, or brother of the master, in the

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a summons (*R.* v. *Alcock, Ex parte Chilton* (1878), 37 L. T. 829); and where a justice signed a petition in favour of the grant of a licence to a grocer and, in order to constitute a quorum, was unexpectedly called on to sit to hear the application in a petty sessional division in which he did not usually sit, his doing so was held not to disqualify him (*R.* v. *Taylor, Ex parte Vogwill* (1898), 14 T. L. R. 185).

(*r*) *R.* v. *London Justices, Ex parte Kerfoot* (1896), 60 J. P. 726; and see *R.* (*Findlater*) v. *Dublin Justices*, [1904] 2 I. R. 75.

(*s*) *R.* v. *Lancashire Justices* (1906), 75 L. J. (K. B.) 198.

(*t*) *R.* v. *Tooke* (1884), 48 J. P. 661; see *R.* (*Donnelly*) v. *County Tyrone Justices* (1910), 44 I. L. T. 264.

(*a*) *R.* v. *Farrant* (1887), 20 Q. B. D. 58.

(*b*) *Leeds Corporation* v. *Ryder*, [1907] A. C. 420, *per* Lord LOREBURN, L.C., at p. 423. It is not enough to allege that a justice has strong views upon the subject in relation to which he is sitting to hear a case (*Ex parte Wilder* (1902), 66 J. P. 761); some proof of bias is required (*R.* (*Taverner*) v. *County Tyrone Justices*, [1909] 2 I. R. 763; *R.* v. *Sparks* (1909), 73 J. P. 485).

(*c*) *Ex parte Steeple Morden Overseers* (1855), 19 J. P. 292; *R.* v. *Surrey Justices* (1855), 19 J. P. 755; *R.* v. *Glamorganshire Justices* (1857), 21 J. P. 773; *R.* v. *Suffolk Justices* (1852), 21 L. J. (M. C.) 169; compare *R.* v. *Cork Justices*, [1910] 2 I. R. 271.

(*d*) *R.* v. *Lancashire Justices, supra.* Where a justice who was chairman of a county council sat, during the hearing of a summons against a defendant for breach of a bye-law, next to the solicitor representing the prosecution, and received, and replied to, a communication from the justices on the bench, a *certiorari* to quash the conviction was refused (but without costs) on proof that the communication could not have influenced the decision (*R.* v. *Budden* (1896), 60 J. P. 166). Where bias is alleged and the magistrate does not show cause, cause may be ordered against him (*R.* (*O'Leary*) v. *Cork Justices* (1911), 45 I. L. T. 3).

(*e*) See, further, titles FACTORIES AND SHOPS, Vol. XIV., pp. 519, 539

SECT. 2. **Special Statutory Disqualifications.**

particular manufacture, trade, or business in connection with which an offence is charged under the Trade Union Act, 1871 (*f*), is precluded from sitting either at the original hearing or on appeal.

Employers and workmen or servants.

The owner, agent, or manager of a mine, or a miner or miners' agent, or the father, son, brother, father-in-law, son-in-law, or brother-in-law of any of these, or the director of a company which owns a mine, may not act without the consent of both parties on the hearing of cases arising under the Coal Mines Regulation Act, 1887 (*g*). A master, manufacturer, or agent may not act in proceedings under the Masters and Workmen Arbitration Act, 1824 (*h*); nor may persons engaged in hat making or felt making act in proceedings under the Frauds by Workmen Act, 1777 (*i*), nor persons engaged in the manufacture of hosiery, or the father, son, or brother of persons so engaged, in proceedings under the Hosiery Act, 1843 (*k*).

Excise officers and traders.

No officer of excise or person employed in the collection or management of the revenue of excise may act as a justice in proceedings brought under any of the Acts relating to excise; and a trader subject to the excise laws is under the same disability in any case which relates to his particular trade or business or to any case in which he is in anywise concerned or interested as a trader. If either excise officer or trader does so act the proceedings are null and void (*l*).

Members of highway board.

Where the decision of a highway board is appealed against no one who has already acted as a member of the board may act as justice (*m*).

Part III.—Liability of Magistrates.

SECT. 1.—*In General.*

Limit to statutory protection.

1162. Protection is accorded by statute to justices in respect of acts done in the execution of their duty as such; but this protection does not extend to cases where they have acted either maliciously and without reasonable and probable cause, or without or in excess

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(offences under the Truck Amendment Act, 1887 (50 & 51 Vict. c. 46), and the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22)); FOOD AND DRUGS, Vol. XV., p. 53 (offences under the Bread Act, 1836 (6 & 7 Will. 4, c. 37); INTOXICATING LIQUORS, Vol. XVIII., pp. 53, 54 (offences under the Licensing Acts).

(*f*) 34 & 35 Vict. c. 31, s. 22; see title TRADE AND TRADE UNIONS.

(*g*) 50 & 51 Vict. c. 58, s. 69; see title MINES, MINERALS, AND QUARRIES.

(*h*) 5 Geo. 4, c. 96, s. 12; see title MASTER AND SERVANT.

(*i*) 17 Geo. 3, c. 56, s. 6; see title TRADE AND TRADE UNIONS.

(*k*) 6 & 7 Vict. c. 40, s. 25; see title TRADE AND TRADE UNIONS.

(*l*) Excise Management Act, 1827 (7 & 8 Geo. 4, c. 53), s. 68; see title REVENUE.

(*m*) Highway Act, 1862 (25 & 26 Vict. c. 61), s. 38; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 95.

of their jurisdiction, and in such cases they are liable to an action for damages at the suit of the party aggrieved (*a*).

SECT. 1. **In General.**

SECT. 2.—*Criminal Information against Justices.*

Criminal information: (i.) *ex officio;*

1163. Magistrates who are guilty of gross misconduct in the execution of their office are liable to prosecution on information. Such an information may be filed by the Attorney-General (*b*) for any misdemeanour at his discretion and without leave of the court (*c*). Where he does so the information is said to be *ex officio*, and the institution and conduct of the proceedings are entirely in his hands (*d*). Notice of the information is commonly given to the defendant by the Master of the Crown Office (*e*), but it rests with the Attorney-General to decide whether he shall give the defendant an opportunity of showing cause why he should not proceed (*f*). The court no doubt has power to quash an *ex-officio* information (*g*), but the Attorney-General may at any stage in the proceedings amend (*h*) its terms or withdraw it and prefer another (*i*). An information may be filed by any other person, but only by leave of the court given in open court and after the applicant has filed at the Crown Office a recognisance in the penalty of £50 to prosecute the information and to abide by and observe such orders as the court may direct (*k*).

(ii.) by other informers.

(*a*) Justices Protection Act, 1848 (11 & 12 Vict. c. 44); Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61). For the conditions under which protection is accorded, see titles LIMITATION OF ACTIONS, p. 176, *ante;* PUBLIC AUTHORITIES AND PUBLIC OFFICERS; and see, further, titles MALICIOUS PROSECUTION AND PROCEDURE, p. 672, *post;* and for false imprisonment, see title TRESPASS.

(*b*) If the office of the Attorney-General is vacant the Solicitor-General has the right in his place (*R.* v. *Wilkes* (1770), 4 Burr. 2527). The Attorney-General of the Duchy of Lancaster has no such right, and the information exhibited by him will be removed from the file on the application of the defendant, even after he has put in an answer to it (*A.-G. of Duchy of Lancaster* v. *Devonshire* (*Duke*) (1884), 14 Q. B. D. 195).

(*c*) *R.* v. *Phillips* (1767), 4 Burr. 2089, where Lord MANSFIELD, C.J., held that it was not for the court to grant the information on the application of the Attorney-General, but for the latter himself to file it; see also *R.* v. *Leicester Corporation* (1767), 4 Burr. 2087, and, generally, title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 329, note (*v*).

(*d*) The venue may not be changed without his consent (*A.-G.* v. *Smith* (1816), 2 Price, 113).

(*e*) Stephen's Digest of Criminal Procedure, 126, n.

(*f*) *R.* v. *Phillips, supra.*

(*g*) *Fountain's Case* (1663), 1 Sid. 152.

(*h*) *A.-G.* v. *Ray* (1843), 11 M. & W. 464; *A.-G.* v. *Smith* (1839), 5 M. & W. 372.

(*i*) Compare *R.* v. *Wilkes, supra; R.* v. *Holland* (1791), 4 Term Rep. 457.

(*k*) Crown Office Rules, 1906 (Statutory Rules and Orders, 1906, 605 *et seq.*), r. 35. The provision that informations should only be filed by leave of the court dates from an Act passed to prevent malicious informations in the Court of King's Bench (stat. (1692) 4 Will. & Mar. c. 18; see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 329, 330, note (*v*). The recognisance must be entered into before the King's Coroner and Attorney or the Master of the Crown Office or a justice of the peace of the county,

SECT. 2. Criminal Information against Justices.

Nature of complaint.

Procedure.

1164. The grievance or act of misconduct complained of must relate to the behaviour of the magistrate as such (*l*); and a notice containing a distinct statement thereof must be served upon him personally or left at his residence with some member of his household six days before the time named in it for making the application (*m*). The application must be made to a Divisional Court (*n*), by motion for an order *nisi*, within a reasonable time after the offence complained of (*o*), and the applicant must depose on affidavit to his belief that the defendant was actuated by corrupt motives, and further, where an unjust conviction is alleged, that the person convicted was innocent of the charge (*p*).

Grounds upon which application granted.

1165. The grounds upon which an application by a private person will be granted are in the discretion of the court (*q*), the tendency in recent times having been to confine the granting of such applications to cases of public importance (*a*).

The application has at different times been granted against magistrates for extortion (*b*), for acting where they were directly interested (*c*), for the improper conviction of innocent persons (*d*), for an illegal sentence (*e*), for interfering with the order of another magistrate (*f*), for refusing bail improperly (*g*), for corruptly making a false return to a mandamus (*h*), and for neglect of duty

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borough, or place in which the cause arises (Crown Office Rules, 1906, r. 35).

(*l*) Crown Office Rules, 1906, r. 36; compare *Ex parte Lee* (1843), 7 Jur. 441; *R.* v. *Arrowsmith* (1843), 2 Dowl. (N. S.) 704.

(*m*) Crown Office Rules, 1906, r. 36; and see *R.* v. *Heming* (1833), 5 B. & Ad. 666; *R.* (*Hanafin*) v. *Rae* (1874), 8 I. R. C. L. 524.

(*n*) See title COURTS, Vol. IX., p. 59.

(*o*) Crown Office Rules, 1906, r. 37. Twelve months was held to be too long, even though the applicant stated that the facts had only come to his knowledge shortly before the application (*R.* v. *Bishop* (1822), 5 B. & Ald. 612); and see *R.* v. *Smith* (1796), 7 Term Rep. 80; *R.* v. *Saunders* (1847), 10 Q. B. 484; *R.* v. *Harries* (1811), 13 East, 270; *R.* v. *Marshall and Grantham* (1811), 13 East, 322).

(*p*) Crown Office Rules, 1906, r. 37; compare *R.* v. *Webster* (1789), 3 Term Rep. 388; *R.* v. *Williams* (1822), 5 B. & Ald. 595; *R.* v. *Athay* (1758), 2 Burr. 653; *R.* v. *Barker* (1800), 1 East, 186.

(*q*) *R.* v. *Jolliffe* (1791), 4 Term Rep. 285, 290.

(*a*) *R.* v. *Labouchere* (1884), 12 Q. B. D. 320, at p. 327, where Lord COLERIDGE, C.J., in the course of his judgment, reviewed the ground and the varying degrees of frequency with which the application had been granted in the past, and cited with approval the case of *R.* v. *Winchelsea* (*Lord*) (1865), not otherwise reported, and passages from the judgments therein of COCKBURN, C.J., and BLACKBURN, J., to this effect; compare *R.* v. *Seaford Justices* (1763), 1 Wm. Bl. 432; *R.* v. *Steward* (1831), 2 B. & Ad. 12.

(*b*) *R.* v. *Jones* (1743), 1 Wils. 7.

(*c*) *R.* v. *Davis* (1772), Lofft, 62 (where, although the information was not granted, the justice was not allowed costs); see *R.* v. *Whately* (1829), 4 Man. & Ry. (K. B.) 431; and *R.* v. *Hoseason* (1811), 14 East, 605.

(*d*) *R.* v. *Webster, supra*; *R.* v. *Saunders, supra.*

(*e*) *R.* v. *Mather* (1733), 2 Barn. (K. B.) 249.

(*f*) *R.* v. *Brooke* (1788), 2 Term Rep. 190.

(*g*) *R.* v. *Badger* (1843), 4 Q. B. 488.

(*h*) *R.* v. *Lancashire Justices* (1822), 1 Dow. & Ry. (K. B.) 485; *R.* v.

in not using force to supress a riot (*i*). It has also been granted for corruptly making illegal appointments (*k*), and for the grant or refusal of licences from corrupt motives (*l*) or political prejudice (*m*) or resentment (*n*).

Principle acted on by the court.

1166. The principle acted upon is to inquire into the motive from which the act complained of has proceeded, and not to grant the application unless there is disclosed a dishonest, corrupt, or oppressive motive, under which description fear and favour may generally be included (*o*).

Matters not justifying complaint.

An error or mistake *bonâ fide* committed by a magistrate or a mere irregularity (*p*) does not justify an application for an information (*q*).

Where the act complained of is done at general or quarter sessions, very strong evidence of corrupt motive or deliberate misconduct is required (*r*).

Part IV.—Local Limit of Justices' Jurisdiction.

SECT. 1.—*At Petty Sessions.*

SUB-SECT. 1.—*County Justices.*

Local limit.

1167. The local limit of a justice's jurisdiction is in general determined by the extent of the county or borough to the commission of the peace of which he is assigned (*s*); but its limits have been enlarged or restricted by statute in the case of particular duties.

The commission of a county justice extends to the whole

Spotland Overseers (1735), Lee *temp.* Hard. 184; *R.* v. *Pettiward* (1769), 4 Burr. 2452.

(*i*) *R.* v. *Heming* (1833), 5 B. & Ad. 666; *R.* v. *Pinney* (1832), 3 State Tr. (N. S.) 17.

(*k*) *R.* v. *Somersetshire Justices* (1822), 1 Dow. & Ry. (K. B.) 443.

(*l*) *R.* v. *Holland and Forster* (1787), 1 Term Rep. 692.

(*m*) *R.* v. *Williams, R.* v. *Davis* (1762), 3 Burr. 1317.

(*n*) *R.* v. *Hann and Price* (1765), 3 Burr. 1716; compare *R.* v. *Young and Pitts* (1758), 1 Burr. 556.

(*o*) *R.* v. *Borron* (1820), 3 B. & Ald. 432, *per* ABBOTT, C.J., at p. 434; *R.* v. *Badger* (1843), 4 Q. B. 468; *Re Fentiman* (1834), 4 Nev. & M. (K. B.) 126; *R.* v. *Baylis* (1762), 3 Burr. 1318; *R.* v. *Cozens* (1780), 2 Doug. (K. B.) 426; *Re* —— (1852), 16 Jur. 995; *R.* v. *Williamson* (1820), 3 B. & Ald. 582.

(*p*) *R.* v. *Borron, supra*; *R.* v. *Jackson* (1787), 1 Term Rep. 653; *R.* v. *Barton* (1850), 4 Cox, C. C. 353.

(*q*) *R.* v. *Fielding* (1759), 2 Burr. 719.

(*r*) *R.* v. *Seaford Justices* (1763), 1 Wm. Bl. 432; *R.* v. *Phelps* (1757), 2 Keny. 570; compare *R.* v. *Shrewsbury Justices* (1733), 2 Barn. (K. B.) 272; *R.* v. *Eyres* (1733), 2 Barn. (K. B.) 250.

(*s*) See p. 536, *ante*. Where a magistrate is assigned to two separate commissions of the peace for two places adjoining one another he is authorised to act for either of them while he is residing in the other (Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 6).

SECT. 1. At Petty Sessions.

County magistracy.

county (*t*), including the detached part of any other county which may be either wholly or in part surrounded by it (*u*). It also embraces all the boroughs within the county (*v*), except such as are counties of themselves (*w*) or such as have a court of quarter sessions of their own and are exempted from the county jurisdiction (*a*). But in all boroughs within the county, and in any borough adjoining the county to the commission of the peace of which he is assigned a county justice is empowered to act in matters that are the business of the county (*b*).

Offences not within the county.

1168. An offence committed within five hundred yards of the boundary of any county may be dealt with by the magistrates of that county as if it were a matter arising within the county (*c*).

Accessories.

An accessory before the fact to an offence punishable summarily may be tried either in the area where the principal offender is tried or in that in which he aided or procured the commission of the offence (*d*).

Jurisdiction in petty sessions.

1169. A county justice may sit in petty sessions in any petty sessional division in the county (*e*), and at such sessions may adjudicate upon any matter, not specially excepted by statute (*f*), which arises in any part of the county (*g*), except in boroughs that

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(*t*) Or to the "riding" or "part" of any county which has a separate commission of the peace; see Justices of the Peace Act, 1906 (6 Edw. 7, c. 16), s. 5 (1), and p. 536, *ante*.

(*u*) Counties (Detached Parts) Act, 1839 (2 & 3 Vict. c. 82), s. 1; Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 7; see also Counties (Detached Parts) Act, 1844 (7 & 8 Vict. c. 61).

(*v*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 154 (1).

(*w*) For a list of these, see note (*f*), p. 540, *ante*.

(*a*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 154 (2). The exemption, where it exists, is effected by the insertion of a "*non intromittant*" clause in the charter of boroughs that became such before the operation of the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), now repealed and replaced by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), or in the grant of a separate court of quarter sessions where the borough has been constituted since 1835; see note (*f*), p. 541, *ante*.

(*b*) Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 6; Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 6.

(*c*) Criminal Law Act, 1826 (7 Geo. 4, c. 64), s. 12.

(*d*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 5; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 258.

(*e*) Including detached parts of other counties, whether such detached parts remain separate petty sessional divisions or are reconstituted by the justices in quarter sessions (Counties (Detached Parts) Act, 1844 (7 & 8 Vict. c. 61), s. 3). It is, however, customary for justices to act regularly in one petty sessional division; and appointments to the Bench are usually made with a view to the requirements of each division. As to petty sessional divisions, see p. 565, *post*.

(*f*) As to applications in bastardy cases, see title BASTARDY, Vol. II., p. 444, and compare *R.* v. *Brodhurst* (1863), 32 L. J. (M. C.) 168, a case arising under the Public Health Act, 1848 (11 & 12 Vict. c. 63) (now repealed). The licensing duties of magistrates are carried out with reference to the licensing districts where the various matters arise; see title INTOXICATING LIQUORS, Vol. XVIII., pp. 21 *et seq.*, 35 *et seq.* As to special sessions generally, see p. 568, *post*.

(*g*) *R.* v. *Beckley* (1887), 20 Q. B. D. 187, C. C. R.; *Buckler* v. *Wilson*,

are counties of themselves, or boroughs having a court of quarter sessions of their own, and exempted from county jurisdiction.

SUB-SECT. 2.—*Borough Justices.*

Jurisdiction in boroughs with separate commission.

1170. In boroughs which have a separate commission of the peace, whether they are counties of themselves and whether they have a court of quarter sessions or not, the jurisdiction of their justices in petty sessions is co-extensive with the area of the borough (*h*).

In other boroughs.

In boroughs which have no separate commission of the peace the local jurisdiction of the mayor and ex-mayor in petty sessions is co-extensive with the area of the borough (*i*).

SUB-SECT. 3.—*Stipendiary Magistrates.*

Jurisdiction of stipendiary magistrates.

1171. In boroughs and urban districts for which a stipendiary magistrate is appointed his local jurisdiction in petty sessions is co-extensive with the area of the borough or urban district (*k*), except where the appointment is made in execution of a special Act of Parliament, in which case his jurisdiction extends to the limits defined in such Act (*l*).

SUB-SECT. 4.—*London Justices.*

Lord Mayor and Aldermen.

1172. In London the local jurisdiction in petty sessions of the Lord Mayor and Aldermen of the City of London is co-extensive with the area of the City (*m*), while that of the justices of the

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[1896] 1 Q. B. 83. The county includes detached portions of other counties wholly or partly surrounded by it (see note (*u*), p. 560, *ante*) and places within 500 yards of its borders (see p. 560, *ante*). Where a county is situated partly within the Metropolitan Police District (see p. 548, *ante*), offences committed within the district against the Metropolitan Police Acts may be dealt with by the county justices if their court-house is within the district; but if it is not, the county justices have no jurisdiction, and the matter must be dealt with at a police court in one of the police court districts (*Dann* v. *Manby* (1872), 26 L. T. 730). The justices of such a county cannot compel the appearance before them, at any place outside the Metropolitan Police District, of a person who resides within the district in answer to an information or complaint touching a matter which arises within the district, except for the purpose of enforcing payment of rates and taxes levied for some place only part of which is within the district (Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 18).

(*h*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 158; see p. 540, *ante*.

(*i*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 155; see p. 538, *ante*.

(*k*) Stipendiary Magistrates Act, 1863 (26 & 27 Vict. c. 97), s. 5; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 161; see p. 546, *ante*.

(*l*) See p. 546, *ante*. Thus, the jurisdiction of the stipendiary magistrate for Chatham and Sheerness extends over the whole of the waters of the estuary of the Thames below Gravesend, whether in the county of Kent or not, and his warrant may be served without indorsement in any part of the county of Kent (Chatham and Sheerness Stipendiary Magistrate Act, 1867 (30 & 31 Vict. c. 63), ss. 6, 7; and see note (*m*), p. 545, *ante*). As to his jurisdiction in licensing matters, see title INTOXICATING LIQUORS, Vol. XVIII., p. 35.

(*m*) Compare Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 41 (1); and see title METROPOLIS.

SECT. 1. At Petty Sessions.

County justices.

county of London is co-extensive with the area of the county excluding the City (*n*); but the jurisdiction of the county justices, except in the case of acts directed to be done at petty sessions of all the justices, is complementary and parallel to the jurisdiction of the metropolitan police magistrates.

Jurisdiction in metropolitan police court districts.

1173. In such parts of the county of London as have been constituted police court districts the county justices are not entitled to charge fees for anything done by them as such in the exercise of their criminal jurisdiction (*o*); but it does not seem that their jurisdiction is ousted by that of the police magistrates (*p*), although no mandamus will be issued to compel the justices to exercise it (*q*).

Limits to exercise of county justices' powers.

Within such districts the powers conferred by the Metropolitan Police Acts (*r*) cannot be exercised by the county justices, unless at least two of them are sitting at a police court (*s*), and, in the case of police courts at which the regular attendance of a police magistrate is ordered under the Metropolitan Police Courts Act, 1840 (*t*), unless there is no police magistrate present. In practice, therefore, the petty sessional jurisdiction of the county justices in police court districts is restricted to licensing and other special sessions matters, poor law and other parochial or union matters, and the enforcing of the payment of rates and taxes (*a*).

Jurisdiction outside metropolitan police court districts.

In the remainder of the county of London outside the limits of the police court districts the county justices have unrestricted petty sessional jurisdiction in the same manner as other county justices (*b*); although in criminal matters and matters arising under the Summary Jurisdiction Acts a police magistrate sitting at any of the police courts of the police court districts has concurrent jurisdiction (*c*).

(*n*) A commission of the peace for the county of London was provided for by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 115 (1).

(*o*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 42.

(*p*) *Dodson* v. *Williams* (1892), *Times*, 10th and 12th August; S. C. (1894), *Times*, 23rd January.

(*q*) *R.* v. *Young* (1891), 61 L. J. (M. C.) 42, C. A.

(*r*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47); Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71).

(*s*) Metropolitan Police Courts Act, 1840 (3 & 4 Vict. c. 84), s. 6.

(*t*) *Ibid.* The police courts referred to are North London, West London, South Western, Greenwich and Woolwich.

(*a*) Metropolitan Police Courts Act, 1840 (3 & 4 Vict. c. 84), s. 6. In regard to all these subjects, with the exception of licensing and other special sessions matters, the police magistrates have concurrent jurisdiction. As to licensing matters, see title INTOXICATING LIQUORS, Vol. XVIII., pp. 22, 35.

(*b*) They may at their own petty sessional courts deal with cases under the Metropolitan Police Acts (Metropolitan Police Courts Act, 1840 (3 & 4 Vict. c. 84), s. 6), and while doing so they enjoy the same protection as police magistrates (*Barnett* v. *Cox* (1846), 16 L. J. (M. C.) 27). Penalties inflicted by them under these Acts at such courts do not go to the Receiver (*Police* (*Receiver*) v. *Bell* (1872), L. R. 7 Q. B. 433); and see title POLICE. They do not, however, enjoy the powers in regard to deserted premises given to a police magistrate (*Edwards* v. *Hodges* (1855), 15 C. B. 477); and see title LANDLORD AND TENANT, Vol. XVIII. p. 561, note (*m*).

(*c*) *R.* v. *Richards* (1851), 16 L. T. (O. S.) 386; see also *R.* v. *St. George, Bloomsbury* (1851), 20 L. J. (M. C.) 200.

SUB-SECT. 5.—*Metropolitan Police Magistrates.*

SECT. 1. At Petty Sessions.

Jurisdiction as court of petty sessions.

1174. The jurisdiction of the metropolitan police magistrates (*d*) as a court of petty sessions is restricted to such times as they are so sitting in one of the police courts in a police court district (*e*).

When so sitting a metropolitan police magistrate has all the powers of a court of summary jurisdiction to deal with any matter arising in the Metropolitan Police District (*f*).

Position outside metropolitan police court districts.

Outside the area of the police court districts he is entitled to act in the same manner as any other justice for any of the counties for which he is commissioned (*g*); but he may not either within or without the area of the police court districts act at any special sessions of justices (*h*).

SECT. 2.—*At Quarter Sessions.*

County magistrates.

1175. In quarter sessions (*i*) the jurisdiction of county magistrates extends to all parts of the county to the commission of the peace of which they are assigned, and to all boroughs within it that are not counties of themselves and have no quarter sessions of their own (*k*).

Borough magistrates.

The magistrates in boroughs which are counties of themselves have a jurisdiction similar to that of other county magistrates in quarter sessions (*l*). The magistrates in boroughs which have a separate commission of the peace, and the mayor and ex-mayor in other boroughs, have no jurisdiction at quarter sessions (*m*); neither have metropolitan police (*n*) nor other stipendiary magistrates (*o*). The Lord Mayor, Aldermen and Recorder of the City of London, however, have quarter sessions jurisdiction in a "court of the Lord Mayor and Aldermen of London" (*p*).

(*d*) As to whom, see also p. 548, *ante.*

(*e*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 14; compare Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 33; Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 20 (10); Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13 (12), (13).

(*f*) See notes (*p*), (*c*), p. 548, *ante.*

(*g*) Metropolitan Police Courts Act, 1840 (3 & 4 Vict. c. 34), s. 2.

(*h*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 14. As to his jurisdiction in licensing matters, see title INTOXICATING LIQUORS, Vol. XVIII., pp. 35, 48. The police magistrates are the authority within the London Police Courts Districts (except in Southwark) to whom application must be made for the transfer of licences pending the next special licensing session of the justices (Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 88 (8)).

(*i*) As to procedure in courts of quarter sessions, see p. 639, *post.*

(*k*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 154. As to their jurisdiction in licensing appeals, see *R.* v. *Deane* (1841), 10 L. J. (M. C.) 126; *R.* v. *Cockburn* (1854), 4 E. & B. 265; title INTOXICATING LIQUORS, Vol. XVIII., pp. 78, 79.

(*l*) See *R.* v. *St. Maurice* (*Inhabitants*) (1851), 16 Q. B. 908; *R.* v. *Pearce* (1880), 5 Q. B. D. 386.

(*m*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 158 (1); and see pp. 538, 544, *ante.*

(*n*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 14.

(*o*) Stipendiary Magistrates Acts, 1858 (21 & 22 Vict. c. 73), s. 3, and 1863 (26 & 27 Vict. c. 97), s. 5.

(*p*) City of London Charter, 1742; compare Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 100.

SECT. 3.
Extended Jurisdiction in respect of Warrants of Arrest.

SECT. 3.—*Extended Jurisdiction in respect of Warrants of Arrest.*

Backing warrants.

1176. A warrant of arrest (*q*), granted by a justice for any area having a separate commission of the peace, may be indorsed by any justice of any other such area in England or Wales, upon proof being given on oath of the handwriting of the justice who issued the warrant (*r*), and such indorsement is sufficient authority to the person bringing the warrant for indorsement, and also to the constables and peace officers of the area where the indorsement is made, to execute the warrant at any place within that area and bring the person against whom it was issued before the justice who issued it, or some other justice for the area in which it was issued, or in which the offence is stated in the warrant to have been committed (*s*).

Warrant of metropolitan police magistrates.

1177. A warrant by a metropolitan police magistrate does not require indorsement by any local justice to enable it to be served and executed outside the Metropolitan Police District by the police to whom it is directed (*t*).

Indorsement in Ireland, Scotland etc.

1178. Warrants of arrest, granted by a justice having jurisdiction in any county or borough in England, may be indorsed by a magistrate in Ireland (*a*), or a sheriff, or sheriff depute or substitute, or justice of the peace in Scotland (*b*), or any officer who himself is empowered to issue a warrant of arrest in the Isle of Man or Channel Islands (*c*), and *vice versâ* (*d*). Such an indorsement is sufficient authority to the person bringing the warrant for indorsement, and to the constables and peace officers of the area where the indorsement is made, to execute the warrant at any place within that area and bring the person before the justice who issued it or some other justice for the area in which it was issued (*e*).

1179. A justice before whom a person is brought under any

(*q*) As to the jurisdiction to issue warrants, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 291, 292; Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 1. Alternatively the magistrate may in the first instance issue a summons and subsequently, in the event of disobedience to the summons, a warrant (*ibid.*; see pp. 593 *et seq.*, *post*). But he must issue a warrant if there is produced to him a certificate showing that an indictment has been found by a grand jury against the alleged offender (Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 3).

(*r*) *Ibid.*, s. 11.

(*s*) *Ibid.* The magistrate, in indorsing the warrant, may direct the alleged offender to be brought before him, and he may examine such witnesses and receive such evidence in proof of the charge as shall be produced before him within his jurisdiction (*ibid.*, s. 22.).

(*t*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 17. This power is also conferred upon any two justices having authority within the Metropolitan Police District (Metropolitan Police Courts Act, 1840 (3 & 4 Vict. c. 84), s. 6), and upon any two justices of the peace for the City of London (*ibid.*, s. 15).

(*a*) Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 12.

(*b*) *Ibid.*, s. 14.

(*c*) *Ibid.*, s. 13.

(*d*) *Ibid.*, ss. 12—15.

(*e*) *Ibid.*, ss. 12—14.

warrant so indorsed may thereupon proceed in the same manner as if the person had been arrested within his jurisdiction (*f*).

SECT. 3. Extended Jurisdiction in respect of Warrants of Arrest.

1180. A warrant of arrest, granted by a justice in England or Wales, may be indorsed and executed in any other part of His Majesty's dominions (*g*).

Execution of warrant in colonies etc.

In the case of crimes committed in any place within the jurisdiction of the Admiralty (*h*), or of crimes committed in places beyond the seas for which an indictment may be preferred at any place in England and Wales (*i*), any justice may issue a warrant for the arrest of the alleged offender if he is or is suspected of being within his jurisdiction, and cause him to be brought before him or some other magistrate for the same area (*j*).

Warrant in respect of offences beyond the seas etc.

Part V.—Petty Sessions and Single Justices.

SECT. 1.—*The Court of Petty Sessions.*

1181. The court of petty sessions is a court of summary jurisdiction consisting of two or more justices sitting in a petty sessional court-house (*k*).

Petty sessions.

The term "petty sessional court-house" means a court or other place at which justices are accustomed to assemble for holding special or petty sessions, or which is for the time being appointed as a substitute therefor (*l*), including any court-house or place at which the Lord Mayor or an Alderman of the City of London or a metropolitan police magistrate or stipendiary is authorised to act alone as a court of petty sessions (*m*).

"Petty sessional court-house."

1182. The sub-division of counties into petty sessional divisions is historically the consequence of the size of the areas for which county justices of the peace are commissioned.

Petty sessional divisions.

(*f*) Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), ss. 12—14.

(*g*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 3. As to the converse case, and generally as to extradition warrants, and the arrest of fugitive offenders, see title EXTRADITION, Vol. XIV., pp, 408, 409, 421—430.

(*h*) Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 2. As to the limits of Admiralty jurisdiction, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 273 *et seq.*

(*i*) As to these, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 276 *et seq.*

(*j*) Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 2.

(*k*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13 (12). As to the persons included in the term, see the text, *infra*, and title COURTS, Vol. IX., p. 75. As to the powers of justices to sit and act alone, see Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), ss. 33, 34, and p. 573, *post.*

(*l*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13 (13). The definitions in this Act replace those in the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), ss. 20, 50. For the meaning of "occasional court-house," see p. 568, *post.*

(*m*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13 (13).

SECT. 1. The Court of Petty Sessions.

Statutory limitations.

In some cases it was ordered by statute that matters should be transacted or determined within the division or limits where they arose or wherein the parties concerned resided or exercised their trade or calling; in others, not required to be heard before all the justices on the commission, it became the custom to have the matter determined by such justices as lived or usually acted in the part of the county where it arose (*n*). This system was subsequently regularised by statute (*a*), by which the mode of creating new divisions and readjusting the boundaries of old ones was prescribed.

Method of determining boundaries of divisions.

1183. The authority which determines the boundaries of the divisions in any county is the court of quarter sessions.

Any two or more justices may submit a statement proposing the constitution of a new division, and this statement, which must contain particulars of the extent to which the proposed alteration would affect existing divisions, is to be laid before the justices at the next quarter sessions by the clerk of the peace (*b*). After consideration of the statement (*c*) the court may either simply adopt or reject the proposal (*d*) or revise all the divisions in the county and readjust their boundaries, specifying each division by the name of some principal and convenient place (*e*); but no new division may be constituted unless there are five justices residing in, or usually acting within, its proposed boundaries (*f*). The order made by quarter sessions must be published by the clerk of the peace (*g*), and, unless petitioned against, or if petitioned against, then after the petition is heard, must be enrolled (*h*), after which the divisions

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(*n*) Compare the preamble to the Division of Counties Act, 1828 (9 Geo 4, c. 43).

(*a*) *Ibid.* The uncertainty of existing divisions rendered regulation imperative. It appeared in *R.* v. *Devon Justices* (1818), 1 B. & Ald. 588, that for a period of five years two justices had without the consent of their colleagues been acting as a court of petty sessions for the district in which they lived.

(*b*) Division of Counties Act, 1828 (9 Geo. 4, c. 43), ss. 1, 2. The clerk of the peace must advertise the statement in the local newspaper after it is laid before quarter sessions (*ibid.*, s. 3).

(*c*) The consideration must take place at the sessions next after that at which the statement is laid before the justices (*ibid.*, s. 2).

(*d*) *Ibid.*; or they may adjourn the consideration to any succeeding sessions (*ibid.*).

(*e*) *Ibid.*, s. 4. The naming of the division is important. Where the petty sessions were held at several places in a division, and an affiliation order was made at one of these and stated to be at such place for the division of that name, when in fact the division was called by another name, it was held that there was no jurisdiction to make the order, it not having been made at the petty sessions held in and for the division where the mother resided (*R.* v. *Whittles* (1849), 13 Q. B. 248, 254).

(*f*) Division of Counties Act, 1828 (9 Geo. 4, c. 43), s. 5.

(*g*) *Ibid.*, s. 4. In the case of the formation of a new division simply, see *ibid.*, s. 4; in the case of a general division, see *ibid.*, s. 8.

(*h*) The enrolment must not take place until the fourth quarter sessions after the making of the order (*ibid.*, s. 9). When it has taken place the fact is to be advertised in the local newspapers by the clerk of the peace (*ibid.*, s. 11). Any person may petition against the order, but is required to give certain notices of his petition three days before the quarter sessions are held at which he desires it to be considered (*ibid.*, s. 9). There is no appeal by means of *certiorari* or otherwise against any order or proceeding

specified are lawful divisions for the holding of special or petty sessions, and their constitution cannot be altered for a period of three years (*i*).

SECT. 1. The Court of Petty Sessions.

Provision of petty sessional court-houses: by county councils;

1184. The county councils, in succession to the justices in quarter sessions, are empowered to provide a petty sessional court-house (*k*), or more than one, for any division (*l*), and to borrow money for the purpose (*m*). The court-house may be situated outside the limits of the division, and even of the county, for which it is provided; but for the purpose of the justices' jurisdiction it is to be deemed to be within such county and division (*n*). The justices of two co-terminous counties are empowered to combine in providing, at the joint expense of the two counties, a court-house near the common boundary for the use of justices of their respective adjoining divisions (*o*).

by borough councils.

Similar powers to those given to the county council for the provision of petty sessional court-houses in counties are given to the councils in boroughs (*p*).

Use of county court.

In either counties or boroughs the county court may be obtained for use as a petty sessional court-house by agreement with the treasurer of the county court (*q*).

Prohibition against use of licensed premises.

No meeting of justices in petty or special sessions may be held in premises licensed for the sale of intoxicating liquors, nor in any room, whether licensed or not, in any building so licensed (*r*).

SECT. 2.—*Courts of Summary Jurisdiction.*

Court of summary jurisdiction.

1185. A court of summary jurisdiction includes a court of petty sessions and also a single justice when either are acting in exercise of their powers of summary jurisdiction under the Summary Jurisdiction Acts, or any of them, or under any other Act, or by virtue of their commission, or under the common law (*s*). Such powers

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of the court of quarter sessions in regard to this matter (*ibid.*, s. 12; see also the Petty Sessional Divisions Act, 1836 (6 & 7 Will. 4, c. 12), s. 5).

(*i*) Division of Counties Act, 1828 (9 Geo. 4, c. 43), s. 10; Petty Sessional Divisions Act, 1836 (6 & 7 Will. 4, c. 12), s. 1.

(*k*) Petty Sessions Act, 1849 (12 & 13 Vict. c. 18), s. 2; Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 30; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3; and see title LOCAL GOVERNMENT, pp. 364, 369, *ante*.

(*l*) Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 8.

(*m*) Public Works Loans Act, 1875 (38 & 39 Vict. c. 89), s. 40.

(*n*) Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 8.

(*o*) Petty Sessions Act, 1849 (12 & 13 Vict. c. 18), s. 3.

(*p*) *Ibid.*, s. 2; Petty Sessions and Lock-up House Act, 1868 (31 & 32 Vict. c. 22), ss. 4, 5; Public Works Loans Act, 1875 (38 & 39 Vict. c. 89), s. 40; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 105, 160; and see title LOCAL GOVERNMENT, p. 318, *ante*. The provision of a court-house by two or more councils at their joint expense, however, requires the approval of a Secretary of State (Petty Sessions and Lock-up House Act, 1868 (31 & 32 Vict. c. 22), s. 4).

(*q*) Petty Sessions Act, 1849 (12 & 13 Vict. c. 18), s. 2.

(*r*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 83; as to the meetings of borough justices, see also the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 160.

(*s*) The existing statutory definition of the term "court of summary

SECT. 2. **Courts of Summary Jurisdiction.**

must be exercised by the justices or justice when sitting in open court (*a*), which means a petty sessional court-house or an occasional court-house (*b*).

Occasional court-house.

An occasional court-house is a police station or other place appointed by the justices of a petty sessional division to be used as such (*c*). The number of such places to be appointed is not limited by statute (*d*).

SECT. 3.—*Times for Holding Courts.*

Petty sessions.

1186. A petty sessional court may be held at any time and without notice to all the justices who usually reside in and act for the petty sessional division; but it is the practice for the justices in each division to specify one or more days in the week and to assemble regularly upon those days in petty sessions. They may only try indictable offences that may be dealt with summarily, on days appointed for the hearing of indictable cases and of which public notice has been given (*e*).

Court of summary jurisdiction.

A court of summary jurisdiction (*f*) may be held at any time without notice, and it is the practice for one or more justices to sit as such a court whenever circumstances require.

SECT. 4.—*Special Sessions.*

Definition.

1187. Special sessions are meetings of the justices convened for the purpose of executing some statutory authority which is exercisable by justices out of quarter sessions (*g*).

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jurisdiction" is that given in the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13 (11), repealing that in the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 50. The term used in the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13 (11), is "when acting under the Summary Jurisdiction Acts" etc., but the word "acting" has been held to be limited by the meaning of the same word as used in the earlier and superseded definition, *i.e.*, to mean only acting in the exercise of their powers of summary jurisdiction (*Boulter* v. *Kent Justices*, [1897] A. C. 556, *per* Lord HERSCHELL, at p. 571; *Hagmaier* v. *Willesden Overseers*, [1904] 2 K. B. 316; and see title INTOXICATING LIQUORS, Vol. XVIII., p. 87). As to the powers of a single justice, see p. 573, *post*.

(*a*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 20 (1).

(*b*) *Ibid.*, s. 20 (2). As to special courts for the trial of children, see title INFANTS AND CHILDREN, Vol. XVII., p. 178.

(*c*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 20 (4), (5). The appointment of occasional court-houses may be made and varied from time to time at a court of petty sessions, notice of which must be given to all the justices of the petty sessional division. Public notice of the places so appointed is to be given by the justices in such manner as they think expedient (*ibid.*).

(*d*) *Ibid.* As to the limits of their powers at such court-house, see *ibid.*, s. 20 (7).

(*e*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 20 (8). They may also be heard on days to which the court held on appointed days is adjourned (*ibid.*). The manner in which notice is to be given is in the discretion of the justices (*ibid.*).

(*f*) See p. 567, *ante*.

(*g*) See Wharton's Law Lexicon, *sub voce* "Sessions," and as to quorum and adjournment, see title COURTS, Vol. IX., p. 86.

SECT. 4. Special Sessions.

Where held.

Notice.

They are held in and for the various petty sessional divisions (*h*), and the place at which they are to be held may be determined by the justices (*i*), but it must not be on premises licensed for the sale of intoxicating liquors (*k*). Although they are frequently spoken of as special sessions of justices, they are to be distinguished from a petty sessional court or a court of summary jurisdiction (*l*).

Special sessions.

1188. Special sessions of the justices in each petty sessional division are ordered to be held as follows :—

Brewster sessions.

A general annual licensing meeting (*m*), and not less than four, nor more than eight, transfer sessions (*n*).

Billiard licences.

The grant or transfer of billiard licences is determined at the general annual licensing meeting and the special sessions for the transfer of licences for the sale of intoxicating liquors respectively (*o*).

Music and dancing licences.

In places where the Public Health Acts Amendment Act, 1890 (*p*), has been adopted, licences for places used for music and dancing may be granted by the justices of a petty sessional division at their general annual licensing meeting, or at any special sessions convened with fourteen days' notice (*p*).

Licensing of theatres etc.

1189. The powers formerly exercised by the justices in special sessions in regard to the licensing of places for the performance of stage plays have been transferred to the county councils (*q*),

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(*h*) Division of Counties Act, 1828 (9 Geo. 4, c. 43); Petty Sessional Divisions Act, 1836 (6 & 7 Will. 4, c. 12).

(*i*) Notice must be given, unless dispensed with by statute (see p. 570, *post*). It is sufficient if the notice is signed by one of the justices usually residing in and acting for the division; see County Rates Act, 1844 (7 & 8 Vict. c. 33), s. 7; High Constables Act, 1869 (32 & 33 Vict. c. 47), s. 3; title COURTS, Vol. IX., p. 86.

(*k*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 83.

(*l*) Compare *Boulter* v. *Kent Justices*, [1897] A. C. 556; *Hagmaier* v. *Willesden Overseers*, [1904] 2 K. B. 316. "They more resemble a public authority who are allowed to act on their own knowledge without being bound and fettered by the ordinary rules of a court of summary jurisdiction" (*Hagmaier* v. *Willesden Overseers*, *supra*, *per* Lord ALVERSTONE, C.J., at p. 320).

(*m*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 10. The day, hour, and place must be settled at a petty sessions held not less than twenty-one days before the meeting, and a precept for the meeting must be signed by a majority of the justices present. Public notice, as well as notice to all the justices acting for the petty sessional division, is to be given by the high constable to whom the precept is directed (*ibid.*); see generally, as to adjournment and other relative matters, title INTOXICATING LIQUORS, Vol. XVIII., pp. 21, 22.

(*n*) See *ibid.*, pp. 23, 42; and note (*h*), p. 563, *ante*.

(*o*) Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 10.

(*p*) 53 & 54 Vict. c. 59, s. 51. Such matters are regulated in London by the London County Council, and in places within twenty miles of London, but outside the county council area, by the justices in quarter sessions assembled (Disorderly Houses Act, 1751 (25 Geo. 2, c. 36), s. 2). In many boroughs where the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), has not been adopted there are local Acts regulating the grant of licences. For form of music and dancing licence, see Encyclopædia of Forms and Precedents, Vol. XI., p. 9. See generally, title THEATRES AND OTHER PLACES OF ENTERTAINMENT.

(*q*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 7 (a).

SECT. 4. Special Sessions.

but may be delegated by them to the justices of the county sitting in petty sessions (*r*), as may also the powers which were formerly exercised by the justices in petty sessions in regard to explosives, but which are now transferred to the county council (*s*).

Licensed houses for lunatics.

1190. In every quarter sessions borough special sessions of the justices are to be held, at the same time as the quarter sessions for the borough, for the licensing of houses for the reception of lunatics in all parts of the county not within the immediate jurisdiction of the Lunacy Commissioners (*t*). Such a meeting is to be held in October for the annual appointment of visitors of the houses so licensed, but other appointments may be made by the justices at any special sessions which is held at the same time as the quarter sessions for the borough (*u*).

Highway Acts.

Not less than eight nor more than twelve special sessions must be held for the purposes of the Highway Acts (*a*). The dates are fixed at a special session, which must be held within the fortnight following the 20th March (*b*). Notice to all the justices is dispensed with by statute (*c*).

Rating appeals.

There must also be four sessions held every year for the hearing of rating appeals; but the question of the liability of any particular place to be rated is excluded from the justices' jurisdiction, which is limited to the true value of the particular place and the fairness of the amount at which it is rated. Public notice of the sessions must be given twenty-eight days beforehand (*d*).

Re-formation of jury list.

A special petty sessions for the re-formation of the jury list (*e*) is held once a year within the last seven days of September. Notice of it is required to be given by the clerk to the justices to the churchwardens and overseers of every parish and township (*f*).

Appointment of parish constables.

A special petty sessions for the appointment of parish constables (*g*) is held once a year between the 24th March and the 9th April in

(*r*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 28, 36 (1). The effect of these provisions is to give the county justices jurisdiction, where the powers are delegated in any borough that is not a county of itself. For a list of these, see Local Government Act, 1888 (51 & 52 Vict. c. 41), Sched. III.; see the Theatres Act (6 & 7 Vict. c. 68), s. 5; and see, generally, title THEATRES AND OTHER PLACES OF ENTERTAINMENT.

(*s*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 7 (b); and see, generally, title EXPLOSIVES, Vol. XIV., p. 360.

(*t*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 208, 209; see title LUNATICS AND PERSONS OF UNSOUND MIND, pp. 474 *et seq.*, *ante*. As to the places within the immediate jurisdiction of the Lunacy Commissioners, see Lunacy Act, 1890 (53 & 54 Vict. c. 5), Sched. III; title LUNATICS AND PERSONS OF UNSOUND MIND, p. 466, *ante*.

(*u*) *Ibid.*, p. 468.

(*a*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 45; and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 96, 97, 113, 130, 146, 147, 171; and see, further, *ibid.*, p. 25, note (*b*).

(*b*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 45.

(*c*) *Ibid.*

(*d*) Parochial Assessment Act, 1836 (6 & 7 Will. 4, c. 96), s. 6; and see title RATES AND RATING.

(*e*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 10; and see title JURIES, Vol. XVIII., p. 234. The Act is applied to the County of London by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 89.

(*f*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 10.

(*g*) Parish Constables Act, 1842 (5 & 6 Vict. c. 109), s. 1.

every petty sessional division of a county, notice of which must be given to any justice acting in the division. A precept is to be issued by the justices within the first seven days of February in each year directing the overseers of each parish to prepare a list of persons qualified to act as parish constables (*h*).

SECT. 4. Special Sessions.

SECT. 5.—*Powers Exercisable at Petty or Special Sessions.*

1191. The administrative powers of justices to be exercised by them for each petty sessional division, but not necessarily in special sessions, extend to the following matters :—

Administrative powers.

(i.) the appointment of overseers, in all places in regard to which the power has not been transferred to the local council (*i*), to be made by two or more justices on or within fourteen days after the 25th March in each year (*k*);

Appointment of overseers.

(ii.) the appointment of special constables, which, in boroughs, is to be made by two or more justices having jurisdiction therein, by precept signed by them in October every year, and to include so many of the inhabitants as they think fit (*l*), and, in counties, by two or more justices usually acting in any division, whenever disturbances have taken place, or are apprehended, and they consider the existing police force insufficient (*m*);

Appointment of special constables.

(iii.) certain powers of justices under the Highway Acts (*n*).

Powers under Highway Acts.

Part VI.—Jurisdiction of Courts of Summary Jurisdiction and Single Justices.

SECT. 1.—*In General.*

1192. The judicial powers of justices are mainly exercised in criminal matters, but are extended by statute in some cases to civil proceedings.

Extent of powers.

Their powers in regard to criminal matters are of two kinds:

(1) To hear, try, determine, and adjudge matters which may be summarily dealt with (*o*); and

(i.) In criminal matters.

(2) To inquire into matters where it is alleged that an indictable

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(*h*) Parish Constables Act, 1842 (5 & 6 Vict. c. 109), s. 2. Certain persons are exempted from being called upon to serve (*ibid.*, s. 6); see, generally, title POLICE.

(*i*) As to the appointment of overseers by other authorities, *i.e.*, the parish council, urban council, and rural district council, see title LOCAL GOVERNMENT, pp. 246, 267.

(*k*) Poor Relief Act, 1601 (43 Eliz. c. 2); Poor Law (Overseers) Act, 1814 (54 Geo. 3, c. 91).

(*l*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 196 (1). Certain persons are, however, exempt; see, further, title POLICE.

(*m*) Special Constables Act, 1831 (1 & 2 Will. 4, c. 41), s. 1; see, generally, title POLICE.

(*n*) See note (*a*), p. 570, *ante*; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 96, 97, 113, 130, 146, 147, 171.

(*o*) Compare Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 20 (1); see p. 589, *post*.

SECT. 1. In General.

offence, which may not be summarily dealt with, has been committed by a person who has been brought up before them, and to commit for trial the alleged offender if it appears to them that the evidence has raised a strong or probable presumption of his guilt (*p*).

SECT. 2.—*In Preliminary Matters.*

Preliminaries.

1193. It is the duty of justices to receive informations or complaints, to issue summonses or warrants thereon, and generally to do all necessary acts and matters preliminary to the hearing, both in criminal offences, whether summarily punishable or not (*q*), and in such civil business as is assigned to them (*a*). These preliminary acts are not required to be performed in open court (*b*).

SECT. 3.—*Over Offences not Summarily Punishable.*

Offences not summarily punishable.

1194. When a person charged with having committed an offence not summarily punishable is brought before justices their duty is not to decide upon his innocence or guilt, but to determine, on hearing the evidence for the prosecution and that for the defence, if any, whether the case is one in which he should be put upon his trial (*c*). They are not, therefore, a court of judgment when so acting; and the proceedings need not, apparently, be held in open court (*d*).

SECT. 4.—*Over Offences Summarily Punishable.*

Offences summarily punishable.

1195. The duty of justices in criminal matters which may be tried summarily is to hear, try, determine, and adjudge the cases brought before them (*e*). This must be done when sitting in open court (*f*). The justices are then a court of summary jurisdiction, and may hear and determine a case either in a petty sessional court-house or an occasional court-house (*g*). If

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(*p*) See p. 611, *post*, and title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 311—328.

(*q*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43); Indictable Offences Act, 1848 (11 & 12 Vict. c. 42); see pp. 589, 611, *post*, respectively.

(*a*) See p. 609, *post*.

(*b*) They are usually done by a single justice; see p. 575, *post*.

(*c*) Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 25; see *R.* v. *Carden* (1879), 5 Q. B. D. 1, *per* COCKBURN, C.J., at p. 6.

(*d*) Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 19. The law officers of the Crown advised on 1st December, 1884, that in view of the definition of "court of summary jurisdiction" in the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 7 (now repealed and replaced by a similar definition in the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13 (11)), justices, even when taking an examination, must sit in open court; but this opinion would probably be modified in view of the judgment of the House of Lords in *Boulter* v. *Kent Justices*, [1897] A. C. 556, 571, *per* Lord HERSCHELL, where it was decided that the definition in question relates purely to matters pertaining to the summary jurisdiction of magistrates; see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 312.

(*e*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 20 (1).

(*f*) *Ibid.*

(*g*) *Ibid.*, s. 20 (2). As to the meaning of these terms, see pp. 565, 569, *ante*.

SECT. 4. Over Offences Summarily Punishable.

in the former, they are a court of petty sessions (*h*); if in the latter, they are not such a court, and in the event of any matter being so heard their powers are limited to the imposition of a period of imprisonment not exceeding fourteen days or a fine not exceeding 20*s*. (*i*); but they may, without prejudice to any other powers of adjournment, adjourn the hearing to the next practicable sitting of a petty sessional court (*k*). Indictable offences that may be dealt with summarily must, however, be heard and determined before a court of petty sessions upon a day appointed for the purpose, or upon some day to which such court is adjourned (*l*).

SECT. 5.—*In Civil Matters.*

In civil matters.

1196. To hear and determine the civil matters assigned to them the justices sit as a court of summary jurisdiction (*m*), and in some cases must do so in petty sessions (*a*).

SECT. 6.—*Powers of a Single Justice.*

Powers conferred by statute.

1197. A single justice, other than the Lord Mayor or an Alderman of the City of London (*b*), or a metropolitan police (*b*), or other

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(*h*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13 (12).
(*i*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 20 (7).
(*k*) *Ibid.*, s. 20 (11).
(*l*) *Ibid.*, s. 20 (8).
(*m*) The fact that the amount which justices may order to be paid is limited when they do not sit at a petty sessional court results in practice in their always hearing civil matters at such a court; see the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 20 (7).
(*a*) Thus they must do so in matters relating to (1) bastardy; see title BASTARDY, Vol. II., pp. 447—449; (2) orders under the Highway Acts; see, generally, title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 96, 97, 113, 130, 146, 147, 171; (3) orders for possession under the Small Tenements Recovery Act, 1838 (1 & 2 Vict. c. 74), s. 1; see, generally, title LANDLORD AND TENANT, Vol. XVIII., pp. 559—561; for form of notice to proceed before justices, for possession of small tenement, see Encyclopædia of Forms and Precedents, Vol. VII., p. 689. But they need not do so in hearing claims or applications for (1) compensation under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 22, 24; see, generally, title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 77; (2) damages under the Dogs Act, 1906 (6 Edw. 7, c. 32), s. 1 (3); see, generally, title ANIMALS, Vol. I., pp. 398 *et seq.*; (3) damages under the Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27); see, generally, title WATERS AND WATERCOURSES; (4) separation orders under the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39); see, generally, title HUSBAND AND WIFE, Vol. XVI., pp. 596 *et seq.*; (5) recovery of civil debts in respect of which they have jurisdiction; see Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 35. In disputes between employers and workmen the jurisdiction of justices under the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), ss. 4, 5, 10, must be exercised in petty sessions, except in the case of the Lord Mayor or an Alderman of the City of London or a metropolitan police or other stipendiary magistrate; see, generally, title MASTER AND SERVANT. The jurisdiction of justices under the poor law need not in general be exercised in petty sessions, but orders made for the relief of poor persons upon their parents etc. must be made at petty sessions; see, generally, title POOR LAW.
(*b*) As to his powers, see p. 575, *post*.

SECT. 6. Powers of a Single Justice.

stipendiary magistrate (*c*), though not invested with the authority of a court composed of two or more justices, has certain powers assigned to him by statute.

Indictable offences.

In the case of indictable offences he may receive a charge or complaint and issue his warrant or summons for the alleged offender to be brought before him or any other justice or justices for the same county or borough (*d*), and he may also issue his summons or warrant for the attendance of witnesses (*e*). He has the same powers as a court of two or more justices, both at the hearing and in respect of the remand of prisoners, admitting them to bail and committing them for trial (*f*); but if the whole evidence given before him is such as neither to raise a strong presumption of guilt nor to warrant the dismissal of the charge, he must order the alleged offender to be detained in custody until he can be brought before two or more justices (*g*).

Summary jurisdiction.

1198. In the exercise of summary jurisdiction powers a single justice is empowered to receive any information or complaint and to grant a summons or warrant thereon, to issue his summons or warrant to compel the attendance of witnesses, and to do all other necessary acts and matters preliminary to the hearing (*h*).

Special matters.

He is entitled to hear, try, determine, and adjudge such matters as are prescribed by statute (*i*), whether he was the justice who received the information or complaint or not (*k*); but, whether sitting in a petty sessional court-house or not, he may not impose a period of imprisonment exceeding a fortnight, nor a fine exceeding 20*s*. (*l*).

While acting in execution of his powers of summary jurisdiction he is a court of summary jurisdiction (*m*), but he cannot constitute a court of petty sessions (*n*), and cannot, therefore, deal with any indictable offence that may be summarily dealt with (*o*).

Supplemental powers.

1199. After the hearing or determination of the case a single justice is empowered to issue all warrants of distress or commitment,

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(*c*) As to his powers, see p. 579, *post*.

(*d*) Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), ss. 1 *et seq.*; see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 290 *et seq.*

(*e*) Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 16.

(*f*) *Ibid.*, ss. 20—25.

(*g*) Criminal Law Act, 1826 (7 Geo. 4, c. 64), s. 1, which in this respect is not repealed.

(*h*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 29.

(*i*) *Ibid.*, s. 12; Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 20 (9). Statutes which provide for the jurisdiction of a single magistrate are: Profane Oaths Act, 1745 (19 Geo. 2, c. 21), s. 3; Places of Religious Worship Act, 1812 (52 Geo. 3, c. 155), s. 12; Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 3; Game Act, 1831 (1 & 2 Will. 4, c. 32), ss. 30, 31, 33; Highway Act, 1835 (5 & 6 Will. 4, c. 50), ss. 94 *et seq.*; Bread Act, 1836 (6 & 7 Will. 4, c. 37), ss. 4 *et seq.*; Railway Regulation Act, 1840 (3 & 4 Vict. c. 97), ss. 13, 16; Larceny Act, 1861 (24 & 25 Vict. c. 96), ss. 12—15, 23, 24, 33, 36; Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), ss. 22—24, 25, 37, 41, 52.

(*k*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 19.

(*l*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 20 (7).

(*m*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13 (11).

(*n*) *Ibid.*, s. 13 (12).

(*o*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 20 (8).

whether he was the justice or one of the justices who sat to hear and determine it or not (*p*).

SECT. 6. Powers of a Single Justice.

Civil matters

1200. A single justice is not empowered to hear and determine such civil matters as are assigned to the jurisdiction of justices, but should adjourn them to the next practicable sitting of a court of petty sessions (*q*). He may, however, do all necessary acts preliminary to the hearing, and the justice who does such acts need not as a rule (*r*) be a member of the court that hears the case.

SECT. 7.—*Powers of the Lord Mayor and Aldermen of the City of London.*

Powers to act alone.

1201. The Lord Mayor or an Alderman of the City of London has the powers of any other justice of the peace (*s*), and, in addition, when sitting at the Mansion House or Guildhall Justice Room, constitutes a court of summary jurisdiction and a court of petty sessions, with the power to do alone any act which ordinarily requires the presence of more than one justice (*t*).

SECT. 8.—*Special Powers of Metropolitan Police Magistrates.*

General power to act alone.

1202. A metropolitan police magistrate, when sitting at a police court in the Metropolitan Police District, constitutes a court of summary jurisdiction and a court of petty sessions, with power to do alone any act which in the case of other justices requires the presence of more than one justice (*a*).

Special powers.

1203. The following special powers are also conferred upon him by statute (*b*) :—

He has the same powers as other magistrates in respect of granting a warrant or summons to secure the appearance before him of an alleged offender (*c*) or the attendance of witnesses (*d*);

(*p*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 29.

(*q*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 20 (11); compare Bastardy Laws Amendment Act, 1873 (36 & 37 Vict. c. 9), s. 7.

(*r*) But see title BASTARDY, Vol. II., p. 446.

(*s*) See p. 573, *ante*.

(*t*) Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 30; Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 34; Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 20 (10); Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13 (12). The right, though expressly given by these statutes, is very ancient; compare Poor Relief Act, 1601 (43 Eliz. c. 2), s. 7. To hear cases arising under the City of London Ballot Act, 1887 (50 & 51 Vict. c. xiii.), two magistrates of the City are required to sit either at the Mansion House or Guildhall Justice Room; and see title METROPOLIS.

(*a*) Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 29; Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 33; Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 20 (10); Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13 (13); see also Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 14.

(*b*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), and the other Acts with which, by *ibid.*, s. 55, it is directed to be read, *i.e.*, the Metropolitan Police Acts, 1829 (10 Geo. 4, c. 44) and 1839 (2 & 3 Vict. c. 47).

(*c*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 19.

(*d*) *Ibid.*, s. 22.

SECT. 8. Special Powers of Metropolitan Police Magistrates.

but his warrant in respect of any matter arising within the Metropolitan Police District may be served or executed outside it by the constable or constables to whom the warrant is directed without indorsement (*e*). He has concurrent powers with those given to other justices in regard to remand and bail in the case of indictable offences (*f*). He may award costs on the hearing of any charge or complaint (*g*), and may order amends up to the amount of £5 to be made where the prosecutor does not proceed further after laying an information, or where, if he does proceed, there was no sufficient ground for making the charge (*h*). Where an offender is convicted before him, he has power to mitigate the penalty prescribed by statute in such manner as he thinks fit (*i*), but in certain cases the consent of the Inland Revenue Commissioners or Commissioners of Customs and Excise is required (*k*).

Remand. Bail. Costs. Amends. Penalty.

Informers.

1204. Where an information has been laid before a metropolitan police magistrate by a common informer who is not a party aggrieved, under any Act which provides that a fixed part of the fine to be imposed shall be paid to the informer, the magistrate may in his discretion reduce the amount to be so paid or withdraw it altogether (*l*).

Stolen goods etc.

1205. A metropolitan police magistrate before whom information is given upon oath that there is reasonable ground for suspecting that goods which have been unlawfully obtained are concealed in any place may grant a warrant for entry to be made at any time of day or night, with the use of force if necessary, to search for the goods and to bring before him every person found in the place who may be suspected of being privy to the concealment (*m*).

If any person is brought before a metropolitan police magistrate, charged with possessing or conveying in any manner goods which may be reasonably suspected of having been stolen or unlawfully obtained, and such person is unable to account satisfactorily for

(*e*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 17.

(*f*) *Ibid.*, s. 36; see Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 21.

(*g*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 31.

(*h*) *Ibid.*, s. 32.

(*i*) *Ibid.*, s. 35; compare Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 4, under which, however, the mitigation of the amount of a fine prescribed by statute is limited to the case of a first offence; and see p. 603, *post*. *Quære*, whether a metropolitan police magistrate would be entitled to reduce a fine prescribed by a subsequent Act to be "not less than" a named sum; see *Osborn* v. *Wood Brothers*, [1897] 1 Q. B. 197, cited p. 603, *post*.

(*k*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 35; Finance Act, 1908 (8 Edw. 7, c. 16), s. 4; Excise Transfer Order, 1909, 15th February (*London Gazette*, 1909, 16th February, 1212); compare the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 53; and see the Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 23.

(*l*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 34. If such an informer directly or indirectly receives money or reward for compounding, delaying, or withdrawing the information, without the magistrate's consent, he is liable to a penalty of £10 (*ibid.*, s. 33), and if he obtains money by a threat of laying an information, or as an inducement for forbearing from laying one, he is liable to the same penalty (Metropolitan Police Courts Act, 1840 (3 & 4 Vict. c. 84), s. 11).

(*m*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 25.

SECT. 8.
Special Powers of Metropolitan Police Magistrates.

his possession of the goods, he is liable to a fine not exceeding £5 or to imprisonment with or without hard labour for any period not exceeding two months (*n*). Further, where a person charged with such an offence alleges that he received the goods from some other person, or that he was employed by some other person as a carrier, agent, or servant, a metropolitan police magistrate may cause to be brought before him every person through whose hands the goods passed and may examine such persons imposing upon any person whom he determines to have had possession of the goods, having reasonable cause to believe they were stolen or unlawfully obtained, a fine not exceeding £5 or a term of imprisonment not exceeding three months with or without hard labour (*o*).

Delivery and restitution orders.

1206. A metropolitan police magistrate has power to make an order for the delivery to their owner of goods which have been stolen or unlawfully obtained, or which, though lawfully obtained, have been unlawfully deposited, pawned, pledged, sold, or exchanged (*p*).

A metropolitan police magistrate may also summon before him any person within the limits of the Metropolitan Police District upon complaint being made to him by the owner of goods that they are being unlawfully detained by such person, and after making inquiry into the facts the magistrate may make an order for the delivery of the goods to the owner either absolutely or upon terms (*q*); but the power is limited to goods of no greater value than £15, and

(*n*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 24. This provision extends, however, only to the possession of goods in transit, and not to their possession in a house or shop (*Hadley* v. *Perks* (1866), L. R. 1 Q. B. 444).

(*o*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 26. The possession by a carrier, agent, or servant in such a case is to be deemed to be the possession of the employer (*ibid.*).

(*p*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), ss. 27, 28. Upon complaint being made, the magistrate may issue a summons or warrant for the appearance before him of the broker or dealer with whom the goods were deposited, and the production of the goods. He may then order them to be delivered to the owner either without payment or on payment of such sum and at such time as he may determine. Should the broker or dealer refuse to deliver up the goods, or dispose of them after notice that they were stolen or unlawfully obtained, the magistrate may determine the full value of the goods and order him to pay it to the owner; but the broker or dealer may, within six months of the magistrate's order, commence an action for the recovery of goods from the person to whom they were delivered under the order (*ibid.*, s. 27). An order may be made for the restitution of goods with or without compensation after a summary conviction, or where the goods are produced without a warrant being first issued (*ibid.*, s. 28). As to such dealings with goods generally, see titles PAWNS AND PLEDGES; SALE OF GOODS; TROVER AND DETINUE. As to the powers of such magistrate in proceedings for recovery of deserted premises, see title LANDLORD AND TENANT, Vol. XVIII., p. 561, note (*m*).

(*q*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 40. The expression "goods" will cover anything that, for example, would be included in such a phrase as "I give and bequeath all my worldly goods" in a will (*R.* v. *Slade* (1888), 21 Q. B. D. 433, *per* MANISTY, J., at p. 435). If the person detaining the goods has a lien or right to detain them by way of security for the payment of money or the performance of any act by the owner, the magistrate may determine the amount of money due and order its payment as part of the terms, or order the performance or tender

SECT. 8. Special Powers of Metropolitan Police Magistrates.

does not extend to muniments, deeds, or papers relating to property of a greater value than £15 (*r*).

The powers of a metropolitan police magistrate of making orders with respect to property in the possession of the police are applicable to the jurisdiction of justices throughout the country (*a*).

Compensation orders: for malicious damage;

1207. A metropolitan police magistrate may make an order for the payment of any sum up to £15, by the present or former occupier of any house or lodging within the Metropolitan Police District, for wilful and malicious damage done by him to the premises or the furniture therein (other than his own), by way of compensation to the landlord, or any other party aggrieved, upon complaint being made by the aggrieved party within one month of the commission of the offence or the termination of the occupation (*b*).

for illegal distress.

1208. In the case of houses or lodgings let by the week or month at a rent not exceeding a total of £15 per annum, a metropolitan police magistrate may summon a landlord or his broker or agent, upon complaint being made by the tenant that his goods have been subjected to unlawful, irregular, or excessive distress, and, if the complaint appears to him just, he may make an order for the return of the goods if unsold, or, if sold, for the payment to the tenant of such balance as he may find to be due after deduction of the rent (*c*). If such order is not complied with the magistrate may enforce payment to the aggrieved party of compensation up to the amount of £15 (*d*).

Orders for wages.

1209. A metropolitan police magistrate is empowered to hear disputes as to wages or money due to labourers employed in or upon the river Thames, or the docks, creeks, wharfs, quays, or places adjacent thereto, and to make an order for so much wages or money, up to £5, as shall appear to him to be due, besides the reasonable costs of the prosecution of the complaint; but places in the City of London are expressly excepted from his jurisdiction (*e*).

Further powers.

1210. A metropolitan police magistrate is also empowered to act with an assessor of nautical and pilotage experience in the hearing of appeals of pilots from the decision of a pilotage authority for any place within the Metropolitan Police District (*f*), and a metropolitan police magistrate is also the authority to determine any difference arising under the Telegraph Acts (*g*) between the Postmaster-General and any person or body of persons having any power, jurisdiction, or

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of the performance of any act due by the owner, or where such act cannot be performed, order the tender of amends for its non-performance (Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 40).

(*r*) *Ibid.*

(*a*) Police (Property) Act, 1897 (60 & 61 Vict. c. 30), repealing and superseding Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), ss. 29, 30; see p. 606, *post*, and title POLICE.

(*b*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 38.

(*c*) *Ibid.*, s. 39.

(*d*) *Ibid.*

(*e*) *Ibid.*, s. 37.

(*f*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 610; see, generally, title SHIPPING AND NAVIGATION.

(*g*) Telegraph Act, 1878 (41 & 42 Vict. c. 76), ss. 4, 5; see also the

control over a street or public road, or having power to give or withhold consent to the placing of telegraph posts in, under, upon, or along a street or public road within the Metropolitan Police District (*h*).

SECT. 8. **Special Powers of Metropolitan Police Magistrates.**

SECT. 9.—*Special Powers of Stipendiary Magistrates.*

Power to act alone.

1211. A stipendiary magistrate, when sitting at a police court or other place appointed in that behalf, constitutes a court of summary jurisdiction and a court of petty sessions, with power to do alone any act which in the case of other justices requires the presence of more than one justice (*i*).

Special powers.

He has the same powers, in regard to places within his district, as metropolitan police magistrates have within the Metropolitan Police District (*h*) for the hearing of the appeal of pilots (*j*) and the determination of differences under the Telegraph Acts (*k*).

Part VII.—Indictable Offences and Offences Punishable Summarily.

SECT. 1.—*What are Indictable Offences.*

What are indictable offences.

1212. All matters which are public offences at common law, and all matters which are forbidden by statute, with or without a general prohibitory clause, but without the provision of a particular remedy of another kind, are the proper subjects of indictment (*l*).

Where a matter is made punishable by statute and a particular remedy is prescribed, then the prescribed remedy must be employed to the exclusion of the remedy by indictment, but if in such case the remedy by indictment already exists, then the prescribed remedy and the remedy by indictment are cumulative and either may be employed (*m*).

General rule as to distinction.

The question whether a matter is one into which magistrates should inquire and after inquiry commit the defendant for trial

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Telegraph Act, 1863 (26 & 27 Vict. c. 112); and, generally, title TELEGRAPHS AND TELEPHONES.

(*h*) See p. 548, *ante*.

(*i*) Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 29; Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 33; Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 20 (10); Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13 (13); see also Petty Sessions Act, 1849 (12 & 13 Vict. c. 18), s. 1; Stipendiary Magistrates Act, 1858 (21 & 22 Vict. c. 73), s. 1.

(*j*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 610; see note (*f*), p. 578, *ante*.

(*k*) Telegraph Act, 1878 (41 & 42 Vict. c. 76), ss. 4, 5; see note (*g*), p. 578, *ante*.

(*l*) 2 Hawk. P. C., c. 25, s. 4; private wrongs, "except in some way they concern the King," are not indictable (*ibid.*). As to the effect of a general and a particular prohibitory clause, see *R.* v. *Wright* (1758), 1 Burr. 543, *per* Lord MANSFIELD, C.J., at p. 544; see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 333, 334.

(*m*) 2 Hawk. P. C., c. 25, s. 4; see *R.* v. *Robinson* (1759), 2 Burr. 799, *per* Lord MANSFIELD, C.J., at p. 803; see also *R.* v. *Boyall* (1759), 2 Burr. 832; and *R.* v. *Hall*, [1891] 1 Q. B. 747.

SECT. 1. What are Indictable Offences.

elsewhere if they think fit (*n*), or whether it is one which it is their duty to hear and determine themselves (*o*), is, *primâ facie*, decided by the point whether the matter is indictable or not.

There are, however, cross divisions, as in some cases there is provision by statute for the summary trial of indictable offences (*p*) and in others for matters, ordinarily the subject of summary jurisdiction, to be treated as if they were indictable (*q*).

SECT. 2.—*Indictable Offences Triable Summarily.*

SUB-SECT. 1.—*Offences by Children.*

Discretion as to procedure.

1213. Any indictable offence, other than one of homicide, which is committed by a child (*r*) over the age of seven and under the age of fourteen may be tried summarily if the justices before whom the child is brought think it expedient, and if the parent or guardian of the child, when informed by the justices of his right to have the child tried by a jury, does not object to the child being dealt with summarily (*s*).

The justices may exercise their discretion to try the case summarily at any time during the hearing at which the evidence satisfies them that it is expedient to do so (*t*), but upon doing so they must cause the charge to be reduced into writing, and must read it to the parent or guardian of the child and inquire whether such parent or guardian objects to the case being dealt with summarily (*u*). The parent or guardian, if he resides within a reasonable distance, must attend the court during the whole of the proceedings, unless to require his attendance would be unreasonable (*v*).

In the event of his not attending, the justices may, if they think it just to do so, remand the child so as to give the parent or guardian opportunity to attend, or, if they think it expedient, deal with the case summarily (*x*).

(*n*) See p. 611, *post.*

(*o*) See p. 589, *post.*

(*p*) See the text, *infra.*

(*q*) See p. 587, *post.*

(*r*) As to the capacity of children to commit crime, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 239.

(*s*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 10 (1). If it appears to the court that any person brought before them is a child or young person, they are to take such evidence as may be forthcoming for that purpose at the hearing, and are to proceed on the view they take of such evidence. Proof subsequently obtained that the view taken by them was wrong does not invalidate any order or judgment made by them (Children Act, 1908 (8 Edw. 7, c. 67), s. 123 (1)). As to the course to be followed in regard to charges against children generally, see title INFANTS AND CHILDREN, Vol. XVII., pp. 176 *et seq.* As to Juvenile Courts, see *ibid.*, p. 177.

(*t*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 10 (1); *R.* v. *Hertfordshire Justices*, [1911] 1 K. B. 612: see p. 582, *post.*

(*u*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 10 (2).

(*v*) Children Act, 1908 (8 Edw. 7, c. 67), s. 98 (1); and see, further, title INFANTS AND CHILDREN, Vol. XVII., p. 177. Rules may be made under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 29, to join a parent's name in a summons addressed to the child (Children Act, 1908 (8 Edw. 7, c. 67), s. 98 (3)).

(*x*) Summary Jurisdiction Act. 1879 (42 & 43 Vict. c. 49), s. 10 (3).

SECT. 2.
Indictable Offences Triable Summarily.

1214. If the case is dealt with summarily the punishment which the justices may inflict is to be of the same description as might have been inflicted if it had been tried on indictment (*y*). A child may not be sentenced to imprisonment or penal servitude for any offence, or committed to prison in default of payment of a fine, damages, or costs (*a*); but he may be kept in a place of detention for any time, not exceeding one month, which the offence committed may warrant (*b*).

Punishment.

Detention.

If a fine is imposed the amount must not in any case exceed £2 (*c*). If the child is a male, and the justices think it expedient, they may, in addition to or instead of any other punishment, adjudge him to be whipped with not more than six strokes of a birch rod by a constable (*d*). The whipping must take place in the presence of an inspector or officer of police of higher rank than constable, and also in the presence, if he desire it, of the parent or guardian of the child (*e*). The number of strokes and the instrument used must be specified, and the child may not be whipped more than once for the same offence (*f*).

Fine.

Whipping.

The justices may also send the child to a reformatory or industrial school (*g*), or place the child by their order under the supervision of a probation officer (*h*).

SUB-SECT. 2.—*Offences by Young Persons.*

Discretion as to procedure.

1215. In the case of young persons, *i.e.*, persons between the ages of fourteen and sixteen (*i*), indictable offences other than homicide may be dealt with summarily if this course seems expedient to the justices, and if the young person charged with the offence, when informed by the court of his right to be tried by a jury, consents to be dealt with summarily (*k*). The justices may exercise their discretion at any time during the hearing of the case at which they become satisfied by the evidence that it is expedient to deal with the case summarily (*l*); but they are to have regard to the character and

(*y*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 10 (1).

(*a*) Children Act, 1908 (8 Edw. 7, c. 67), s. 102 (1).

(*b*) *Ibid.*, s. 106. As to the meaning of the term "place of detention," see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 422, note (*d*); INFANTS AND CHILDREN, Vol. XVII., p. 177; PRISONS.

(*c*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 10 (1) (c).

(*d*) *Ibid.*, s. 10 (1) (d).

(*e*) *Ibid.*

(*f*) Whipping Act, 1862 (25 & 26 Vict. c. 18), ss. 1, 2; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 423.

(*g*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 10 (4); see Children Act, 1908 (8 Edw. 7, c. 67), ss. 57—83, and, generally, titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 421; EDUCATION, Vol. XII., pp. 71, 72.

(*h*) Children Act, 1908 (8 Edw. 7, c. 67), s. 60; see Probation of Offenders Act, 1907 (7 Edw. 7, c. 17), especially *ibid.*, s. 3 (2); and title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 421.

(*i*) Children Act, 1908 (8 Edw. 7, c. 67), s. 131. As to the course to be followed in regard to charges against young persons generally, see title INFANTS AND CHILDREN, Vol. XVII., pp. 176, 177.

(*k*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 11 (1); Summary Jurisdiction Act, 1899 (62 & 63 Vict. c. 22), s. 2.

(*l*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 11 (2); *R.* v. *Hertfordshire Justices*, [1911] 1 K. B. 612; see p. 582, *post*.

SECT. 2. **Indictable Offences Triable Summarily.**

antecedents of the person charged, the nature of the offence, and all the circumstances of the case (*m*), and they must cause the charge to be reduced into writing and read to the young person before inquiring whether he consents to being dealt with summarily (*n*).

Punishment.

1216. The justices may, if they find the young person guilty of the offence with which he is charged, inflict upon him a fine not exceeding £10 (*o*), or commit him to a place of detention for a period not exceeding one month (*p*); but they may not sentence him to imprisonment nor commit him to prison, unless they certify that he is of so unruly or depraved a character that he cannot or is not fit to be sent to a place of detention (*q*). The justices may, if they think fit, send him to a reformatory or industrial school (*r*), or commit him to the care of a relation or other person selected by them (*a*), or by their order place him under the supervision of a probation officer (*b*).

SUB-SECT. 3.—*Offences by Adults.*

Option of accused.

1217. In the case of adults, *i.e.*, persons over the age of sixteen (*c*), certain indictable offences may be dealt with summarily if the course seems expedient to the justices, and if the person charged with the offence, when informed by them of his right to be tried by a jury, consents to be dealt with summarily (*d*).

Discretion as to procedure.

The justices may exercise their discretion in the same manner and with the same conditions as in the case of young persons, at any time until the case has been adjudicated upon (*e*).

Punishment.

If they find the person guilty of the offence with which he is charged they may sentence him to imprisonment with or without hard labour for a term not exceeding three months, or to the payment of

(*m*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 11 (1).

(*n*) *Ibid.*, s. 11 (2).

(*o*) *Ibid.*, s. 11 (1).

(*p*) Children Act, 1908 (8 Edw. 7, c. 67), s. 106; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 422.

(*q*) Children Act, 1908 (8 Edw. 7, c. 67), s. 102 (3). If they do sentence him to imprisonment with such a certificate the term may be for any period not exceeding three months, with or without hard labour (Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 11 (1)).

(*r*) Children Act, 1908 (8 Edw. 7, c. 67), ss. 57—83; see, generally, titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 421; EDUCATION, Vol. XII., pp. 71, 72.

(*a*) Children Act, 1908 (8 Edw. 7, c. 67), s. 60.

(*b*) *Ibid.*; see the Probation of Offenders Act, 1907 (7 Edw. 7, c. 17), especially *ibid.*, s. 3 (2).

(*c*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 49. The justices are entitled to take evidence at the hearing as to the age of a person who might be under the age of sixteen, and if upon the evidence the person appears to them to be over the age of sixteen, he is deprived of the benefit of the provisions of the Children Act in favour of young persons (Children Act, 1908 (8 Edw. 7, c. 67), s. 123 (1)).

(*d*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 12.

(*e*) See p. 581, *ante*. This is so even where the defendant has consented to the case being dealt with summarily and evidence has been given by him on that understanding without receiving the caution (see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 316) required by the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 18 (*R.* v. *Hertfordshire Justices*, [1911] 1 K. B. 612).

a fine not exceeding £20 (*f*). A person who is found guilty by the justices after consenting to be dealt with summarily has no right of appeal to quarter sessions (*g*).

Offences against property.

1218. The right to deal summarily with offences against property is limited to cases where the property concerned, in the opinion of the justices before whom the charge is brought, does not exceed £2 (*h*).

The offences which may be summarily dealt with are:—

(1) Simple larceny (*i*).

(2) Offences declared by any Act for the time being in force to be punishable as simple larceny (*k*).

(3) Larceny from or stealing from the person (*l*).

(4) Larceny as a clerk or servant (*m*).

(5) Aiding, abetting, consulting, or procuring the commission of any of the above offences (*n*).

(6) Attempting to commit any of the above offences (*o*).

(7) Embezzlement by a clerk or servant (*p*).

(8) Receiving stolen goods (*q*).

(9) Obtaining or attempting to obtain by any false pretence from any person any chattel, money, or valuable security with intent to defraud (*r*).

(10) The offence of unlawfully and maliciously setting fire to any part of any wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern (*s*).

Offences committed habitual drunkard.

(11) Offences within the scope of the Inebriates Act, 1898 (*t*),

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(*f*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 12.

(*g*) *R.* v. *London Justices, Ex parte Lambert*, [1892] 1 Q. B. 664; *R.* v. *Dickinson, Ex parte Davis*, [1910] 1 K. B. 469.

(*h*) See the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), Sched. I., col. 2; Summary Jurisdiction Act, 1899 (62 & 63 Vict. c. 22), Schedule; and as to such offences generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 627 *et seq.*

(*i*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), Sched. I., col. 2.

(*k*) *Ibid.*

(*l*) *Ibid.*

(*m*) *Ibid.*

(*n*) *Ibid.*

(*o*) *Ibid.* In this case the limitation in regard to the value of the property is omitted.

(*p*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), Sched. I., col. 2. As to embezzlement, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 650 *et seq.*

(*q*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49). This includes the commission of any of the offences relating to property specified in the Larceny Act, 1861 (24 & 25 Vict. c. 96), ss. 91, 95; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 676 *et seq.*

(*r*) Summary Jurisdiction Act, 1899 (62 & 63 Vict. c. 22), Schedule; Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 88; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 690 *et seq.*

(*s*) Summary Jurisdiction Act, 1899 (62 & 63 Vict. c. 22), Schedule. The offence is created by the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 16.

(*t*) Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 2. The offences to which this provision relates are set out in *ibid.*, Sched. I.

SECT. 2. Indictable Offences Triable Summarily.

committed by a habitual drunkard (*u*), who has been summarily convicted of any such offence at least three times in the preceding twelve months (*v*).

Indecent assault.

(12) Committing an indecent assault upon a person, whether male or female, who in the opinion of the justices is under the age of sixteen years (*a*).

Indictable offences triable at option of the justices.

1219. Adult persons who plead guilty to any of the above offences, with the exception of the last two, may be dealt with summarily by the justices before whom they are brought without any limitation, in the case of offences connected with property, of the value of the property concerned (*b*). The justices may at any time during the hearing of the case ask the person charged with any such offence whether he pleads guilty, but before doing so they must have become satisfied that the evidence is sufficient to put him upon trial for the offence with which he is charged and that the case is one which may properly be dealt with summarily having regard to his character and antecedents, the nature of the offence, and the circumstances generally (*c*).

Procedure.

Charge to be reduced to writing and read.

They must also have caused the charge to be reduced to writing and read to the person charged, and must explain to him that he is not obliged to plead or to answer, but that if he pleads guilty he will be dealt with summarily, and if he does not plead or pleads not guilty he will be dealt with in the usual course by being committed for trial (*d*).

Warning the person charged.

They must also warn the person charged that he is not obliged to say anything, but that whatever he says will be taken down in writing and may be given in evidence against him upon his trial, and they are to give him clearly to understand that he has nothing to hope from any promise of favour, and nothing to fear from any threat, which may have been held out to him to induce him to make any admission or confession of his guilt, but that whatever he then says is liable to be used in evidence against him on his trial notwithstanding any such promise or threat (*e*).

Plea of guilty.

1220. If the person charged in reply to the justices' question pleads guilty, the justices must thereupon cause the plea of guilty to be entered and sentence him to be imprisoned with or without

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(*u*) For definition, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 417, note (*p*), and, generally, see *ibid.*, pp. 417, 418; title INTOXICATING LIQUORS, Vol. XVIII., pp. 159 *et seq.*

(*v*) Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 2. The offences to which this provision relates are set out in *ibid.*, Sched. I.

(*a*) Children Act, 1908 (8 Edw. 7, c. 67), Sched. II. For this offence the term of imprisonment which may be awarded by the court is extended to six months (*ibid.*, s. 128).

(*b*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 13 (1). The offences are to be found set out in *ibid.*, Sched. I., col. 1; see p. 583, *ante.*

(*c*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 13 (1).

(*d*) *Ibid.*, s. 13 (2). If they think it desirable they are to explain the meaning of being dealt with "summarily" or "in the usual course," and to state the assizes or sessions, as the case may be, at which the case will be tried, if tried by a jury (*ibid.*).

(*e*) *Ibid.*

hard labour for any term not exceeding six months (*f*). If he does not plead guilty, his answer, if any, is to be taken down in writing, read over to him, and signed by one of the justices constituting the court (*g*). It is then to be kept with the depositions of the witnesses and transmitted with them to the proper officer of the court by whom the case is to be tried (*h*). At the trial it may, if necessary, be given in evidence against him without further proof, unless it is shown that the justice purporting to have signed it did not in fact do so (*i*).

Plea of not guilty.

1221. The justice, before whom any person charged with an indictable offence that may be dealt with summarily is brought may adjourn the case and remand him from time to time either before or during the hearing of the case for the purpose of ascertaining whether it is expedient to deal with the case summarily (*k*), or if, at the time of the charge, the justices before whom the prisoner charged is brought do not constitute a petty sessional court, they may adjourn the case and remand him until the next practicable sitting of a petty sessional court (*l*).

Adjournment and remand.

1222. The rule with regard to procedure in indictable cases that may be dealt with summarily is that the procedure in indictable cases is to be followed until the justices have assumed the power to deal summarily with the matter, and after that the procedure in summary jurisdiction (*m*). The evidence of witnesses taken before the justices assumed such power need not be taken again, but any witness may at the defendant's request be recalled for cross-examination (*n*).

Rule as to procedure.

If the defendant is convicted, the effect of the conviction is the same as if it had taken place on indictment (*o*), and the petty sessional court have the same power to make an order for the restitution of property that any court would have had if the case had

Effect of conviction.

(*f*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 13 (1).

(*g*) *Ibid.*, s. 13 (3).

(*h*) *Ibid.*; Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 20; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 321.

(*i*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 13 (3).

(*k*) *Ibid.*, s. 24 (1) (a). The mode of exercising the power of remand is the same as that exercised by justices in the hearing of inquiries into indictable offences (*ibid.*, s. 24 (2); Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 21); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 319.

(*l*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 24 (1) (b). Such cases cannot be dealt with summarily except by a petty sessional court (*ibid.*, s. 20 (8)); see p. 565, *ante*. In this case the time during which the person charged may be remanded is not limited to eight days (Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 24 (2)), but advantage cannot be taken of this provision, in cases where the consent of the person charged, or his parent or guardian, is required, until such consent is given; see *ibid.*, s. 27 (1): as to procedure in indictable cases, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 311 *et seq.*

(*m*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 27 (1).

(*n*) *Ibid.*, s. 27 (2).

(*o*) *Ibid.*, s. 27 (3). But justices may not give the option of a fine to

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gone for trial (*p*). The conviction must contain a statement of the plea of guilty or of the consent of the defendant (or his parent or guardian) to the case being dealt with summarily (*q*).

Effect of dismissal.

If the information on which the defendant is charged is dismissed, the dismissal is of the same effect as the acquittal would have been had the case been tried upon indictment (*r*). The defendant is entitled to demand a copy of the order of dismissal, certified by the court or two of the justices constituting it (*s*).

Filing of conviction or order.

The conviction or order of dismissal, together with the depositions of witnesses and the statement, if any, made by the defendant, are to be transmitted to the clerk of the peace and filed by him (*t*).

Costs.

1223. The justices may by order direct payment out of the county or borough fund of the costs of the prosecution or defence, or both, in accordance with the scale approved by the Secretary of State (*a*).

Indictable offences triable at option of the prosecution.

1224. By statute certain special offences are made triable summarily or upon indictment at the option of the prosecution.

Such are the making of a false claim to pay or pension by a seaman in the royal navy, or the personation of a seaman for the purpose of making such claim (*b*); the like offences in the case of persons serving in the army (*c*) or other defensive forces of the Crown (*d*), or in the case of a member of a police force (*e*); misappropriation of the funds of a trade union (*f*) or industrial or provident society (*g*); putting injurious matter into post boxes or sending

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an offender; and it is doubtful whether the Probation of Offenders Act, 1907 (7 Edw. 7, c. 17), applies to these cases.

(*p*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 27 (3); see p. 606, *post*, and title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 449, 684, 685, 702,

(*q*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 27 (5).

(*r*) *Ibid.*, s. 27 (4); and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 374.

(*s*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 27 (4); see Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 14, and p. 601, *post*.

(*t*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 43), s. 27 (6); see Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 14.

(*a*) Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15), s. 1; see, generally, title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 445 *et seq.* This provision replaces the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 28, except in so far as the latter has been applied by other Acts, *e.g.*, the Inebriates Act, 1899 (62 & 63 Vict. c. 35), s. 1 (Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15), Schedule). As to the county and borough funds, see title LOCAL GOVERNMENT, pp. 319, 358, *ante*.

(*b*) Admiralty Powers, etc. Act, 1865 (28 & 29 Vict. c. 124), ss. 6, 8. The summary jurisdiction may be exercised by a single justice (*ibid.*); see, generally, title ROYAL FORCES.

(*c*) Army Act, 1881 (44 & 45 Vict. c. 58), s. 142; see title ROYAL FORCES.

(*d*) Pensions and Yeomanry Pay Act, 1884 (47 & 48 Vict. c. 55), s. 3; see title ROYAL FORCES.

(*e*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 9; see title POLICE.

(*f*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 12; see title TRADE AND TRADE UNIONS.

(*g*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 64; see title INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES, Vol. XVII., p. 32.

or attempting to send such matter by post (*h*); and offences under the Merchant Shipping Act, 1894, declared by that Act to be misdemeanours (*i*).

SECT. 3.—*Summary Offences Triable upon Indictment.*

SUB-SECT. 1.—*After a Previous Conviction.*

Summary offences triable upon indictment, after one previous conviction;

1225. Certain offences which are ordinarily dealt with summarily are, in the case of a second or third offence, made punishable on indictment.

An alleged offender, who has been once previously convicted of any of the following offences, is to be tried upon indictment:—the stealing of deer in an uninclosed part of a forest (*k*); the stealing of dogs (*l*); the possession of stolen dogs (*m*); the stealing of fruit or vegetables from a garden (*n*); malicious damage to fruit or vegetables in a garden (*o*); offences against the Acts relating to the manufacture of hats (*p*).

after two previous convictions.

An alleged offender, who has been twice previously convicted of any of the following offences, is to be tried upon indictment:—the stealing of or malicious damage to growing trees (*q*); night poaching (*a*); disobedience by overseers to the rules made by the Local Government Board (*b*); offences by masters under the Truck Acts (*c*).

(*h*) Post Office Act, 1908 (8 Edw. 7, c. 48), ss. 61—63; see title POST OFFICE.

(*i*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 680 (1); see title SHIPPING AND NAVIGATION.

(*k*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 12. Such a second offence is felony; see title ANIMALS, Vol. I., p. 371.

(*l*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 18; see title ANIMALS, Vol. I., p. 405.

(*m*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 19; see title ANIMALS, Vol. I. p. 405.

(*n*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 36. Such a second offence is a felony (see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 638), and is punishable as in the case of simple larceny (see *ibid.*, p. 627), and, therefore, if the alleged offender is an adult and pleads guilty, or, if the property is of value not exceeding £2, and being an adult, he gives his consent, he may be dealt with summarily (Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), Sched. I.); see pp. 583, 584, *ante*.

(*o*) Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 23. Such a second offence is a felony; see, generally, title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 783.

(*p*) Frauds by Workmen Act, 1748 (22 Geo. 2, c. 27), s. 2; Frauds by Workmen Act, 1777 (17 Geo. 3, c. 56), ss. 5, 6, 9; see title TRADE AND TRADE UNIONS.

(*q*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 33; Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 22. The former offence is a felony, the latter a misdemeanour; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 638, 782.

(*a*) Night Poaching Act, 1828 (9 Geo. 4, c. 69), s. 1; see title GAME, Vol. XV., pp. 233 *et seq.*

(*b*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 98; see title POOR LAW.

(*c*) Truck Act, 1831 (1 & 2 Will. 4, c. 37), ss. 1—3, 9; Truck Amendment Act, 1887 (50 & 51 Vict. c. 46), ss. 3, 6—9, 11; Truck Act, 1896 (59 & 60 Vict. c. 44), s. 4; see title FACTORIES AND SHOPS, Vol. XIV., p. 518.

SECT. 3.

Summary Offences Triable upon Indictment.

Summary offences triable on indictment by express statutory saving.

SUB-SECT. 2.—*In other Cases.*

1226. In some cases (*d*), where an offence is stated to be a misdemeanour, the right to try the case upon indictment is expressly saved by statute; but the saving would appear to be superfluous, as the right to try an offence upon indictment, if ever established, is not lost by the provision of a summary remedy which is not expressly stated to be in substitution for it (*e*).

In the case of offences by railway servants against the Railway Regulation Acts (*f*), the justice before whom the alleged offender is brought may either deal with him summarily or commit him for trial at quarter sessions (*f*). A justice may also commit any person, convicted before him as an incorrigible rogue, to quarter sessions, when the justices in sessions may further imprison him (*g*).

SECT. 4.—*Right of Accused to Trial by Jury.*

Claim to be tried by jury.

When made.

Duty of justices.

1227. In the case of every offence, other than assault, the accused is entitled to claim to be tried by a jury, if the punishment to which he would be liable on conviction is a term of imprisonment exceeding three months in duration (*h*). The claim must, however, be made by the accused on his appearing before the justice, and before the charge is gone into (*i*).

It is the duty of the justices constituting the court in the case of every offence to which the provision applies to inform (*k*) the accused

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(*d*) See, for example, the Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 50; title TRAMWAYS AND LIGHT RAILWAYS; and the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 3, 4; title FOOD AND DRUGS, Vol. XV., p. 33.

(*e*) See p. 579, *ante*. The mere classification of an offence as a misdemeanour in the statute creating the offence is sufficient to establish the right to try it upon indictment, even though a summary remedy is provided. Thus, under the Dentists Act, 1878 (41 & 42 Vict. c. 33), and the Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), false representation that a person is duly qualified and falsification of the register are offences that are triable summarily under the Act or upon indictment; see title MEDICINE AND PHARMACY.

(*f*) Railway Regulation Acts, 1840 (3 & 4 Vict. c. 97), and 1842 (5 & 6 Vict. c. 55).

(*g*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 5. Idle and disorderly persons who have been twice previously convicted as such may be kept in prison until quarter sessions and further imprisoned by the justices in sessions (*ibid.*, ss. 5, 10). This provision is not applicable to women (*ibid.*, s. 10). As to vagrancy, see, further, titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 508, 537, 692; POOR LAW.

(*h*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 17 (1); Vagrancy Act, 1824 (5 Geo. 4, c. 83). The provision is limited to cases where the actual sentence is for a term of imprisonment exceeding three months, and does not apply to cases where such a term could be given in default of payment of a fine (*Carle* v. *Elkington* (1892), 67 L. T. 374), nor to cases where at the expiration of the original sentence the accused would be liable to further imprisonment in default of finding securities for his not so offending again (*Williams* v. *Wynne* (1885), 57 L. J. (M. C.) 30).

(*i*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 17 (1).

(*k*) *Ibid.*, s. 17 (2).

of this right, and to inquire whether he desires to claim it before the charge is gone into (*l*).

SECT. 4. Right of Accused to Trial by Jury.

1228. If the accused is a child, the justices must ascertain whether his parent or guardian is present, and if so whether he desires to claim the right on behalf of the accused (*m*). The attendance of the parent or guardian may be required for this purpose (*n*), but if he does not attend the justices are entitled to deal with the case summarily (*o*).

Where accused is a child.

1229. After the accused has claimed his right to be tried by a jury the proceedings before the justices are in all respects the same as if the accused were charged with an indictable offence (*p*), and this applies to the provision of the costs of the proceedings (*q*).

Procedure after claim.

Part VIII.—Procedure under Summary Jurisdiction.

SECT. 1.—*In General.*

1230. The judicial powers of justices sitting in petty sessions or as a court of summary jurisdiction are the creation of statute (*r*). The Acts of Parliament which confer the powers are very numerous and deal with a great variety of subjects, with the result that there are peculiarities of procedure incidental to some of them, but the mode in which the powers conferred by them are exercised, and the procedure generally governing their exercise, are prescribed by the Summary Jurisdiction Acts (*a*).

Nature of judicial powers.

SECT. 2.—*Information and Complaint.*

1231. Proceedings before justices sitting in petty sessions or as a court of summary jurisdiction are begun by an information or complaint (*b*). The distinction in summary jurisdiction procedure

Distinction between information and complaint.

(*l*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 17 (2). If, however, the fact of a previous conviction, which would render the defendant liable to more than three months' imprisonment for the offence charged, is made known to the justices at any time before sentence, they may not deal with the matter as a first offence, but must give him the option of trial by jury (*R.* v. *Beesby*, [1909] 1 K. B. 849); but see *R.* v. *Fowler* (1895), 64 L. J. (M. C.) 9; and compare *Barker* v. *Arnold*, [1911] 2 K. B. 120.

(*m*) *Ibid.*, s. 17 (3).

(*n*) Children Act, 1908 (8 Edw. 7, c. 67), s. 98; and see title INFANTS AND CHILDREN, Vol. XVII., pp, 166, 167.

(*o*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 17 (3).

(*p*) *Ibid.*, s. 17 (1).

(*q*) Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15), s. 9 (1); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 445 *et seq.*

(*r*) *Kitchen* v. *Shaw* (1837), 6 Ad. & El. 729; compare *Cullen* v. *Trimble* (1872), L. R. 7 Q. B. 416; *Johnson* v. *Colman* (1875), L. R. 10 Q. B. 544. As to the distinction between petty sessions and courts of summary jurisdiction, see p. 565, *ante.*

(*a*) These Acts are defined as meaning the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), and the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), and any Act past or future amending those Acts or either of them (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13 (7), (10)).

(*b*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 1. That

SECT. 2. Information and Complaint.

between an information and a complaint is that an information is laid where the person charged has committed, or is alleged to have committed, an offence for which he is liable by law, upon a summary conviction, to be imprisoned, or fined or otherwise punished; while a complaint is made where the person in regard to whom it is made is liable, or alleged to be liable, to have an order made upon him either to pay money or to do an act which he has refused or neglected to do contrary to law (*c*).

Information.

1232. An information need not be laid upon oath (*d*), nor even in writing, unless the statute under which it is laid so requires (*e*). It is, however, customary and advisable for an information to be in writing (*f*), and where it is desired that the justices should issue a warrant the information must be laid upon oath or affirmation (*g*).

Complaint.

A complaint need not be made on oath (*h*) nor in writing (*i*), but if the summons issued by the justices upon it is disobeyed the matter of complaint must be substantiated upon oath before a warrant will be issued (*j*).

By whom.

1233. In the great majority of cases any person (*k*), whether interested or not, may act as informant or complainant, but the right to do so is reserved in some instances by statute to an aggrieved person (*l*),

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which marks the beginning or "institution" of proceedings is not the issue of a summons or warrant, but the laying or making of an information or complaint (*Brooks* v. *Bagshaw*, [1904] 2 K. B. 798).

(*c*) Summary Jurisdiction Act, 1848 (11 & 12) Vict. c. 43), s. 1; compare *Re Dillon* (1859), 11 I. C. L. R. 232, *per* HAYES, J., at p. 238. The determination of an information involves the conviction or acquittal of the person charged. The determination of a complaint involves an order of the justices upon the defendant or an order dismissing the complaint; compare the forms given in the schedule to the Summary Jurisdiction Rules, 1886 (Stat. R. & O. Rev., Vol. XI., Summary Proceedings, England, pp. 1 *et seq.*).

(*d*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 10.

(*e*) *R.* v. *Millard* (1853), 22 L. J. (M. C.) 108, C. C. R.; see *Basten* v. *Carew* (1825), 3 B. & C. 649.

(*f*) Although the Summary Jurisdiction Acts do not expressly require writing, the provisions with regard to variance (see p. 592, *post*) appear to contemplate it, and justices not uncommonly require it. In the case of a summons (see p. 593, *post*) applied for by the police, justices often require an information in writing, unless it is laid by the constable who applies for the summons.

(*g*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 10.

(*h*) *Ibid.*, s. 10.

(*i*) *Ibid.*, s. 8.

(*j*) *Ibid.*, s. 2.

(*k*) The information should, as a rule, be laid by the party applying for the summons; as to the summons, see p. 593, *post*.

(*l*) Thus, informations charging common assault must be laid by or on behalf of the party aggrieved (Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 42). Proceedings for the recovery of penalties under the Public Health Act, 1875 (38 & 39 Vict. c. 55), can only be begun by a party aggrieved or the local authority concerned, unless the consent in writing of the Attorney-General is first obtained; see *Dodd* v. *Pearson*, [1911] 2 K. B. 383. Proceedings against the owner or agent of a mine can only be begun by an inspector of mines except with the consent of a Secretary of State; and see *R.* v. *Bates*, [1911] 1 K. B. 964. Proceedings under the Dangerous Performances Acts, 1879 and 1897 (42 & 43 Vict. c. 34; 60 & 61 Vict. c. 52), and the Sunday Observance Act, 1677 (29 Car. 2, c. 7); Sunday Observance Prosecution Act, 1871 (34 & 35 Vict. c. 87), require

and a corporation cannot, unless authorised by the terms of the statute, act as a common informer (*m*).

The information or complaint may be laid or made by the informant or complainant in person, or by his counsel or solicitor or other person authorised in that behalf (*n*).

Limitation of time.

1234. Except in those instances in which a special limit of time is prescribed by the statute under which the proceedings are taken, the time within which an information must be laid or a complaint made is six months from the time when the subject-matter of the proceedings arose (*o*).

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the consent of the chief of police or in the latter case that of two justices.

(*m*) *St. Leonard's, Shoreditch, Guardians* v. *Franklin* (1878), 3 C. P. D. 377; see title CORPORATIONS, Vol. VIII., p. 357.

(*n*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 10.

(*o*) *Ibid.*, s. 11. The limitation does not, however, apply to continuing offences: *Higgins* v. *Northwich Union Guardians* (1870), 22 L. T. 752 (smoke nuisance); *Ulverstone Union Guardians* v. *Park* (1889), 53 J. P. 629 (liability for maintenance of bastard children); *R.* v. *Catholic Life and Fire Assurance and Annuity Institution* (1883), 48 L. T. 675 (failure on part of a company to make statutory returns); *Chepstow Electric Light and Power Co.* v. *Chepstow Gas and Coke Consumers' Co.*, [1905] 1 K. B. 198 (compensation under private Act). The limitation does, however, apply in such cases as the following:—*R.* v. *Portsmouth Justices*, [1892] 1 Q. B. 491 (vaccination order); *Morant* v. *Taylor* (1876), 1 Ex. D. 188 (order for demolition of a building under a private Act); *Hull* v. *London County Council*, [1901] 1 K. B. 580 (projection on building contrary to the London Building Acts). Under the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), the limitation has been held to apply in cases where cruelty is charged (*Ellis* v. *Ellis*, [1896] P. 251), but not where the charge is desertion (*Heard* v. *Heard*, [1896] P. 188). The time of limitation also applies to proceedings for the recovery of civil debts; see, *e.g.*, *Mackie* v. *Fox* (1911), 75 J. P. 470. It begins to run from the time of the offence, or in the case of a complaint from the time when the cause of complaint is complete (*Corbett* v. *Badger*, [1901] 2 K. B. 278; see *Labalmondiere* v. *Addison* (1858), 1 E. & E. 41; *Mayer* v. *Harding* (1867), 17 L. T. 140). Where the cause of complaint is non-payment of money due, and the cause of complaint is complete, a fresh demand will not revive the right to take proceedings (*Harpin* v. *Sykes* (1885), 49 J. P. 148). In the case of an offence, the day on which it is committed is excluded in computing the time limit (*Radcliffe* v. *Bartholomew*, [1892] 1 Q. B. 161); and see title TIME. Proceedings under the Adulteration of Seeds Act, 1869 (32 & 33 Vict. c. 112), must be begun in twenty-one days (*ibid.*, s. 7); under the Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92), within one month (*ibid.*, s. 14); under the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), within twenty-eight days in the case of perishable articles (*ibid.*, s. 10); under the Bread Act, 1836 (6 & 7 Will. 4, c. 37), within forty-eight hours or longer, as the justices may think fit (*ibid.*, s. 31); under the Game Act, 1831 (1 & 2 Will. 4, c. 32), within three months (*ibid.*, s. 41); under the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), within three years after commission of the offence, or one year of its discovery by the prosecutor (*ibid.*, s. 15); under the Special Constables Act, 1831 (1 & 2 Will. 4, c. 41), s. 15, and the County Police Act, 1839 (2 & 3 Vict. c. 93), for assaults on county or special constables, or neglect of duty by such constable, within two months; under the Vaccination Acts, 1867 (30 & 31 Vict. c. 84), and 1871 (34 & 35 Vict. c. 98), within twelve months (*ibid.*, s. 11)); under the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), within three months of an offence coming to the knowledge of an inspector, or two months after an inquest held in relation to it, but in any case within six months (Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 146). In disputes between employers

SECT. 2.
Information and Complaint.

Contents:
(i.) as to offences or grounds of complaint;

1235. It must not include more than one offence or matter of complaint (*p*), but should it do so the defect, although one of substance, is not a fatal objection (*q*). The justices in such a case cannot refuse to hear the matter, but they should either limit the prosecutor to proceeding on one offence or ground of complaint (*r*) or, after hearing the evidence, should determine which offence or ground of complaint is disclosed (*s*).

An information charging the commission of the same offence several times on the same occasion (*t*), and even on a series of occasions (*u*), is not defective, but it will not support more than one conviction (*a*).

(ii.) as to persons charged.

Two or more persons may be charged in the same information, but it is in the discretion of the justices to hear the cases separately (*b*).

Variation between terms of information and evidence.

1236. Provided that proceedings are begun within the required time, variations between the terms of an information and the evidence given in support of it are not material (*c*). Where there is such variation the justices before whom the matter is heard may cause the information to be amended (*d*), and, if they are of opinion

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and workmen proceedings need not be begun within six months (*Charles* v. *Plymouth Works* (*Mortgagees*) (1890), 60 L. J. (M. C.) 20). Where a statute simply provides that the penalties must be recovered within a certain time, the words of the provision must be complied with (*R.* v. *Mainwaring* (1858), 27 L. J. (M. C.) 278); but where, in addition, the statute prescribes observance of the procedure of the Summary Jurisdiction Acts, it is sufficient if proceedings are begun within six months (*Morris* v. *Duncan*, [1899] 1 Q. B. 4); and see also as to friendly societies, *Mackie* v. *Fox* (1911), 75 J. P. 470, C. A.

(*p*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 10; see *R.* v. *Cridland* (1857), 7 E. & B. 853. An uncertainty sometimes exists whether a particular section of a statute creates one offence or two, but it is submitted that a test may generally be found in the answer to the question whether evidence can be given of distinct acts, committed by the person charged, constituting two or more offences; compare *Milnes* v. *Bale*, *Milnes* v. *Lea* (1875), L. R. 10 C. P. 591, *per* BRETT, J., at p. 594. Where the offence is charged in the alternative it is clear that two offences are included, as where a tramway company was charged with the emission of smoke so as to constitute a ground of complaint to the passengers *or* the public (*Cotterill* v. *Lempriere* (1890), 24 Q. B. D. 634; see also *R.* v *Slater*, *Ex parte Bowler* (1903), 67 J. P. 299; *R.* v. *Wells* (1904), 68 J. P. 392). But where the information charged the emission of smoke *and* steam, it was held that only one offence was committed (*Davis* v. *Loach* (1886), 51 J. P. 118; see *Smith* v. *Perry*, [1906] 1 K. B. 262).

(*q*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 1.

(*r*) *Rodgers* v. *Richards*, [1892] 1 Q. B. 555.

(*s*) *Johnson* v. *Needham*, [1909] 2 K. B. 626; or they may call upon the informant to elect which offence he alleges to have been committed (*ibid.*).

(*t*) *R.* v. *Scott* (1863), 4 B. & S. 368; see further hereon, 63 J. P. 546.

(*u*) *Onley* v. *Gee* (1861), 30 L. J. (M. C.) 222.

(*a*) *R.* v. *Rawson*, [1909] 2 K. B. 748.

(*b*) *R.* v. *Cridland* (1857), 7 E. & B. 853; *R.* v. *Littlechild* (1871), L. R. 6 Q. B. 293.

(*c*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 9. Similar provision is not made in the case of complaints, which, unlike informations, are not commonly set out in writing.

(*d*) Thus, where in a dispute between employer and workman the employer is wrongly described (*Whittle* v. *Frankland* (1862), 2 B. & S. 49), or where ownership of property is incorrectly stated (*Ralph* v. *Hurrell* (1875), 32 L. T. 816), or the date of an offence wrongly given (*Exeter*

that the defendant has been misled or deceived, they may adjourn the hearing to a future day and at their discretion grant or refuse bail to the defendant (*e*), but where the variation is such that a different offence is disclosed from that charged (*f*), or that the wrong person has been charged (*g*), the case must be dismissed.

Description of offence.

1237. It is sufficient to describe any offence in the words of the statute or any order, bye-law, regulation or other document creating it (*h*), and in such description any exception, exemption, proviso, excuse, or qualification contained in the provision creating the offence need not be specified or negatived (*i*). Where the offence is created by statute the information should conclude with the words "against the form of the statute," otherwise it should conclude with the words "against the peace" etc. (*k*). If the information charges a person with the commission of an offence for which he has a right to claim to be tried by a jury, the fact that he has already been convicted should be stated in the information (*l*).

SECT. 3.—*Summons or Warrant.*

SUB-SECT. 1.—*Summons.*

Discretion of justices to grant process.

1238. When an information or complaint is laid or made before them, justices have a discretion in granting or withholding process (*m*), but the discretion must be deliberately exercised (*n*), otherwise, in the event of the matter being one within their jurisdiction, they will be compelled by rule to hear and determine it (*o*).

If they decide to grant process on an information they have a further discretion as to whether they will issue a summons or a warrant (*p*), but it is not usual or advisable to issue a warrant in

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Corporation v. *Heaman* (1877), 37 L. T. 534), the information should be amended, not dismissed. It is expressly provided that in informations or complaints, or the proceedings thereon, partners, joint tenants, parceners or tenants in common, and the property belonging to them as such, are sufficiently described by naming one of them. The works or buildings maintained etc. at the expense of a locality, or the materials for repairing them, may be described as the property of the inhabitants of that locality; goods provided for the service of the poor law, as the property of the overseers of the poor of the locality, or the guardians of the poor of the union concerned; materials etc. for the repair of highways, as the property of the surveyor, and the property of commissioners of sewers of any district as such, in each case without naming the persons (Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 4).

(*e*) *Ibid.*, s. 9.

(*f*) *Martin* v. *Pridgeon* (1859), 1 E. & E. 778; *Loadman* v. *Cragg* (1862), 26 J. P. 743; *R.* v. *Brickhall* (1864), 33 L. J. (M. C.) 156.

(*g*) *Oxford (City) Tramway Co.* v. *Sankey* (1890), 54 J. P. 564.

(*h*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 39 (1).

(*i*) *Ibid.*, s. 39 (2).

(*k*) *R.* v. *Wise* (1844), 3 L. T. (O. S.) 410. Omission of the words is not, however, a fatal objection (Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 1).

(*l*) See Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 17; but see *R.* v. *Beesby*, [1909] 1 K. B. 849, and p. 588, *ante*.

(*m*) *R.* v. *Kennedy* (1902), 86 L. T. 753; and see cases cited at p. 657, *post*.

(*n*) *R.* v. *Adamson* (1875), 1 Q. B. D. 201; see p. 657, *post*.

(*o*) *R.* v. *Adamson*, *supra*.

(*p*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 2.

SECT. 3. Summons or Warrant.

the first instance except in cases where a summons may be expected to be disobeyed (*q*).

Form and contents.

1239. The summons must contain a short statement of the matter of the information or complaint, and must require the person to whom it is addressed to appear, at a time and place named in it, before the justice issuing the warrant or such other justices having the same jurisdiction as may be present at such time and place (*r*). It must be signed by one of the justices who received the information or complaint (*s*).

Defects or variations.

1240. Defects in the summons or warrant, or variations between the facts alleged in either of them and the evidence as given, are not objections fatal to the hearing of the case, but where the justices are of opinion that the defendant may have been deceived or misled they may in their discretion adjourn the hearing, upon such terms as they think fit, and grant or refuse bail to the defendant (*t*). Any irregularity in the form or service of the summons, or the form or execution of the warrant, is cured by the appearance of the party summoned or arrested (*a*), but this does not apply in the case of a defendant who appears purely for the purpose of taking objection to such an irregularity (*b*).

Effect of appearance.

Service.

1241. The summons is served by the person to whom it is delivered upon the party to whom it is addressed either personally or by leaving it with someone for him at his last or most usual place of abode (*c*), and the person serving it must attend at the time

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(*q*) *R.* v. *Stafford* (*Borough*) *Justices* (1835), 5 Nev. & M. (K. B.) 94; *O'Brien* v. *Brabner* (1885), 49 J. P. 227.

(*r*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 1. The usual practice is to make the summons returnable on a day when a court of petty sessions is regularly held.

(*s*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 29; see p. 590, *ante*; *Dixon* v. *Wells* (1890), 25 Q. B. D. 249. A form of summons is supplied in the schedule to the Summary Jurisdiction Rules, 1886 (Stat. R. & O. Rev., Vol. XI., Summary Proceedings, England, pp. 1 *et seq.*); see r. 31. It provides for a seal, but the absence of a seal, even if a defect, is not a fatal objection to the proceedings (*R.* v. *Garrett-Pegge, Ex parte Brown*, [1911] 1 K. B. 880).

(*t*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), ss. 1, 9.

(*a*) *R.* v. *Berry* (1859), 28 L. J. (M. C.) 86, C. C. R.; *Egginton* v. *Pearl* (1875), 33 L. T. 428; *R.* v. *Hughes* (1879), 4 Q. B. D. 614, C. C. R.; *Gray* v. *Customs Commissioners* (1884), 48 J. P. 343.

(*b*) *Dixon* v. *Wells* (1890), 25 Q. B. D. 249; *Pearks, Gunston and Tee, Ltd.* v. *Richardson*, [1902] 1 K. B. 91.

(*c*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 1. The person to whom the summons is delivered is usually a constable or police officer. The mode of service here prescribed is sufficient in all cases except under statutes passed since the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), in which some other mode of service is prescribed, or in which the procedure of the Summary Jurisdiction Act is excluded, when, in default of a mode of service being prescribed, the service must be personal (see Stone's Justices' Manual, 43rd ed., 929). The defendant's last place of abode means his then present place of abode, if he has any, or his last, if he has ceased to have any (*R.* v. *Evans and Yale* (1850), 19 L. J. (M. C.) 151, *per* COLERIDGE, J., at p. 154). The last abode of a defendant who has ceased to reside in England, but has a place of abode abroad, is that in the foreign country (*R.* v. *Farmer*, [1892] 1 Q. B. 637, C. A.). But where a defendant has ceased to reside in England, and there is no

Service and non-appearance.

and place named in the summons to give evidence of service if required (*d*). If the summons has not been served the justices may in their discretion issue a second summons (*e*); but if it has been served and disobeyed, then, upon proof that it was served a reasonable time before the time appointed for the defendant to appear, they may cause the matter of the information or complaint to be substantiated on oath and issue their warrant (*f*) for the arrest of the defendant (*g*), or proceed to hear and determine the matter of the information or complaint *ex parte* to all intents and purposes as if the defendant had appeared (*h*).

Withdrawal of summons.

1242. No provision exists for the withdrawal of a summons, but in practice it is not infrequently withdrawn, the effect being to put an end to the complaint upon which it is founded (*i*).

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evidence that he has acquired a fixed place of abode in a foreign country, service at his last place of abode in England is good (*R.* v. *Webb*, [1896] 1 Q. B. 487; see also *Delombre* v. *Fouquault* (1909), 44 L. J. 263. It has been held under an old statute, now repealed, that, where the summons is left with someone for the defendant, it is sufficient to leave a copy of the summons if the original is shown to him (*R.* v. *Chandler* (1811), 14 East, 267); but the nature of the summons must be explained to the person with whom it is left (*R.* v. *Smith* (1875), L. R. 10 Q. B. 604): and service upon a person living in the building in which there is a shop belonging to the defendant, but in which the defendant does not himself reside, is insufficient (*R.* v. *Lilley, Ex parte Taylor* (1910), 75 J. P. 95). For examples of prescribed modes of service, see titles BASTARDY, Vol. II., p. 446; COMPANIES, Vol. V., p. 83; FOOD AND DRUGS, Vol. XV., pp. 30, 31; FRIENDLY SOCIETIES, Vol. XV., p. 191. Other special modes of service are prescribed by the Army Act, 1881 (44 & 45 Vict. c. 58), s. 145 (3); Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 9; and see Employers and Workmen Rules, 1886 (Stat. R. & O. Rev., Vol. XI., Summary Proceedings, England, p. 35), r. 2; Distress for Rates Act, 1849 (12 & 13 Vict. c. 14), s. 5; Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), ss. 39, 40. As to service under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), and the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), see *R.* v. *Mead*, [1894] 2 Q. B. 124, and *R.* v. *Mead*, [1898] 1 Q. B. 110.

(*d*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 1: and see as to proof of service by declaration, the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 41).

(*e*) See *Ex parte Fielding* (1861), 25 J. P. 759.

(*f*) As to execution of warrants, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 290 *et seq.*; as to backing of warrants, see *ibid.*, and p. 564, *ante*. The provisions of the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), relating to the execution and backing of warrants, are incorporated into the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c 43); see *ibid.*, s. 3.

(*g*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), ss. 2, 13. But *quære* if there is evidence that the defendant could not have received notice of the summons. If, in answer to a summons, the defendant has appeared by counsel, there is no obligation on him to appear personally, and the justices have no jurisdiction to issue a warrant on the ground that he should have appeared himself (*R.* v. *Thompson*, [1909] 2 K. B. 614); *R.* v. *Montgomery, Ex parte Long* (1910), 74 J. P. 110.

(*h*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), ss. 2, 13. The provision as to reasonable time should be observed by justices in order to give the defendant an opportunity of being heard (compare *R.* v. *Stafford (Borough) Justices* (1835), 5 Nev. & M. (K. B.) 94), but the justices are themselves the judges of what is a reasonable time (*Re Williams* (1851), 21 L. J. (M. C.) 46; *R.* v. *Smith* (1875), L. R. 10 Q. B. 604; *R.* v. *Cambridgeshire Justices* (1880), 44 J. P. 168).

(*i*) *Pickavance* v. *Pickavance*, [1901] P. 60.

SECT. 3.

SUB-SECT. 2.—*Warrant.*

Summons or Warrant.

Issue upon oath.

1243. The justices may also, if the matter of the information or complaint is substantiated upon oath, issue a warrant authorising the police to arrest the accused and bring him before the court to answer the charge (*j*).

Power to withdraw warrant.

1244. Where a warrant has been issued by a justice in the exercise of his judicial discretion, he appears to have power to withdraw it at any time before its execution, and to be liable to be compelled to do so where it is clear that the person against whom it is issued has committed no offence (*k*), but it would appear to be otherwise where the issue of a warrant is a purely ministerial act (*l*).

SECT. 4.—*The Hearing.*

Non-appearance of informant or complainant.

1245. If the informant or complainant does not appear upon the day named the case will in the ordinary course be dismissed (*m*), but the justices have power in their discretion to adjourn the hearing to some other day upon such terms as they think fit, and in such case they may in their discretion grant or refuse bail to the defendant (*n*).

Both parties present.

1246. If both parties are present the justices must proceed forthwith, subject to their powers of adjournment, to hear and determine the case (*o*).

Appearance by counsel.

1247. Both the informant or complainant and the defendant may appear in person or by their counsel or solicitor (*p*).

(*j*) As to the issue and indorsement of warrants, see p. 564, *ante*. In certain cases the accused may be arrested without warrant; for a recent example, see the Protection of Animals Act, 1911 (1 & 2 Geo. 5, c. 27), s. 12 (1) (this Act comes into force on 1st January, 1912); see, further, title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 296 *et seq.*, and for an example of a case where, in a great emergency, a superintendent of police may, by written order, give a constable an authority similar to a justice's warrant, see the Official Secrets Act, 1911 (1 & 2 Geo. 5, c. 28), s. 9.

(*k*) *R.* v. *Crossman, Ex parte Chetwynd* (1908), 98 L. T. 760; see Stone's Justices' Manual (1911), 930.

(*l*) *Barons* v. *Luscombe* (1835), 3 Ad. & El. 589.

(*m*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 13.

(*n*) *Ibid.* But the absence of the informant will not invalidate the decision of the justices if the defendant desires the hearing to proceed (*May* v. *Beeley*, [1910] 2 K. B. 722).

(*o*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 13. As to the power to adjourn, see p. 599, *post*.

(*p*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 12; see *R.* v. *Thompson*, [1909] 2 K. B. 614, and note (*g*), p. 595, *ante*. Where a solicitor is employed he must be admitted and enrolled and otherwise duly qualified to act within the meaning of the Solicitors Act, 1843 (6 & 7 Vict. c. 73); see *ibid.*, s. 3; and title SOLICITORS. A solicitor, if not authorised by the defendant, cannot bind the defendant by pleading guilty on his behalf, even where the defendant is an infant and he is authorised by the defendant's father (*R.* v. *Aves, R.* v. *Same* (1871), 24 L. T. 64). The following officials are specially authorised by statute to conduct certain proceedings before justices:—a factory inspector, with the written consent of a Secretary of State, in matters arising under the Factory Acts, or in the course of his duty as inspector (Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 120; see title FACTORIES AND SHOPS, Vol. XIV., p. 530); an officer or person employed or authorised by the Commissioners or Solicitor of Inland Revenue in revenue matters (Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 27; see title REVENUE); a clerk or other officer of a board of guardians on

SECT. 4. The Hearing.

Time and place of hearing.

1248. In the ordinary course the hearing will take place on the day named in the summons or upon a day named by the justices, after the defendant is arrested on their warrant, notice of which day must be given to the informant or complainant (*q*).

It must take place in open court (*r*) before one or more justices, as the circumstances may require (*s*).

Procedure.

1249. The first step at the hearing is to state to the defendant the substance of the information or complaint and ask him if he has any cause to show why he should not be convicted or have an order made against him (*t*).

Matters of defence.

Statutory exemption.

1250. The defendant is entitled to prove that he is protected by some exemption, exception, proviso, or condition in the statute on which the information or complaint is framed (*a*), or to set up a claim of right in any case where an interest in real property is involved (*b*).

Claim of right.

1251. A claim of right, if established, ousts the jurisdiction of justices altogether (*c*). If the claim is made *bonâ fide* it is not for the justices to inquire into all the circumstances to see if it is impossible (*d*), and if upon the consideration of admitted facts it is clear that the law will not admit of the claim their jurisdiction is not ousted (*e*); but if in order to decide whether a legal claim exists it is necessary to determine some disputed question of fact, or if it is not clear that the right claimed is impossible in law, their jurisdiction is ousted (*f*).

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behalf of the board (Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101) s. 68; see title POOR LAW); the clerk to any local authority for any local authority under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 259 (see title PUBLIC HEALTH AND LOCAL ADMINISTRATION); the clerk to a local education authority or a person appointed to carry out the compulsory bye-laws of a school on behalf of a local education authority (Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 85; Elementary Education Act, 1876 (39 & 40 Vict. c. 79), s. 38). In proceedings under the Elementary Education Acts, generally, any person may appear by any member of his family or any other person authorised by him in that behalf; see title EDUCATION, Vol. XII., p. 65. An informant or complainant, whether a public officer or a private person, has a right to examine and cross-examine witnesses, although he is not a barrister or solicitor (*Duncan* v. *Toms* (1887), 56 L. J. (M. C.) 81), but it is not desirable that a police officer should conduct a case (*Webb* v. *Catchlove* (1886), 50 J. P. 795); and see *Duncan* v. *Toms*, *supra*, and titles POLICE; SOLICITORS.

(*q*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 13.

(*r*) *Ibid.*, s. 12. Open court means a petty sessional court-house or an occasional court-house (Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 20 (2)); see pp. 565, 568, *ante*.

(*s*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 12; see p. 573, *ante*, and p. 600, *post*.

(*t*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 14.

(*a*) *Ibid.*; *Dunning* v. *Trainer* (1909), 73 J. P. 400.

(*b*) *R.* v. *Cridland* (1857), 7 E. & B. 853; and see cases cited below.

(*c*) As to the essentials of such a claim, see titles FISHERIES, Vol. XIV., p. 640; GAME, Vol. XV., p. 231; TRESPASS.

(*d*) *Scott* v. *Baring* (1895), 64 L. J. (M. C.) 200; see also *Croydon Rural District* v. *Cowley* (1909), 73 J. P. 205.

(*e*) *Arnold* v. *Morgan*, [1911] 2 K. B. 314, 322.

(*f*) *Ibid.*; see also *Hudson* v. *MacRae* (1863), 4 B. & S. 585; and, further, cases cited in title GAME, Vol. XV., p. 231.

SECT. 4. The Hearing.

Plea of *autrefois convict* or *autrefois acquit.*

1252. The defendant may also plead *autrefois convict* (*g*) or *autrefois acquit* (*h*) if the same act of his has already been the subject of proceedings (*i*), but if on the previous occasion the information or complaint was dismissed merely upon a point of form and not adjudicated upon, the plea will not avail (*k*).

The plea of *autrefois acquit* cannot be set up in addition to a plea of not guilty (*l*).

Judgment when no defence shown.

1253. If the defendant can show no cause or no sufficient cause the justices will forthwith give judgment against him accordingly (*a*), but if he disputes the truth of the facts alleged against him the justices will proceed to hear the case (*b*).

Hearing the parties and the evidence.

1254. The justices will hear the informant or complainant and his witnesses, and then the defendant and his witnesses, after which they will hear any evidence brought by the informant or complainant in reply if the defendant has examined any witnesses or given any evidence on any point other than his general character (*c*). They have the same power as a judge of the High Court to call or examine witnesses themselves or to allow or disallow questions put to a witness by or on behalf of the parties (*d*).

Witnesses.

1255. All witnesses must be examined upon oath or affirmation, which the justices have full power to administer (*e*). The attendance of a reluctant witness may be secured by compulsory means (*f*), and

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(*g*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 356. A conviction for offences punishable summarily is a bar to proceedings upon indictment on the same facts (*R.* v. *Walker* (1843), 2 Mood. & R. 446; *R.* v. *Miles* (1890), 24 Q. B. D. 423, C. C. R.), but if, after a summary conviction, the act of the defendant results in further consequences calling for a more serious charge, the summary conviction is no bar to such a charge being brought (*R.* v. *Morris* (1867), L. R. 1 C. C. R. 90; *R.* v. *Friel* (1890), 17 Cox, C. C. 325).

(*h*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 356; *R.* v. *Elrington* (1861), 1 B. & S. 688. If an information is dismissed by justices who are equally divided, the dismissal is a bar to a fresh information on the same facts (*Kinnis* v. *Graves* (1898), 67 L. J. (Q. B.) 583). As to the certificate of dismissal, see p. 601, *post.*

(*i*) The test is whether the same evidence would be required on both occasions. If fresh evidence is adduced and the charge is different there is no bar (*Bollard* v. *Spring* (1887), 51 J. P. 501); and see title ESTOPPEL, Vol. XIII., pp. 356, 357. In bastardy matters, which are outside the operations of the Summary Jurisdiction Acts, a further summons on the same facts may be granted; see title BASTARDY, Vol. II., p. 445.

(*k*) *R.* v. *Ridgway* (1822), 5 B. & Ald. 527; *R.* v. *Harrington* (1864), 28 J. P. 485. So, too, where an information was laid by a person not entitled to lay it and dismissed, it was held no bar to an information subsequently laid by a qualified person (*Foster* v. *Hull* (1869), 20 L. T. 482).

(*l*) *R.* v. *Banks* (1911), 27 T. L. R. 575, C. C. A; see further hereon, *R.* v. *Norton* (*Stephen*) (1910), 45 L. J. 581.

(*a*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 14.

(*b*) *Ibid.*

(*c*) *Ibid.*; but they need not hear evidence which in their discretion they regard as immaterial (*R.* v. *Knight* (1897), 41 Sol. Jo. 276).

(*d*) Compare *Coulson* v. *Disborough*, [1894] 2 Q. B. 316, C. A.; and see Stone's Justices' Manual, 1911, p. 932; title EVIDENCE, Vol. XIII., p. 599.

(*e*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 15. As to the power of a justice to direct a prosecution for perjury, see Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), s. 9 (1) (this Act comes into force on 1st January, 1912).

(*f*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 7. A

the refusal without just excuse of a witness to answer questions relevant to the issue renders him liable to imprisonment on the issue of a warrant by a justice who is present (*g*).

Determination of matter.

1256. After hearing the evidence upon both sides and considering the whole matter, the justices will proceed to determine it, and either convict the defendant or make an order upon him, or else dismiss the information or complaint (*h*).

Ex parte proceedings.

1257. In some cases where, in the interests of the public, immediate action is required (*i*), power is given to justices to proceed *ex parte* without issuing either a summons or warrant (*k*), and no proceedings against a man personally, even in such cases, can be initiated without the issue of a summons or warrant (*l*).

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witness' attendance may be secured by the issue of a summons and of a warrant if the summons is disobeyed, or by the issue of a warrant in the first instance (Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 7). If the witness is out of the jurisdiction the means of compelling his attendance (see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 314, note (*m*)), prescribed by the Indictable Offences Act, 1848 (11 & 12 Vict. c. 43), may be adopted (Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 36). If the witness required is in Scotland his attendance may be secured in the same manner (Summary Jurisdiction (Process) Act, 1881 (44 & 45 Vict. c. 24), s. 4). A warrant will only be issued in the first instance upon sworn evidence that the witness is unlikely to attend without compulsion. It will be issued if a summons is disobeyed, upon proof that the summons was duly served (see p. 595, *ante*), and that a reasonable sum was paid or tendered to him for his costs and expenses. There is some doubt whether the powers given extend to securing the attendance of an unwilling informant or complainant (see Stone's Justices' Manual, 1911, pp. 40 *et seq.*). There is no power given to compel a witness to produce documents etc., and if these are required a Crown office *subpœna duces tecum* must be issued (see title EVIDENCE, Vol. XIII., pp. 579 *et seq.*); but a justice has power under the Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11), ss. 7, 10, to make an order for either of the parties before him to inspect and take copies of entries in bankers' books (*R.* v. *Kinghorn*, [1908] 2 K. B. 949; and see title BANKERS AND BANKING, Vol. I., pp. 644 *et seq.*). Powers to compel the attendance of witnesses are given to metropolitan police magistrates by the Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 22. There is no power to enable justices to take the evidence of a witness who is prevented by illness from attending the court (*Ex parte Kimbolton* (*Inhabitants*) (1861), 25 J. P. 759), and the provision of the Criminal Law Amendment Act, 1867 (30 & 31 Vict. c. 35), with regard to the taking of dying declarations applies only in the case of indictable offences. As to the duty of a magistrate under the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 17, to attend at the residence of and to take depositions of a witness who is seriously ill, and unable to attend the hearing, see *R.* v. *Bros, Ex parte Hardy*, [1911] 1 K. B. 159. As to dying declarations, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 393 *et seq.*

(*g*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 7. The justice must be one having jurisdiction at the place of hearing, and the period of imprisonment must not exceed seven days (*ibid.*); see *R.* v. *Flavell* (1884), 14 Q. B. D. 364. A witness is not bound to answer questions which are reasonably likely to incriminate him; see title EVIDENCE, Vol. XIII., pp. 574 *et seq.*

(*h*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 14.

(*i*) *Gill* v. *Bright* (1871), 41 L. J. (M. C.) 22; *Ex parte Francis*, [1903] 1 K. B. 275; compare *R.* v. *Cheshire Lines Committee* (1873), L. R. 8 Q. B. 344.

(*k*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 1; see the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 116, 117; *White* v. *Redfern* (1879), 5 Q. B. D. 15; *Thomas* v. *Van Os*, [1900] 2 Q. B. 448.

(*l*) *Waye* v. *Thompson* (1885), 15 Q. B. D. 342.

SECT. 4.
The Hearing.

Adjournment.

Time and place to be stated.

1258. The justices or a justice have power to adjourn the hearing of a case, whether before the hearing is begun or at any time after it has been begun and before it is finally determined (*m*). The adjournment may be for any length of time; but should it be for such an unreasonable period as would in effect amount to the justices declining jurisdiction, the High Court will interfere so as to get the matter determined (*n*). The time and place at which the hearing is to be resumed must be stated in the presence and hearing of the parties or the persons representing them (*o*).

Bail.

The justices may in their discretion permit the defendant to be at large, either with or without bail, or order him to be kept in custody during the interval (*p*).

Non-appearance after adjournment.

If either or both of the parties fails or fail to appear personally or by his or their representatives at the time and place appointed for the resumed hearing, the justices may proceed with the hearing in their absence (*q*); and if the informant or complainant is the party failing to appear, the justices may dismiss the information or complaint with or without costs as they think fit (*r*).

Adjournment to petty sessions.

If the court before which the defendant appears is not a petty sessional court, the justice or justices present may adjourn the hearing to the next practicable sitting of a petty sessional court (*s*).

Same justices to act throughout.

1259. Where the matter is one requiring the presence of two or more justices, two at least of the justices composing the court must have been present and acting together during the whole of the hearing and determination of the case (*a*).

The same principle applies where the matter is one which can be heard by one justice or where the court is composed of an alderman of the City of London or metropolitan police magistrate or other stipendiary (*b*).

But the justice who issued the warrant or summons need not be present at the hearing (*c*), and neither his death nor the fact that he has ceased to hold office invalidates the warrant or summons (*d*).

(*m*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 16; see also *ibid.*, ss. 9, 13, and p. 596, *ante*.

(*n*) *R.* v. *Southampton Justices, Ex parte Lebern* (1907), 96 L. T. 697. The justices may exercise their discretion in granting a long adjournment when in their opinion it is in the interests of justice to do so (*ibid.*; *R.* v. *Smith* (1894), *Times*, 29th January); compare *R.* v. *Monaghan Justices* (1911), 45 I. L. T. 10. Even in cases in which the statute creating an offence gives no power of adjournment, the powers given by the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), are available (*Gelen* v. *Hall* (1857), 2 H. & N. 379). The defendant has no right to have the proceedings adjourned in order for him to obtain a solicitor or counsel to defend him (*R.* v. *Lipscombe, Ex parte Biggins* (1862), 26 J. P. 244; *R.* v. *Cambridgeshire Justices* (1880), 44 J. P. 168), but justices will usually exercise their discretion in favour of such an adjournment.

(*o*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 16.

(*p*) *Ibid.*

(*q*) *Ibid.*

(*r*) *Ibid.*

(*s*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 20 (11); see p. 565, *ante*.

(*a*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 29. This applies to every hearing, not merely to an adjourned hearing.

(*b*) Compare *Re Guerin* (1888), 58 L. J. (M. C.) 42.

(*c*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 29.

(*d*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 37.

Where the justice or justices before whom the hearing is begun is or are unable to proceed with the hearing, it is sufficient if the witnesses are resworn before the new court and the evidence already given by them is read over to them and assented to by them (*e*).

Decision of the justices, how determined.

1260. The decision of the justices is determined by the votes of the majority, the chairman having the same right to vote as the other justices present, but having no casting vote (*f*). Where the justices are equally divided the case should be adjourned and reheard by a reconstituted court (*g*). They are entitled to take time or to adjourn before delivering their decision (*h*), which is not irrevocable, at all events in the case of a conviction, until the conviction is actually drawn up (*a*).

Postponement of decision.

Where two informations are laid against the same defendant the justices may postpone the announcement of their decision on the first information until after they have heard the second, but only on condition that they apply the evidence in each case to that case alone (*b*).

Certificate of conviction.

1261. If the justices convict the defendant or make an order against him it is their duty to furnish a minute or memorandum thereof (*c*) and to draw up the conviction or order in proper form under their hand and seal (*d*).

Certificate of acquittal.

If they dismiss the information or complaint they may, if they

(*e*) *Ex parte Bottomley*, [1909] 2 K. B. 14; *Re Guerin* (1888), 58 L. J. (M. C.) 42; *R.* v. *Smith* (1817), 2 Stark. 208; *R.* v. *Jeffreys* (1870), 22 L. T. 786. In *Ex parte Bottomley, supra*, a criminal inquiry for an indictable offence was held before an alderman of the City of London, who fell ill during the proceedings, and the inquiry was continued before another alderman. The course there pursued was for some of the witnesses, who had been called before the alderman who began the hearing, to be recalled. This may be justified on the grounds that all that is required at such an inquiry is to satisfy the magistrate of the existence of a *primâ facie* case on which he could commit the defendant for trial if he deemed fit, and that no injustice is done to the defendant, as he already has notice of all the evidence which will be called against him at the trial(compare *Re Guerin, supra*). But where the matter is being dealt with summarily, it is presumed that it will be necessary to recall and reswear all the witnesses.

(*f*) Stone's Justices' Manual, 1911, p. 947.

(*g*) *Bagg* v. *Colquhoun*, [1904] 1 K. B. 554; see *R.* v. *Ashplant* (1888), 52 J. P. 474; *Ex parte Evans*, [1894] A. C. 16. If, however, the justices do not adjourn the hearing, the information or complaint must be dismissed (*R.* v. *Ashplant, supra*); see also *Kinnis* v. *Graves* (1898), 67 L. J. (Q. B.) 583.

(*h*) See p. 599, *ante*.

(*a*) *Jones* v. *Williams* (1877), 36 L. T. 559, *per* LINDLEY, J., at p. 560. It is presumed, however, that if the justices announce that they have dismissed a case they cannot reverse their decision. Alteration, if it takes place at all, must take place before the end of the sitting of the court; compare p. 641, *post*. As to the subsequent increase of a fine to justify a longer term of imprisonment in default of payment, see *M'Rory* v. *Findlay* (1911), 48 Sc. L. R. 314.

(*b*) *R.* v. *Fry, Ex parte Master* (1898), 67 L. J. (Q. B.) 712; *Hamilton* v. *Walker*, [1892] 2 Q. B. 25.

(*c*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 14. No fee is chargeable for this (*ibid.*). The defendant must be served with a copy before a warrant of commitment or distress is issued against him (*ibid.*, s. 17).

(*d*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 14. The conviction or order may be on paper or parchment (*ibid.*, s. 17), and must be signed by two justices where it is required that two justices should hear the case, but the signature of two is sufficient where more than two have heard the case (see Home Office circular of 25th June, 1896). If the

SECT. 4. The Hearing.

think fit and are required to do so, make an order of dismissal and furnish the defendant with a certificate thereof (*e*).

Filing of certificate.

Certificates of conviction or dismissal must be transmitted to, and filed by, the clerk of the peace (*f*).

SECT. 5.—*Judgment.*

Imprisonment.

1262. In the event of the justices deciding against the defendant they have power to commit him to prison (*g*) in all cases in which the statute giving occasion for the information or complaint authorises imprisonment either in the first instance (*h*) or in default of his doing any act (*i*) or paying any sum of money (*j*) which the justices have ordered him to do or pay.

Default of distress.

The justices may also commit him to prison in all cases other than proceedings for the recovery of civil debts, where, a warrant of distress having been issued by them, there is default of distress (*k*).

Fine in lieu of imprisonment.

1263. In every case where imprisonment is prescribed by statute in the first instance they may in their discretion inflict a fine in lieu thereof (*l*); but the amount of such fine must not exceed £25 nor render the defendant liable, in default of payment, to a greater term of imprisonment than he would have been liable to by the statute under which he was convicted (*m*).

Reduction of prescribed punishment.

They have also power in their discretion to reduce the term of imprisonment prescribed by statute in any case, or to impose the same without hard labour if that is prescribed, or to mitigate punishment in both these ways (*n*).

Consecutive terms of imprisonment.

1264. Where a defendant whom the justices have convicted is already in prison they have power to make an order, and embody it in the warrant of commitment addressed to the gaoler, directing that the term of imprisonment which they impose shall commence at the expiration of the term which the defendant is then serving (*o*).

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statute on which it was founded was passed since the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), and contains a form of conviction or order, that form must be adopted; otherwise the forms given in the schedule to the Summary Jurisdiction Rules, 1886 (Stat. R. & O. Rev., Vol. XI., Summary Proceedings, England, pp. 1 *et seq.*), should be employed.

(*e*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 14. Although placed within the discretion of justices it appears from *ibid.*, s. 18, that, in all cases where costs are given, an order of dismissal is required. The certificate is evidence without further proof of the dismissal, and is a bar to other proceedings (*ibid.*, s. 14; and see p. 598, *ante*).

(*f*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 14; Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 27 (6).

(*g*) As to prisons generally, see title PRISONS.

(*h*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 24.

(*i*) *Ibid.*

(*j*) *Ibid.*, s. 23.

(*k*) *Ibid.*, ss. 21, 22; see the Stipendiary Magistrates Act, 1858 (21 & 22 Vict. c. 73), s. 5. As to the scale of imprisonment, see p. 604, *post;* and as to distress generally, see title DISTRESS, Vol. XI., pp. 221 *et seq.*

(*l*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 4.

(*m*) *Ibid.* As to scale of imprisonment, see p. 604, *post.*

(*n*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 4. But this power to mitigate punishment does not apply to any proceedings taken under any Act relating to the regular or auxiliary forces of the Crown (*ibid.*, s. 52; and see title ROYAL FORCES).

(*o*) Summary Jurisdiction Act. 1848 (11 & 12 Vict. c. 43), s. 25.

They also have power, in the case of a defendant whom they have convicted at one time of several distinct offences, to make an order directing that the terms of imprisonment imposed in regard to the respective offences shall run consecutively (*p*); but they may not inflict more than two sentences to run consecutively (*q*), and where the defendant is convicted of more than one assault committed on the same occasion the terms of imprisonment imposed by the justices must not in the aggregate exceed six months (*r*).

Limit in cases of assault.

1265. Where the justices decide to impose a pecuniary penalty the sum adjudged must be paid at once unless they make a further order in regard to it. But they have power to direct payment to be made at such time or times, in one sum or by instalments, and in such place or places, and to such person or persons as they may specify, and to permit the person liable to pay the money to give security with or without sureties for its payment (*s*).

Fine.

Time and mode of payment.

Where a specified sum is prescribed by statute as the penalty for an offence they may reduce the amount if imposed in respect of a first offence (*t*), but not otherwise (*u*).

Reduction of penalty.

1266. Justices have also power in their discretion to award to either party, if successful, such costs as seem to them just and reasonable (*a*). The amount so awarded should be specified in the conviction or order of dismissal, and is recoverable from the

Award of costs on dismissal or conviction.

(*p*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 25; *R.* v. *Cutbush* (1867), L. R. 2 Q. B. 379. Where two penalties are imposed, one of a term of imprisonment and the other of a fine with imprisonment in default of payment, the justices should direct the term of imprisonment in default of payment to commence at the end of the other punishment in order to afford time for collection of the money required to pay the fine (Home Office circular, 21st February, 1898).

(*q*) *R.* v. *Martin*, [1911] 2 K. B. 450.

(*r*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 18. This provision does not, however, apply to imprisonment in default of finding securities (*ibid.*); see p. 607, *post;* see further hereon Home Office Circular, 28th June, 1911, 131 L. T. Jo. 225.

(*s*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 7. If default is made in the payment of any instalment the same proceedings may be taken as if default had been made in payment of all the instalments remaining unpaid (*ibid.*). The person to whom payment is ordered to be made, if not the clerk to the justices, must pay the amount over to the clerk to the justices as soon as may be and account for it to him (*ibid.*).

(*t*) *Ibid.*, s. 4. Where, however, by a statute passed since the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), it is provided that not less than a minimum sum shall be imposed for a first offence, the justices have no power to reduce the penalty below that sum (*Osborn* v. *Wood Brothers*, [1897] 1 Q. B. 197); and where the statute prescribing the amount exists in order to carry into effect a treaty or convention with a foreign State in which there is a stipulation for a fine of a minimum amount, they cannot reduce that amount (Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 54).

(*u*) For this purpose the fact that the defendant's first conviction is not stated in the information or summons is immaterial if the fact is proved (*Murray* v. *Thompson* (1888), 22 Q. B. D. 142).

(*a*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 18. But, in cases where the penalty imposed does not exceed 5*s.*, costs are not to be given against the defendant unless the justices so expressly order. The fees payable by an informant are to be remitted to him unless the justices expressly counter-order the remission, and the fine may be paid wholly or in part to him at the discretion of the justices (Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 8).

SECT. 5. Judgment.

defendant in the same manner as any penalty imposed by them is recoverable, and, where any such penalty is imposed, then by the same warrants and at the same time as the penalty itself (*b*). From the informant or complainant it is recoverable in the same manner as if the sum were a civil debt (*c*).

Amount ordered to be paid includes costs.

1267. The sum adjudged to be paid by a conviction or order includes the costs if the amount of the latter is ascertained by the conviction or order (*d*); and where the conviction or order does not impose a fine the costs, if ascertained, may be recorded as a sum adjudged to be paid (*e*).

Enforcement of order by distress or imprisonment.

1268. If the payment is not made as directed justices have power to issue a warrant authorising distress of the defendant's goods (*f*) or a warrant committing him to prison (*g*). The term of imprisonment which may be inflicted in default of payment of the sum adjudged or of distress is limited by scale (*h*).

Term of imprisonment.

A person sentenced to imprisonment for default in payment is entitled to be discharged upon payment to the keeper of the prison (*i*) of the sum due and the costs and expenses mentioned in the commitment (*k*); and if he pays part of the sum due and costs he is entitled to remission of such part of the term of imprisonment as is proportionate to the part of the sum paid (*l*).

(*b*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 18; see the text and notes, *infra*.

(*c*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 18, 26; Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 47; see also *ibid.*, s. 35; *R.* v. *London* (*Lord Mayor*), *Ex parte Boaler*, [1893] 2 Q. B. 146; and see p. 609, *post*.

(*d*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 49.

(*e*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 24.

(*f*) *Ibid.*, s. 19. As to procedure on distress warrants, see title DISTRESS, Vol. XI., pp. 221 *et seq.*

(*g*) This in effect gives the defendant the option of a fine or imprisonment. The warrant may be issued either in default of distress or where the statute directs commitment in case of non-payment, or where imprisonment would be less injurious than distress (Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), ss. 21—23; title DISTRESS, Vol. XI., p. 223).

(*h*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 5. The scale is as follows:—

Amount adjudged to be paid.	Imprisonment.
Not exceeding 10*s*.	Not exceeding 7 days.
Exceeding 10*s*. but not exceeding £1	,, ,, 14 ,,
,, £1 ,, ,, £5	,, ,, 1 month.
,, £5 ,, ,, £20	,, ,, 2 months.
Exceeding £20	,, ,, 3 ,,

The imprisonment is to be without hard labour, except where that is authorised by the statute under which the defendant is convicted, and then only if the justices think fit, and the term awarded does not exceed that authorised by the statute (*ibid.*). In proceedings under Revenue Acts, where the sum to be paid exceeds £50, the period of imprisonment in default may exceed three months, but must not exceed six (*ibid.*, s. 53).

(*i*) See title PRISONS.

(*k*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 28.

(*l*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 21 (4); Prison Act, 1898 (61 & 62 Vict. c. 41), s. 9. The same result will follow by application of the proceeds of distress; see title DISTRESS, Vol. XI., p. 223. The person to whom the defendant makes the payment must pay over the amount to the clerk to the justices upon whose warrant the defendant is committed (Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 31);

SECT. 5.
Judgment.

Other orders.

Nominal penalties.

1269. If the justices find that the charge made against a defendant is proved, but that the circumstances of the case render it expedient to impose no penalty at all or merely a nominal one, they need not proceed to a conviction, but may instead dismiss the charge or information, or discharge the defendant conditionally on his giving security with or without sureties to be of good behaviour and to appear for conviction and sentence when called on at any time during a period, not exceeding three years, to be named in the order (*m*).

Damages for injury or compensation for loss.

They may also in such circumstances make an order for the payment by the defendant of damages for injury or compensation for loss not exceeding £10, and of such costs as they deem reasonable (*n*).

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and see further, p. 603, *ante;* and title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 413, 425.

(*m*) Probation of Offenders Act, 1907 (7 Edw. 7, c. 17), s. 1 (1). The circumstances which they may take into consideration are the character, antecedents, age, health, or mental condition of the defendant, or the trivial nature of the offence, or the extenuating circumstamces, if any, under which the offence was committed; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 413, 425. There is some doubt as to whether the provision applies to the case of an adult who could not have been tried by the justices if he had not pleaded guilty; compare the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 16 (repealed by the Probation of Offenders Act, 1907 (7 Edw. 7, c. 17)). The conditions under which the defendant may be discharged are to be delivered in writing to the defendant (*ibid.*, s. 2 (3)). Among them is one for the supervision of the probation officer (*ibid.*, s. 2 (1)).

Probation officers may be appointed for each petty sessional division in the same manner as clerks to justices are appointed (*ibid.*, s. 3 (1); see p. 611, *post*), and receive the salary fixed by the authority which appoints them. The authority may relieve them of their office (Probation of Offenders Act, 1907 (7 Edw. 7, c. 17), s. 3 (4), (6)). The person specified for supervision of a case is ordinarily to be one of the probation officers appointed for the petty sessional division in which the justices act (*ibid.*, s. 3 (3) (a)); but if they think it expedient the justices may appoint an officer from another petty sessional division, or a person who is not a probation officer at all (*ibid.*). Special probation officers are appointed for children and act in cases where the defendant is under sixteen years of age (*ibid.*, s. 3 (2)).

The duties of a probation officer are defined as being: (1) to visit or receive reports from each person under his supervision at reasonable intervals as stated in the order, or as he may think fit; (2) to see that the conditions imposed are observed; (3) to report to the court on the behaviour of persons under their supervision; (4) to advise, assist, befriend, and, when necessary, to find suitable employment for persons under their supervision (*ibid.*, s. 4). The City of London and each metropolitan police court district are regarded as separate petty sessional divisions for this purpose (*ibid.*, s. 3 (7)).

Other conditions which the justices may impose are: (1) a prohibition from associating with thieves and other undesirable persons; (2) abstention from intoxicating liquor, where the offence charged was due to drink see *R.* v. *Davies*, [1909] 1 K. B. 892); (3) generally for securing that the defendant should lead an honest and industrious life (Probation of Offenders Act, 1907 (7 Edw. 7, c. 17), s. 2 (2)). The extent of the power conferred by this provision is as yet undefined. The conditions may be varied, or the recognisance on which they are imposed discharged by the justices, as they think fit (*ibid.*, s. 5). As to the power of quarter sessions to sentence a prisoner on breach of condition, see *R.* v. *Spratling*, [1911] 1 K. B. 77.

(*n*) Probation of Offenders Act, 1907 (7 Edw. 7, c. 17), s. 1 (3). If the statute under which the offence is charged permits of higher damages being

SECT. 5.
Judgment.

Restitution orders: property in possession of police;

1270. The justices have power to direct the delivery of property of any kind, which has come into the possession of the police in connection with any criminal charge, to the person who appears to them to be the owner of it, on the application of the person claiming it or of the police themselves (*o*). If the owner cannot be ascertained, the justices may make such order as they think fit (*p*), but property left in the hands of the police cannot be sold and the money appropriated for a year (*q*). Any person claiming to be the true owner can take proceedings for the recovery of property, dealt with by an order of the justices, from the person in whose possession it is, at any time within six months from the date of the order (*a*).

property not in possession of police.

1271. Property which has not passed into the possession of the police (*b*) may be the subject of an order of restitution by justices if it has been stolen, or, in certain circumstances, if it has been obtained by false pretences (*c*).

Return of property to defendant.

1272. Where the justices have before them a report of the police giving particulars of the property taken from the defendant they may direct the return of the property, or of any portion of it, to him, or to any other person named by him, if they are of opinion that the

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paid, the amount specified in the statute may be allowed by the justices (Probation of Offenders Act, 1907 (7 Edw. 7, c. 17), s. 1 (3)). As to ordering payment by the parent or guardian in the case of a person under sixteen, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 424; and generally as to proceedings against children and young persons, juvenile courts, and evidence in relation thereto, see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 315, note (*n*), 328, 362 *et seq.*, 377 *et seq.*, 422 *et seq.*; EVIDENCE, Vol. XIII., p. 569; INFANTS AND CHILDREN, Vol. XVII., pp. 170 *et seq.*, 176 *et seq.*

(*o*) Police (Property) Act, 1897 (60 & 61 Vict. c. 30), s. 1 (1). It includes property coming into the hands of the police from a pawnbroker who suspects that it is stolen property (see Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 34, and title PAWNS AND PLEDGES), or, in the Metropolitan Police District, from any person who suspects that it is stolen property (see Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 66; City Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 48; and title POLICE), or, in the case of any person arrested without a warrant, under the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 103. The power may be exercised by one justice. As to the powers of a metropolitan police magistrate, see p. 577, *ante*,

(*p*) Police (Property) Act, 1897 (60 & 61 Vict. c. 30), s. 1 (1).

(*q*) *Ibid.*, s. 2 (3). If the property is perishable or inconvenient to keep it may be sold, but the proceeds must be kept till the period of a year is complete (*ibid.*).

(*a*) *Ibid.*, s. 1 (2). The right ceases by statute after the six months (*ibid.*).

(*b*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 100; see the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 27 (3). But this does not apply where the offence is one against the Larceny Act, 1901 (1 Edw. 7, c. 10) (see *R.* v. *Brockwell* (1905), 69 J. P. 376), nor to current coin which is passed as such, unless in the possession of the thief, or, as in the case of a £5 gold piece, kept, not as a coin, but as a curiosity (*Moss* v. *Hancock*, [1899] 2 Q. B. 111). The order may be either for the restitution of the goods or of their proceeds, but not of both (*R.* v. *London County Justices, Ex parte Dettmer & Co.* (1908), 72 J. P. 513). See, further, title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 684 *et seq.*

(*c*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 701, 702; and *Ranson* v. *Platt*, [1911] 2 K. B. 291. As to the special powers of metropolitan police magistrates, see pp. 576, 577, *ante*.

interests of justice and the safe custody of the defendant himself are not endangered thereby (*d*); but the order must be made while the defendant is before the court and not after conviction (*e*).

SECT. 6.—*Recognisances.*

To keep the peace.

1273. The justices may order any person to enter into a recognisance and find securities to keep the peace or to be of good behaviour towards the person applying to them for such order (*f*), or generally (*g*), but the person against whom it is sought to obtain the order must be brought before the justices upon a complaint, when the facts are ascertained and the case decided in the same manner as any other complaint under the Summary Jurisdiction Acts (*h*). If the justices make such an order and the defendant fail to comply with it, he may be imprisoned (*i*).

On adjournments or appeals.

1274. In the exercise of their summary jurisdiction powers justices may require a defendant to enter into a recognisance with or without sureties for his appearance, on any adjournment of the hearing, whether made in the ordinary course of the hearing or on account of variance in the information, complaint, summons, or warrant, and the evidence adduced, or on account of the non-appearance of the informant or complainant, or on appeal to quarter sessions, or by special case (*k*).

Dispensing with defendant's recognisance.

1275. On the other hand, they may dispense with any statutory requirement as to the defendant entering into a recognisance and finding sureties for keeping the peace or performing any other condition, whether the punishment specified by statute is imprisonment or a fine (*l*); and where a defendant has been committed to prison in default of finding sureties they may dispense with the sureties or reduce the amount in which they are bound, or use their

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(*d*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 44. The power may be exercised by one justice.

(*e*) *R.* v. *D'Eyncourt* (1888), 21 Q. B. D. 109.

(*f*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 25. The powers given may be exercised by one justice, or by a court of summary jurisdiction, whether a petty sessional court or not.

(*g*) Probation of Offenders Act, 1907 (7 Edw. 7, c. 17); see p. 605, *ante*. The order may be made, although the date fixed for the proceeding which threatened to cause a breach of the peace, has passed (*R.* v. *Little, Ex parte Wise* (1910) 74 J. P. 7).

(*h*) Summary Jurisdiction Act, 1879 (42 & 43 Vict, c. 49), s. 25. The former practice of granting an order on the oath of the informant, in a manner similar to that in which articles of the peace are ordered by quarter sessions (see p. 633, *post*), is abolished by this provision.

(*i*) If a defendant in default of compliance is brought before a court of petty sessions, he may be sentenced to six months' imprisonment, but if before a single justice only, or justices in a court of summary jurisdiction which is not a petty sessional court, then to fourteen days only.

(*k*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), ss. 3, 9, 13, 16; Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), ss. 20 (11), 31, 38; Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 3, If entered into under the last Act they must be forwarded for enforcement to the clerk of the peace (*ibid.*, s. 13), but if under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), they need not be so transmitted except where a person seeking to put in force a recognisance to keep the peace or be of good behaviour so requires it by notice in writing (*ibid.*, s. 9 (3)).

(*l*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 4.

SECT. 6. Recognisances.

discretion in dealing otherwise with the case, if upon inquiry into the case and upon the production of new evidence they think right so to do (*m*).

Amount. Before whom entered into.

1276. The amount in which the principal and sureties are to be bound must be fixed by the justices, but the recognisances may be actually entered into before any other justice or justices, or before a clerk to justices, or before a superintendent or inspector of police or their equal in rank, or the officer in charge of a police station, or, where any of the parties is in prison, before the governor or keeper of the prison (*n*).

Forfeiture of recognisance. Distress.

1277. If the justices, in relation to proceedings before whom the recognisance was ordered, consider it to be forfeited they may declare it to be forfeited and enforce payment by distress (*o*); but at any time before a sale is effected of the goods distrained they may cancel or mitigate the forfeiture upon the defendant's application, and upon his giving security to their satisfaction for the future performance of the conditions required, and for the payment of the costs incurred by the forfeiture, or upon such other conditions as they think fit (*p*).

Imprisonment.

If the justices are satisfied by information on oath that a person whom they have caused to enter into a recognisance under the Probation of Offenders Act, 1907 (*a*), has failed to observe any of the conditions imposed on him, they may secure his attendance before them by warrant or summons, and, on being satisfied of his default, may convict and sentence him forthwith for his original offence without further proof of his guilt (*a*). If the person in default is under twelve years of age they may order him to be sent to a certified industrial school (*b*).

(*m*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49) s. 26. The mode of application for such variation of the conditions is an application for a summons requiring the complainant to show cause to the contrary (Summary Jurisdiction Rules, 1886, r. 17).

(*n*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 42. The governor of a prison is not required to accept any surety unless he receives a certificate from the justices or their clerk that the proposed surety is able, if required, to pay the amount in which he is to be bound (Summary Jurisdiction Rules, 1886, r. 13; see note (*l*), p. 616, *post*).

(*o*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 9 (2). Forfeited sums are to be paid to the clerk to the justices and dealt with by him in the same manner as unappropriated fines (*ibid.*, s. 9 (4); see p. 603, *ante*, and p. 615, *post*). As to procedure on distress, see title DISTRESS, Vol. XI., pp. 221 *et seq.*

If the principal commits any offence which is in law a breach of the conditions of the recognisance the justices may by conviction declare the recognisance forfeited and require payment by the principal and sureties of the sums for which they are bound (Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 9 (2)).

(*p*) *Ibid.*, s. 9 (1).

(*a*) 7 Edw. 7, c. 17, s. 6 (1), (5). If brought in the first instance before a court of summary jurisdiction other than the one making the order the court may remand him, in custody or in bail, to the court which made the order (*ibid.*, s. 6 (2), (3), (4)).

(*b*) *Ibid.*, s. 6 (4); see the Children Act, 1908 (8 Edw. 7, c. 63), s. 57; and title EDUCATION, Vol. XII., p. 71. As to ordering a parent or guardian to give security, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 424; and as to binding persons under sixteen, see *ibid.*, p. 425.

SECT. 6. Recognisances.

Security for payment or money etc.

1278. The justices may accept security from a party before them for the payment of a sum of money or of an instalment thereof (*c*), or for the due performance of the conditions of a recognisance (*d*), or for the prosecution of an appeal to quarter sessions (*e*). Such security, whether given by a principal or surety, may be given by the deposit of money with the clerk to the justices, or by an oral or written acknowledgment of the undertaking or conditions by which, and the sum for which, the party is bound (*f*).

Recovery of amount secured.

A sum due in pursuance of a security from a principal may be recovered in the same manner as a fine, if the security was given in regard to a sum adjudged payable by a conviction; or in the same manner as a civil debt, if the security was given for any other purpose (*g*). A sum due from a surety is recoverable in every case as a civil debt (*h*), and a sum paid by a surety on behalf of his principal may be recovered by him in the same manner (*i*).

SECT. 7.—*Recovery of Civil Debts.*

Definition of civil debt.

1279. A civil debt is a sum of money claimed to be due and recoverable in a court of summary jurisdiction upon complaint, and not upon information (*k*). Justices have power to entertain a complaint for a civil debt and to issue a summons thereon, but they may not issue a warrant for the apprehension of the defendant if he fails to appear (*l*). The summons must have either contained in it or annexed to it particulars of the sum claimed (*m*).

(*c*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 7 (3). Where security is so given the payment of the sum of money secured must be enforced by means of it instead of any other means (*ibid.*, s. 23 (5)).

(*d*) *Ibid.*, s. 9.

(*e*) *Ibid.*, s. 31 (3), (4).

(*f*) *Ibid.*, s. 23. The Summary Jurisdiction Rules, 1886, provide a form for a security (*ibid.*, r. 14), and contain regulations as to the duties of the clerk to the justices in regard to recording it and giving notice of forfeiture (*ibid.*, rr. 15, 16); see p. 616, *post.*

(*g*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 23 (3). As to such modes of recovery, see p. 604, *ante*, and the text, *infra.*

(*h*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 23 (2).

(*i*) *Ibid.*, s. 23 (4).

(*k*) *Ibid.*, s. 6. The words "and not upon information" mean that the term "civil debt" is confined to cases where a complaint is the proper mode of proceeding and to emphasise the exclusion of criminal matter from the provision (*R.* v. *Kerswill*, [1895] 1 Q. B. 1). No fine nor penalty for an offence, whether of a public or *quasi*-public character, can be recovered as a civil debt (*R.* v. *Paget* (1881), 8 Q. B. D. 151), but the fact that a particular statute provides that a debt due may be recovered as if it was a penalty under that Act does not constitute the debt anything but a civil matter (*R.* v. *Master* (1869), L. R. 4 Q. B. 285). Poor rates are not recoverable as a civil debt (*R.* v. *Price* (1880), 5 Q. B. D. 300; see *Seaman* v. *Burley*, [1896] 2 Q. B. 344, C. A.; and title RATES AND RATING), but a district rate is so recoverable (*Southwark and Vauxhall Water Co.* v. *Hampton Urban Council*, [1899] 1 Q. B. 273, C. A.), and so is a sum due for maintenance of a pauper relation (*Re Gamble*, [1899] 1 Q. B. 305; see title POOR LAW).

(*l*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 35 (1).

(*m*) Summary Jurisdiction Rules, 1886, r. 19.

SECT. 7. Recovery of Civil Debts.

Enforcement of order.

1280. If at the hearing the justices decide that the sum claimed is due they may make an order for the payment of it and of costs (*n*); but they cannot enforce their order by imprisonment in default of distress or otherwise unless the defendant either has or has had since the date of the order the means to pay the sum adjudged to be due and has neglected or refused or does neglect or refuse to pay it (*o*). In the case of such neglect or refusal the justices making the order, or any other justice having jurisdiction in the same area, may exercise the power of imprisonment given to a county court by the Debtors Act, 1869 (*p*); but before doing so a judgment summons must be issued and served on the defendant calling upon him to appear and be examined upon oath (*q*). At the hearing of the judgment summons the defendant may be called upon to give evidence (*r*), and any witness may be summoned to prove the means possessed by the defendant in the same manner as witnesses are summoned to give evidence on the hearing of a complaint (*s*). The hearing of the summons may be adjourned from time to time (*t*).

Commitment order.

1281. If after hearing the evidence adduced the justices determine to commit the defendant to prison, the order of commitment must bear the date of the day it is made (*a*), and must have indorsed on it the amount on payment of which the defendant will be discharged (*b*). That amount will include the costs, if any, given to the plaintiff for endeavouring to enforce the order (*c*).

Discharge of defendant on payment.

1282. The defendant is entitled to be discharged before commitment if he pays the prescribed amount to the officer holding the order (*d*), or after commitment on payment to the clerk to the justices who made the order, or to the governor of the prison (*e*).

(*n*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 35.

(*o*) *Ibid.*, s. 35 (2); see title DISTRESS, Vol. XI., p. 224.

(*p*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 35 (2); Debtors Act, 1869 (32 & 33 Vict. c. 62); and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 341 *et seq.*

(*q*) Summary Jurisdiction Rules, 1886, r. 20. The service must take place two clear days before the day appointed for the appearance of the defendant (*ibid.*, r. 23). It is to be served personally wherever practicable, but if it appears on oath that prompt personal service is for any reason impracticable, the court may make an order for substituted or other service as they think proper (*ibid.*, r. 21). The summons may be issued although no distress warrant is applied for, and its service, when made out of the jurisdiction of the court issuing it, may be proved by affidavit or solemn declaration (*ibid.*, r. 22).

(*r*) *Ibid.*, r. 20.

(*s*) *Ibid.*, r. 25.

(*t*) *Ibid.*, r. 24.

(*a*) *Ibid.*, r. 26.

(*b*) *Ibid.*, rr. 27, 28.

(*c*) *Ibid.*, r. 29; see the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5.

(*d*) Summary Jurisdiction Rules, 1886, r. 27. The officer must pay over the sum to the clerk to the justices (*ibid.*).

(*e*) *Ibid.*, r. 28. If payment is made to the governor of the prison (see title PRISONS), a sufficient amount must be added to cover the cost of transmission by post office order or otherwise to the clerk to the justices.

Part IX.—Procedure not under Summary Jurisdiction.

PART. IX. Procedure not under Summary Jurisdiction.

1283. The preliminary examination before justices of persons charged with the commission of indictable offences is regulated by the Indictable Offences Act, 1848 (*f*), and is dealt with elsewhere.

Preliminary examination in indictable cases.

Warrants or orders issued or made by justices in regard to the removal of paupers, and complaints or orders made to or by them with respect to lunatics, are excepted from the operation of summary jurisdiction procedure, and are dealt with elsewhere (*g*).

Paupers and lunatics.

Bastardy matters, also dealt with elsewhere, are similarly excepted (*h*), save as to the backing of warrants for the appearance of a putative father, the levying of sums to be paid under an order of justices, or imprisonment in default, and the conditions of appeal (*i*).

Bastardy orders.

Part X.—Clerks to Justices.

SECT. 1.—*In General.*

1284. A clerk is appointed for every petty sessional division of a county and for every borough having a separate commission of the peace (*k*).

Where appointed.

The appointment is made in counties by the justices acting in and for the petty sessional division (*l*), and in boroughs having a separate commission of the peace by the justices of the borough (*m*). In boroughs which have no separate commission the appointment is made by the justices acting in and for the petty sessional division of the county. A clerk cannot be appointed by the mayor and ex-mayor for borough business only (*n*).

By whom appointed.

Where special or petty sessions are usually held at more than one court-house or place in a petty sessional division, a separate clerk may be appointed in respect of each such place (*o*); and in any case the

More than one clerk in a division.

(*f*) 11 & 12 Vict. c. 42; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 311 *et seq.*

(*g*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 35; see titles LUNATICS AND PERSONS OF UNSOUND MIND, pp. 389 *et seq.*, *ante;* POOR LAW.

(*h*) See title BASTARDY, Vol. II., pp. 443 *et seq.*

(*i*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 35; Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 54. See title BASTARDY, Vol. II., pp. 443 *et seq.*

(*k*) Justices Clerks Act, 1877 (40 & 41 Vict. c. 43), s. 5; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 159; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 84.

(*l*) Justices Clerks Act, 1877 (40 & 41 Vict. c. 43), s. 5.

(*m*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 53), s. 159 (1).

(*n*) *Huntingdon Corporation* v. *Huntingdon County Council*, [1901] 2 K. B. 257; but the county justices may appoint a second clerk for the division which includes the borough (*ibid.*).

(*o*) Justices Clerks Act, 1877 (40 & 41 Vict. c. 43), s. 5 (1).

SECT. 1. In General.

appointment of more than one clerk may be authorised by the Secretary of State on the application of the local authority (*p*).

Qualification.

1285. The qualification required in the case of a clerk either to county or borough justices is that he must either (1) be a barrister of not less than fourteen years' standing, or (2) be a solicitor of the Supreme Court, or (3) have served not less than seven years as clerk to a stipendiary or police magistrate or to either a metropolitan or City of London police court (*q*). But exception is made in the case of one who has acted as, or as the assistant of, a justices' clerk for a period of fourteen years, if in the opinion of the justices making the appointment there are special circumstances which make his selection desirable (*r*).

Disqualifications.

1286. No clerk of the peace for a county or borough or his deputy or the partner of either may be appointed clerk to the justices of a petty sessional divison or of a borough within the county (*s*); and, in the case of a borough, no alderman nor councillor of a borough may be appointed clerk to the justices of the borough (*t*).

The office of justice and that of clerk to justices are incompatible (*a*).

A clerk to borough justices is forbidden under pain of a heavy penalty from being directly or indirectly employed or interested by himself, or his partner, or otherwise, in the prosecution of any offender committed for trial by the justices, for whom he acts as clerk, at any court of gaol delivery or quarter sessions (*b*).

There is no similar provision in regard to counties, but the practice of acting in such circumstances has been discountenanced (*c*).

Tenure of office.

1287. The clerks to justices both in counties and boroughs hold office during the pleasure of the justices (*d*). They may therefore be dismissed at any time (*e*), and upon dismissal have no claim to compensation for loss of their emoluments (*f*).

(*p*) Justices Clerks Act, 1877 (40 & 41 Vict. c. 43), s. 5 (4).

(*q*) *Ibid.*, s. 7.

(*r*) *Ibid.*

(*s*) Justices Clerks Act, 1877 (40 & 41 Vict. c. 43), s. 7; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 159 (2). Certain exceptions to this rule were made by these statutes in favour of persons already holding the office in 1877 and 1861 respectively.

(*t*) *Ibid.*, s. 159 (2).

(*a*) See p. 551, *ante*.

(*b*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 159 (3), (4), (5). The penalty is £100, half of which is payable to the person bringing the action to recover it. Where a clerk to the justices of a borough, which had no quarter sessions of its own, was in partnership with the holder of the office of clerk of the peace for the county, and by agreement with him received half the fees payable to the clerk of the peace, it was held, under the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), which the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), repeals and replaces, that the clerk had committed an offence (*R.* v. *Fox* (1859), 1 E. & E. 729).

(*c*) See *R.* v. *Bushell* (1888), 52 J. P. 136, *per* Lord COLERIDGE, C.J.

(*d*) Justices Clerks Act, 1877 (40 & 41 Vict. c. 43), s. 5; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 159 (1).

(*e*) *Ex parte Sandys* (1833), 4 B. & Ad. 863; *R.* v. *Fox* (1858), 8 E. & B. 939; *R.* v. *Bodmin Corporation*, [1892] 2 Q. B. 21.

(*f*) Criminal Justice Administration Act, 1851 (14 & 15 Vict. c. 55), s. 9.

SECT. 1.
In General.

Salary and fees.

1288. Every person holding the office of clerk to justices must be paid by salary (*g*); and the fees which were formerly payable to him are now collected by him and paid to the local authority (*h*).

(*g*) Justices' clerks were formerly paid by fees, but payment by salary became permissible in 1851 under the Criminal Justice Administration Act, 1851 (14 & 15 Vict. c. 55), s. 9, and compulsory in 1878 under the Justices Clerks Act, 1877 (40 & 41 Vict. c. 43), s. 2. The salary to be paid to a clerk is to include and to be deemed the remuneration for all business which he may by reason of his office be called on to perform (Criminal Justice Administration Act, 1851 (14 & 15 Vict. c. 55), s. 10). Under that Act certain classes of business might be excepted, but the exception was abolished by the Justices Clerks Act, 1877 (40 & 41 Vict. c. 43), s. 3, and the only business for which justices' clerks may receive fees for their own use is the giving copies of depositions (*ibid.*). The amount of the salary is to be determined or varied upon reconsideration by the Secretary of State upon the recommendation of the local authority (Criminal Justice Administration Act, 1851 (14 & 15 Vict. c. 55), s. 9; Justices Clerks Act, 1877 (40 & 41 Vict. c. 43), s. 2). The local authority, subject to the following exception, is the standing joint committee of the county council and quarter sessions (Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 30, 84): in the case of boroughs which had separate commissions of the peace before 1878 the borough council is the local authority (*Thetford Corporation* v. *Norfolk County Council*, [1898] 2 Q. B. 468, C. A.); but no order for the determination or variation of the salary may be made in the case of a borough without the approval, by a meeting of the borough justices, of the recommendation made by the council (Criminal Justice Administration Act, 1851 (14 & 15 Vict. c. 55), s. 9). Where no recommendation is made, the Secretary of State may fix the salary upon his own initiative (Justices Clerks Act, 1877 (40 & 41 Vict. c. 43), s. 2), except in the case of boroughs which have received a separate commission of the peace since the 1st February, 1878, in which case, in the absence of a recommendation by the council, it is presumed that the clerk to the justices would be entitled to claim the fees. The salary is payable, in the case of petty sessional divisions of a county, by the county council (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 84 (2)); and this includes boroughs which have no separate commission of the peace, but in which a court of petty sessions for the county is held (*Huntingdon Corporation* v. *Huntingdon County Council*, [1901] 2 K. B. 257); and see title LOCAL GOVERNMENT, p. 359, *ante*. In the case of boroughs having a court of quarter sessions it is payable out of the borough fund (Criminal Justice Administration Act, 1851 (14 & 15 Vict. c. 55), s. 9; see *Thetford Corporation* v. *Norfolk County Council, supra*, overruling *Ex parte Kent County Council and Dover Council, Ex parte Kent County Council and Sandwich Council*, [1891] 1 Q. B. 389, and *Re Herefordshire County Council and Leominster Borough Town Council, and Re Local Government Act*, 1888, [1895] 1 Q. B. 43); and see title LOCAL GOVERNMENT, pp. 319, 320, *ante*. County boroughs having no quarter sessions of their own are to contribute to the expenses of the petty sessions of the county (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 32); and see title LOCAL GOVERNMENT, p. 353, *ante*. The amount of the clerk's salary may, if it is thought fit, be made to vary according to the amount of business (Justices Clerks Act, 1877 (40 & 41 Vict. c. 43), s. 2; and see Home Office Circular, 16th December, 1901). As to the salary of the clerks of metropolitan police magistrates and stipendiary magistrates, see pp. 616, 617, *post*.

(*h*) Criminal Justice Administration Act, 1851 (14 & 15 Vict. c. 55), s. 11; Justices Clerks Act, 1877 (40 & 41 Vict. c. 43), s. 9. As to the local authority, see note (*g*), *supra*. The fees to be collected by the clerks to justices are those set out in a table of fees submitted by the local authority and approved by the Secretary of State, who has power to alter it, due regard, however, being had to the principle that the amount likely to be received in respect of them should be

SECT. 1. In General.

Penalty for demand of excessive fee.

Any clerk who demands a fee greater than that duly authorised (*i*) commits an offence for which he is liable to a penalty of £20 (*k*).

Recovery of fees where no order as to costs.

When there is no order of the justices as to costs the amount of the fees due to the clerk is a simple debt, payment of which is to be enforced in a county court against a prosecutor or informant who is personally liable (*l*).

Remission of fees.

The fees due to a clerk to justices may be remitted by the justices before whom the proceedings were had in regard to which the fees were payable (*m*). A record of fees so remitted is contained in the remitted fee book kept by the clerk (*n*).

Deputy.

1289. When any other person acts as the clerk to a court of summary jurisdiction he is to be deemed to act as the deputy of the clerk, and is to make a return to the clerk of all matters done by the court, and of all matters which the clerk of the court is required to enter in a register or otherwise to record (*o*).

Duties of clerk in general:

1290. The duties of a clerk to justices in every petty sessional division of a county comprise the duties of clerk of petty sessions, clerk of special sessions, and clerk of any justice or justices of the peace (*p*).

The duties of a clerk to justices in a borough having a separate commission of the peace are of a similar nature.

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equivalent to the amount to be paid by way of salary to the clerks (Justices Clerks Act, 1877 (40 & 41 Vict. c. 43), s. 8). Formerly the table of fees was settled by the justices at quarter sessions, subject to the approval of the justices of assize, or, in Middlesex, the Lord Chief Justice of England; compare Justices' Clerks' Fees Act, 1753 (26 Geo. 2, c. 14). The table of fees may be revised from time to time by the Secretary of State upon complaint that the amount received in respect of them is either more or less than equivalent to the clerk's salary. He may require a statement of fees actually received to be submitted to him by the local authority and a new table to be compiled by them; and in default of their complying with his requisition he may compile the revised table himself (Justices Clerks Act, 1877 (40 & 41 Vict. c. 43), s. 8).

(*i*) As to the authorised table of fees, see note (*h*), p. 613, *supra*.

(*k*) Justices' Clerks' Fees Act, 1753 (26 Geo. 2, c. 14), s. 2; Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 30. The penalty may be recovered by anyone who will sue for it, and the venue is local (*Lewis* v. *Davis* (1875), L. R. 10 Exch. 86, Ex. Ch.). Where, however, the extra fee is demanded by the clerk under a *bonâ fide* mistake of fact, he would appear not to be liable to the penalty (see *Bowman* v. *Blyth* (1856), 7 E. & B. 26).

(*l*) *Drew* v. *Harris* (1849), 14 J. P. 26; but where the person sued is not personally liable, as, for instance, a stationmaster who gives a person in charge for an offence committed at a railway station, and appears before the justices to give evidence but is not the prosecutor, payment cannot be enforced against him (*Reddish* v. *Hitchinor* (1878), 48 L. J. (M. C.) 31). It is no ground for enforcing an order on overseers for payment of money for fees due to a constable to show that the constable had already paid fees due to a clerk to justices and sought to reimburse himself (*Neithrop Overseers* v. *Whidcoat* (1863), 9 L. T. 383).

(*m*) Criminal Justice Administration Act, 1851 (14 & 15 Vict. c. 55), s.12.

(*n*) Summary Jurisdiction Rules, 1886, r. 10. The form of the book is prescribed in *ibid.*, Sched., Part III., and provides for record of (1) the date; (2) nature of business; (3) amount of fees; (4) reason for remission; (5) signature of justices. As to the remission of penalties, or payment of fine to an informant towards the payment of his costs, see p. 603, *ante*.

(*o*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 48.

(*p*) Justices Clerks Act, 1877 (40 & 41 Vict. c. 43), s. 5.

SECT. 1.
In General.

(i.) To keep the register.

1291. It is the duty of every clerk to justices to keep a register containing the minutes or memoranda of all convictions and orders of the court (*q*), together with such particulars as are required by the rules made under the Summary Jurisdiction Acts (*r*). Each entry in the register relating to proceedings before a petty sessional court must be made or signed by one of the justices constituting the court (*s*); but where the proceedings are before a court of summary jurisdiction, not a petty sessional court, a return made or signed by the justices or one of the justices constituting the court may be sent to the clerk and entered by him in the register (*a*).

Effect of the register in evidence.

The register, or any extract therefrom certified by the clerk, is *primâ facie* evidence of the matters contained therein for the information of a court of summary jurisdiction acting for the same county, borough, or place as that for which the register is kept (*b*). Production of it does not dispense with legal proof of a previous conviction or order made against a defendant (*c*), unless made in the same court and in regard to a similar matter (*d*). It must be open for inspection, without charge, by any justice or any person authorised by any justice or the Secretary of State (*e*).

Inspection.

(ii.) To keep accounts.

To whom rendered.

1292. A clerk to justices is required to keep an account of the fines and penalties imposed by the justices for whom he acts (*f*), and this account is kept by him in conjunction with the account of fees received (*g*). The account is to be rendered to the treasurer

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(*q*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 79), s. 22.

(*r*) Summary Jurisdiction Rules, 1886, r. 3. The register itself must show (1) the number of cases; (2) the name of informant or complainant; (3) the name of the defendant and his age if under sixteen; (4) the nature of the offence or matter of complaint; (5) the minute of adjudication; (6) the justices adjudicating (*ibid.*, Sched., Part III.).

(*s*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 79), s. 22 (4).

(*a*) *Ibid.*; Summary Jurisdiction Rules, 1886, r. 5.

(*b*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 79), s. 22 (2).

(*c*) *Ibid.*

(*d*) *London School Board* v. *Harvey* (1879), 4 Q. B. D. 451; *Police Commissioner* v. *Donovan*, [1903] 1 K. B. 895.

(*e*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 22 (6).

(*f*) Justices Clerks Act, 1877 (40 & 41 Vict. c. 43), s. 6; Summary Jurisdiction Rules, 1886, r. 6.

(*g*) *Ibid.*, Sched., Part III. The form there prescribed provides for a record of (1) date of any order made; (2) name of the person by whom the fine or fee is payable, and in the case of a fine the name of the parish, township, or place in which the offence was committed; (3) nature of the offence or proceeding; (4) date of committal, if any; (5) amount of the fine; (6)—(10) appropriation of the fine to the police, the Exchequer or other persons, deductions etc., and net amount payable to the treasurer; (11) total fees; (12)—(15) appropriation of fees to police, clerk of the peace, and other persons, deductions etc., and net amount payable to the treasurer. Where payment of a fine is deferred or made by instalments, the fact must be noted under a separate heading, "Remarks" (*ibid.*, r. 7); and in the case of fines payable by instalments each receipt must be recorded in a book kept for that purpose (*ibid.*, r. 9). A local authority may vary the form in which the account is to be kept (*ibid.*, r. 6), but where accounts are kept in any form prescribed or authorised by the rules, the clerk is dispensed from the duty of rendering other accounts relating to the same particulars (Summary Jurisdiction Rules, 1886, r. 8).

SECT. 1. In General.

of the local authority (*h*), to whom the fees and such of the fines as are not otherwise appropriated by statute are payable quarterly, or at any less interval, as may be directed by that authority (*i*). He must keep a separate record of fines payable to the Exchequer, and render account thereof quarterly to the Secretary of State on the 10th day of January, April, July, and October (*j*).

Penalty for omission to account.

Wilful omission by a clerk to justices to account for or pay any fee or fine received by him renders him liable to a penalty of £20 for every such omission (*k*).

(iii.) To keep the security book.

1293. The clerk must also keep a security book for the record of every security given in relation to any proceeding before the justices whose clerk he is (*l*). The book or any certified extract therefrom is *primâ facie* evidence, in the same manner as the register of the facts stated therein (*m*). Where a security is forfeited it is the duty of the clerk to serve notice thereof on the principal two clear days before issue of a warrant of distress (*n*). Forfeited securities are to be applied by the clerk in the same manner as unappropriated fines (*o*).

SECT. 2.—*Clerks to Metropolitan Police Magistrates.*

Appointment and salary.

1294. The clerks and other officers of the various police courts established in the metropolitan police court districts are appointed by the Secretary of State (*p*). Their salaries are charged upon the Metropolitan Police Fund (*q*).

(*h*) The local authority is, in the case of clerks of petty sessional divisions of counties, the county council; in the case of clerks to borough justices the borough council (Criminal Justice Administration Act, 1851 (14 & 15 Vict. c. 55), s. 11; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 84; and see *Thetford Corporation* v. *Norfolk County Council*, [1898] 2 Q. B. 468, C. A.).

(*i*) Justices Clerks Act, 1877 (40 & 41 Vict. c. 43), s. 6. As to the application of unappropriated fines inflicted by borough justices in non-county and non-quarter sessions borough, see *George* v. *Thomas*, [1910] 2 K. B. 951.

(*j*) Summary Jurisdiction Rules, 1886, r. 11. The record must contain (1) the date; (2) the name of the person fined; (3) the Act under which the fine was imposed; (4) the amount of the fine; (5) the name of the person by whom it was received; (6) if any fine already remitted, the date and the person to whom sent; (7) particulars as to any forfeiture; (8) remarks (*ibid.*, Sched., Part III.).

(*k*) Justices Clerks Act, 1877 (40 & 41 Vict. c. 43), ss. 6, 9. The penalty may be recovered by any person who sues for it (*ibid.*).

(*l*) Summary Jurisdiction Rules, 1886, r. 15. The record must show whether the person bound is bound as principal or surety, the sum in which, and the undertaking or condition by which, he is bound, the date of the security, and the person before whom it is taken (*ibid.*). Where not entered into before the court or the clerk of the court a return is to be made by the person before whom it was entered into, and is to be recorded by the clerk (*ibid.*). The clerk may issue a certificate that he is satisfied of the ability of a proposed surety to pay the amount in which he is to be bound, for the information of the governor of a prison (*ibid.*, r. 13; see note (*n*), p. 608, *ante*).

(*m*) Summary Jurisdiction Rules, 1886, r. 15.

(*n*) *Ibid.*, r. 16.

(*o*) *Ibid.*, r. 12.

(*p*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 5.

(*q*) Metropolitan Police Courts Act, 1897 (60 & 61 Vict. c. 26), s. 1; see title POLICE.

SECT. 2. Clerks to Metropolitan Police Magistrates.

In order to be eligible as chief clerk of any of the police courts established in the metropolitan police court districts a person must be a solicitor of the Supreme Court, or have served as clerk in one or more of the said police courts or as clerk to the justices of a petty sessional division within the Metropolitan Police District for at least seven years (*r*).

Qualification.

No clerk appointed to any of the first established courts (*s*) may hold any other office or employment whatever (*t*).

Duties.

1295. Their duties are the same as those of clerks to justices (*u*).

Account of fees.

The fees and fines collected by them are to be accounted for and, except fines otherwise appropriated by statute, are payable to the Receiver of the Metropolitan Police District (*v*).

Fees.

1296. The fees which are authorised are settled by statute, and a table in which they are set out must be fixed in a conspicuous place in each of the police courts (*w*). Where a fee is due but not paid the magistrate has power to summon the debtor and make an order for its payment with costs (*a*). In default of payment he may issue a warrant of distress for the recovery of the amount due and costs (*b*).

SECT. 3.—*Clerks to Stipendiary Magistrates.*

Appointment.

1297. Clerks to stipendiary magistrates (*c*) are appointed by the magistrates themselves, and are removable at their pleasure (*d*).

Salary.

Their salaries are payable by the local authority, and in the event of dispute the difference is to be determined by the Secretary of State (*e*).

Qualification.

Only solicitors in actual practice are eligible for the appointment (*f*).

Disqualification.

They may not be concerned, either by themselves or their partners, in any matter before the magistrate for whom they act as clerk or in any matter arising out of or consequent thereon upon pain of dismissal (*g*).

(*r*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 5.
(*s*) As to these courts, see note (*d*), p. 548, *ante*.
(*t*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 5, and 1840 (3 & 4 Vict. c. 84), s. 7.
(*u*) See pp. 614, 616, *ante*.
(*v*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), ss. 46, 47. The magistrates are responsible for delivery of the accounts (*ibid.*, s. 46). As to the position and duties of the Receiver, see title POLICE. Fees for the execution of summonses and warrants are to be applied for the benefit of the Police Superannuation Fund (*ibid.*, s. 46; Police Act, 1890 (53 & 54 Vict. c. 45), s. 36, Sched. IV.); see title POLICE.
(*w*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 43; and see *ibid.*, Sched. A.
(*a*) *Ibid.*
(*b*) *Ibid.*
(*c*) See p. 547, *ante*,
(*d*) Stipendiary Magistrates Act, 1863 (26 & 27 Vict. c. 97), s. 6.
(*e*) *Ibid.*
(*f*) *Ibid.*
(*g*) *Ibid.*; and see p. 547, *ante*.

SECT. 3. Clerks to Stipendiary Magistrates.

Duties.

Fees.

Account of fees.

They are required to do all such duties as are performed by the clerks to justices generally (*h*).

1298. The fees which they may charge are those authorised to be taken by the clerks to justices acting for the county in which the court to which they are appointed is situated (*i*).

An account of fees is to be kept by the clerk and rendered to the treasurer of the local authority (*j*), to whom also the amount of fees received is to be paid quarterly (*k*).

Part XI.—Quarter or General Sessions.

SECT. 1.—*In Counties.*

Meaning of quarter sessions.

1299. The expression "court of quarter sessions" means, as regards a county, the justices of the county or any part of it having a separate commission of the peace in general or quarter sessions assembled (*l*).

General sessions.

Such an assemblage may, at any time, be convened on the authority of any two justices acting by virtue of the powers given to them by their commissions, and constitutes a court of general sessions (*m*).

Convened quarterly.

The court must by statute be convened once in each of the four quarters of the year (*n*).

Quarter sessions distinguished from general sessions.

At such sessions the court is a court of quarter sessions, and some acts within the jurisdiction of justices at sessions can be performed at such sessions only (*o*). Quarter sessions are therefore merely a species of general sessions distinguished by the facts that they are convened at a statutory time and are the occasion when certain parts of the justices' jurisdiction may alone be exercised (*p*) The distinction is not now of great value, for the authority of

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(*h*) Stipendiary Magistrates Act, 1863 (26 & 27 Vict. c. 97), s. 6.

(*i*) *Ibid.*; and see p. 613, *ante*.

(*j*) As to the local authority, see p. 613, *ante*.

(*k*) Stipendiary Magistrates Act, 1863 (26 & 27 Vict. c. 97), s. 7.

(*l*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13 (14); compare the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 100.

(*m*) *R.* v. *Mullaney* (1833), 6 C. & P. 96; and see title COURTS, Vol. IX., p. 82, note (*e*).

(*n*) Stat. (1362) 36 Edw. 3, stat. 1, c. 12; stat. (1388) 12 Ric. 2, c. 10; stat. (1414) 2 Hen. 5, stat. 1, c. 4; and see title COURTS, Vol. IX., p. 83. The dates determining the period at which quarter sessions must be held are the 11th October, 28th December, 31st March, 24th June (see title COURTS, Vol. IX., p. 83), but the justices at a meeting at the court of quarter sessions itself, or at a special meeting held for the purpose, are empowered to fix the next holding of the court at any day not more than fourteen days earlier or fourteen days later than these dates (Assizes and Quarter Sessions Act, 1908 (8 Edw. 7, c. 41), s. 3 (1)).

(*o*) 2 Hale, P. C. 49; *R.* v. *London Justices* (1812), 15 East, 632; *R.* v. *Middlesex Justices* (1843), 4 Q. B. 807; *R.* v. *Middlesex Justices* (1848), 5 Dow. & L. 580.

(*p*) 2 Hawk. P. C., c. 8, s. 47.

justices to summon a general sessions at unusual times has fallen into desuetude (*q*), and general sessions other than quarter sessions are only held at the present day in the counties of London and Middlesex, to which special enactments apply (*r*).

Precept. Notice.

1300. When the date at which quarter sessions are to be held is fixed a precept is signed by two justices and addressed to the sheriff to summon jurors, coroners, gaolers, and constables, and to proclaim the sessions (*s*). The precept should be dated at least fifteen days before the sessions; and public notice is usually given by advertisement issued by the clerk of the peace (*a*).

Where held.

1301. Quarter sessions may be held at any convenient place in the county (*b*), and the practice in certain counties is to hold them at different places in successive quarters of the year or to adjourn the sessions in any one quarter from one town to another (*c*).

Justices who may sit.

1302. All justices named in the commission of the peace and persons who are justices *ex officio* are entitled to attend quarter sessions.

Number required.

Two must in fact attend in order to constitute a valid sessions (*d*). If only one is present he has no authority to adjourn the sessions: and no court of quarter sessions can be held until the next quarter (*e*).

(*q*) An illustration of this is that it was considered advisable expressly to authorise the holding of the special meeting of justices referred to in note (*n*), p. 618, *ante* (Assizes and Quarter Sessions Act, 1908 (8 Edw. 7, c. 41), s. 3 (1)).

(*r*) See pp. 620, 621, *post*.

(*s*) If a precept is duly issued by the justices, the issue of another precept for the holding of quarter sessions by other justices is illegal (*R.* v. *Sainsbury* (1791), 4 Term Rep. 451). Nobody can be compelled to attend quarter sessions unless the precept is duly issued, but if the jury and all persons necessary to the holding of the sessions are present the sessions are valid in the absence of a precept (*R.* v. *Ipswich Corporation* (1706), 2 Ld. Raym. 1233).

(*a*) Archbold, Practice of Quarter Sessions, 6th ed., 65.

(*b*) *R.* v. *Hayward* (1837), 6 Ad. & El. 590; *R.* v. *Suffolk Justices* (1847), 4 Dow. & L. 628. Quarter sessions for the counties of Kent, Middlesex, and Surrey may be held at a place within the county of London (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 42 (12)). As to those for Middlesex, see p. 620, *post*. As to the place where quarter sessions are to be held, and the accommodation to be provided, compare the cases cited in note (*a*), p. 621, *post*.

(*c*) This is the practice in many counties. In Hertfordshire, quarter sessions are held alternately in the Hertford and St. Albans divisions and an adjourned session is held each quarter in whichever of the two divisions the quarter sessions does not assemble in. The justices of each division transact the business relating to that division. Prisoners who have committed an offence in one division are to be tried in that division; jurors residing in one division are to be summoned ordinarily in that division, but may be summoned in the other (County of Hertford and Liberty of St. Albans Act, 1874 (37 & 38 Vict. c. 45), and County of Hertford Act, 1878 (41 & 42 Vict. c. 50)).

(*d*) Compare Stipendiary Magistrates Act, 1858 (21 & 22 Vict. c. 73), s. 9.

(*e*) *R.* v. *Polstead* (*Inhabitants*) (1747), 2 Stra. 1263. As to the adjournment of borough sessions, compare note (*s*), p. 544, *ante*, and p. 640, *post*.

SECT. 1.
In Counties.

Chairman and deputy chairman.

1303. The proceedings of quarter sessions are presided over and their decisions given by the chairman or deputy chairman. These offices are filled as vacancies occur by the vote of the justices present (*f*). Where the justices are equally divided in opinion, the chairman and deputy chairman have no casting vote (*g*).

Adjournment of business.

1304. Business may be adjourned from one sessions to another, but where it is not adjourned the orders made at one sessions cannot be dealt with at a subsequent sessions (*h*).

Maiden sessions.

1305. When it appears five days before the holding of a court of quarter sessions that there will be no business for the court to transact, the holding of the court is dispensed with (*i*), and the clerk of the peace, either by himself or by the sheriff or under-sheriff who has summoned the jurors, may give them notice not to attend (*j*). He must also inform all clerks to justices in the county of the fact that the court will not be held (*k*).

SECT. 2.—*In Middlesex.*

Quarter sessions for the county of Middlesex.

1306. Quarter sessions for the county of Middlesex, which before the year 1888 included the greater part of the metropolis, are the subject of special statutes (*l*), the greater number of the provisions of which have been repealed (*m*).

(*f*) Beyond the inherent power of a court of quarter sessions to regulate its own procedure there does not appear to be any authority for the appointment of a deputy chairman. The possible appointment of a deputy chairman is, however, expressly recognised by the Quarter Sessions Act, 1842 (5 & 6 Vict. c. 38), s. 4 (now repealed). Further, there does not appear to be any limit to the number which may be appointed. In the absence of both the chairman and deputy chairman the senior justice present is usually called upon to preside, but this practice is not universal.

(*g*) See p. 647, *post*.

(*h*) *Midland Rail. Co.* v. *Edmonton Union Guardians*, [1895] 1 Q. B. 357, C. A.; affirmed, [1895] A. C. 485.

(*i*) Assizes and Quarter Sessions Act, 1908 (8 Edw. 7, c. 41), s. 2. Persons having a right to present a bill of indictment to a grand jury in a case where no person has been committed for trial are to give notice to the clerk of the peace of their intention to present one five days before the court is held (*ibid.*, s. 1 (5); and see title JURIES, Vol. XVIII., p. 243).

(*j*) Assizes and Quarter Sessions Act, 1908 (8 Edw. 7, c. 41), s. 1 (1), (2). Jurors who have received such a notice are protected from the imposition of any fine for failing to attend in pursuance of the summons (*ibid.*; and see title JURIES, Vol. XVIII., p. 239).

(*k*) Assizes and Quarter Sessions Act, 1908 (8 Edw. 7, c. 41), s. 1 (3). Justices who have already committed, or are about to commit, a prisoner to the court are authorised to commit him to another court of quarter sessions, or to assizes, where the case may conveniently be tried (*ibid.*).

(*l*) Middlesex Sessions Act, 1844 (7 & 8 Vict. c. 71); Criminal Justice Administration Act, 1851 (14 & 15 Vict. c. 55), ss. 13—17; Middlesex Sessions Act, 1859 (22 & 23 Vict. c. 4); Middlesex Sessions Act, 1874 (37 & 38 Vict. c. 7).

(*m*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 42 (11), 126. The enactments respecting the times for holding sessions and the appointment and payment of an assistant judge and his deputy have ceased to apply to Middlesex (*ibid.*, s. 42 (11)).

Intermediate sessions are still held in addition to quarter sessions. The place of assembly is at the Guildhall, Westminster (*n*).

SECT. 3.—*In the County of London.*

Quarter sessions in the county of London.

1307. There is a court of quarter sessions for the county of London, including the whole of the administrative county with the exception of the City of London (*o*).

Constitution of court.

Chairman and deputy chairman.

1308. The court is presided over by a chairman and deputy chairman, each of whom is a paid officer appointed by the Crown holding office during good behaviour (*p*). The office is confined to barristers of not less than ten years' standing (*q*), and the holder of it is *ex officio* a justice of the peace (*r*), but may not during his continuance in office serve in Parliament nor practise as a barrister (*s*).

Either the chairman or deputy chairman is authorised to hold sessions when sitting by himself (*t*).

Time and place of holding courts.

1309. The sessions of the court are regulated by a scheme drafted by the London County Council and approved by the Secretary of State (*a*). Sessions may under the scheme be arranged to take place simultaneously at different places in the county, and every sessions or adjourned sessions has the same jurisdiction, including the power of hearing and determining appeals, as if it were a court of quarter sessions (*b*).

Jurisdiction in rating appeals.

1310. The court of quarter sessions for the county of London is the court of appeal from assessments to poor rate in the metropolis, including the City of London, on the hearing of matters relating to which two members of the court of quarter sessions of the City (*c*)

(*n*) Provision is made by the Local Government Act, 1888 (51 & 52 Vict. c. 41), for the holding of the sessions in the county of London, if desired, but jurors must not be drawn from within that county (*ibid.*, s. 42 (12); and see title JURIES, Vol. XVIII., p. 232).

(*o*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 40 (2). As to the City of London, see p. 622, *post*. Up to the year 1888 London, with the exception of the City of London and the liberties of the Tower and of Westminster, was included for quarter sessions purposes in the area of the counties—Middlesex, Surrey, and Kent—to which it geographically belonged. The liberty of Westminster is merged in the county of London (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 48); the liberty of the Tower, in the City of London; see title METROPOLIS.

(*p*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 42 (1), (2), (3). The appointment is by the Crown on the petition of the county council, and the salary is not to exceed that stated in the petition; but the first holder of the office of chairman (the ex-chairman of the Middlesex Quarter Sessions) was, in fact, appointed by that Act itself (*ibid.*, s. 117 (5)), which, further, appears to have contemplated the appointment of more than one paid deputy chairman, but only one has hitherto been appointed.

(*q*) *Ibid.*, s. 42 (1).

(*r*) *Ibid.*, s. 42 (2).

(*s*) *Ibid.*, s. 42 (4).

(*t*) *Ibid.*, s. 42 (5).

(*a*) *Ibid.*, s. 42 (7). The place at which sessions are to be held is decided by the county council (*London County Council* v. *Standing Joint Committee* (1911), 104 L. T. 923); but the amount of accommodation required is decided by the standing joint committee (*London County Council* v. *Standing Joint Committee* (1911), 27 T. L. R. 567).

(*b*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 42 (6).

(*c*) See p. 622, *post*.

SECT. 3. In the County of London.

selected by that court are entitled to attend and sit as members of the court (*d*).

SECT. 4.—*In the City of London and Borough of Southwark.*

Court of quarter sessions (i.) in the City;

1311. The court of quarter sessions of the City of London still exists (*e*), but its jurisdiction in regard to indictable offences is concurrent with that of the Central Criminal Court, which in practice exercises it exclusively (*f*); its administrative functions are transferred to the Court of Common Council and the London County Council (*g*), and its jurisdiction in rating appeals is limited to appointing two of its members to sit and act as members of the court of quarter sessions of the county of London in the hearing of appeals affecting the City (*h*).

It has thus been shorn of most of its duties, and, although it continues to meet eight times a year (*i*), little business remains to be transacted.

(ii.) in the borough of Southwark.

1312. A court of quarter sessions is still held for the borough of Southwark (*k*).

SECT. 5.—*In other Boroughs.*

The recorder the sole judge.

1313. In all other quarter sessions boroughs (*l*), whether counties of themselves or not (*m*), the court is held by the recorder (*n*), who sits as the sole judge (*o*).

Deputy recorders.

1314. The recorder may in case of sickness or unavoidable absence appoint a deputy to act for him at the sessions then being held or about to be held (*p*).

(*d*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 42 (10). The statute regulating such appeals is the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), the court of appeal under which, prior to the Local Government Act, 1888 (51 & 52 Vict. c. 41), was a specially composed court of justices drawn from the counties in which the metropolis is situated (Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 24).

(*e*) See the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 41; title COURTS, Vol. IX., pp. 177, 178.

(*f*) See title COURTS, Vol. IX., p. 87.

(*g*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 41 (1). Those duties of the court which would, if the City were a quarter sessions borough with a population exceeding 10,000, be exercised by the borough council are transferred to the common council, while those which would in such case be exercised by the county council are transferred to the London County Council.

(*h*) *Ibid.*, s. 42 (10).

(*i*) See title COURTS, Vol. IX., p. 203.

(*k*) *Ibid.*

(*l*) For a list of quarter sessions boroughs, see note (*f*), p. 540, *ante.*

(*m*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 100.

(*n*) As to his appointment, salary etc., see p. 544, *ante.*

(*o*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 165 (1), (2).

(*p*) *Ibid.*, s. 166 (1). The sessions are not illegal, or the acts of the deputy recorder invalid, even if the absence of the recorder is not unavoidable (*ibid.*, s. 166 (2)). If the recorder is dead, or is for any reason unable to make the appointment, or to remove a person whom he has appointed, the authority which has power to appoint the recorder (see p. 544, *ante*) may itself appoint the deputy, and in so doing may assign a suitable remuneration to him out of the salary of the recorder (Recorders, Stipendiary Magistrates, and Clerks of the Peace Act, 1906 (6 Edw. 7. c. 46), s. 1). If the office of

The deputy must be a barrister of five years' standing (*q*), and his appointment ceases with the end of the sessions in respect of which the appointment was made (*r*).

Assistant recorders.

1315. On the borough council passing a resolution giving the required authority, and the resolution being certified in writing to the recorder, or deputy recorder, by the mayor or two aldermen or the town clerk before any quarter sessions is held (*s*), the recorder, or deputy recorder (*t*), may order a second court to be formed and appoint thereto an assistant recorder, if it appears to him that the sessions will last more than three days (*a*).

Second court.

Qualification of assistant recorder.

The person so appointed must be a barrister of five years' standing (*b*), whose name has been at some previous time approved by the Secretary of State as that of a fit person for such an office (*c*).

Powers and jurisdiction.

His powers and jurisdiction are the same as those of the recorder himself (*d*), but they are limited in duration to such time as the recorder himself, or deputy recorder, is sitting in quarter sessions, except for the purpose of bringing to a close proceedings the hearing of which has already been begun (*e*); and he may be called upon by the recorder, or deputy recorder, to adjourn his court at any time that the recorder, or deputy recorder, considers that a second court is no longer required (*f*).

Jurisdiction of court.

1316. The jurisdiction of the court extends to all crimes, offences, and matters, except licensing appeals, cognisable by courts of quarter sessions in counties (*g*).

Time and place of holding sessions

1317. Sessions must be held once in every quarter, and may be held oftener if and as the recorder thinks fit or as the Secretary of State directs (*h*). They must be held within the limits of the borough (*i*).

SECT. 6.—*The Caption.*

The caption.

1318. At each assembly of quarter sessions, whether of a county or borough, the proceedings are distinguished by a caption, *i.e.*, a formal recital of the style of the court.

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recorder becomes vacant, the deputy may continue to act until it is filled, up to a maximum of six months (*ibid.*).

(*q*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 166 (1).

(*r*) *Ibid.*

(*s*) *Ibid.*, s. 168 (6) (a). Where such a resolution has been carried and certified to the recorder it remains a valid authority for a period of twelve months from its date (*ibid.*, s. 168 (7)).

(*t*) *Ibid.*, s. 168 (9).

(*a*) *Ibid.*, s. 168 (1), (2). As to the assistant clerk of the peace, see p. 626, *post*. His salary, and that of the assistant recorder, is regulated by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 168 (8), Sched. IV.

(*b*) *Ibid.*, s. 168 (1).

(*c*) *Ibid.*, s. 168 (6) (b).

(*d*) *Ibid.*, s. 168 (2).

(*e*) *Ibid.*, s. 168 (3). The exception extends to the sentencing of a prisoner who has been tried but not sentenced (*ibid.*).

(*f*) *Ibid.*, s. 168 (4).

(*g*) *Ibid.*, s. 165 (3).

(*h*) *Ibid.*, s. 165 (1).

(*i*) *Ibid.*

SECT. 6. The Caption.

Nature.

The caption remains the same throughout the sessions (*k*), and documents relating to business transacted at them must be headed by a copy of it, as it is a necessary part of the record (*l*) for the purpose of showing that the court before whom the business was transacted was one of competent jurisdiction (*m*).

Contents.

The caption must contain the name of the county or borough (*n*), a statement whether the court was one of general or of quarter sessions, the place where it was held and the fact that it was within the jurisdiction, and the names of at least two justices holding the court (*o*), or in the case of a borough the recorder or deputy recorder (*p*).

SECT. 7.—*Officers of Quarter Sessions.*

SUB-SECT. 1.—*Custos Rotulorum.*

Custos rotulorum.

1319. The *custos rotulorum* is the principal civil officer and representative of the Crown in each county. He is appointed by the Sovereign (*q*), and must be one of the justices assigned to the commission of the peace for the county (*r*).

He has the titular custody of the records of the county and of the court of quarter sessions (*s*), and is entitled to exercise his office by deputy (*t*).

SUB-SECT. 2.—*Clerk of the Peace.*

Clerk of the peace.

1320. The clerk of the peace is the principal officer of the court of quarter sessions.

(*k*) *R.* v. *Marsh* (1837), 6 Ad. & El. 236, *per* COLERIDGE, J., at p. 249.

(*l*) *R.* v. *Smith* (1828), 8 B. & C. 341.

(*m*) *R.* v. *Yeoveley* (*Inhabitants*) (1838), 8 Ad. & El. 806, *per* Lord DENMAN, C.J., at p. 818.

(*n*) This customarily appears both in the margin and in the text, though perhaps this is not necessary (2 Hawk., P. C., c. 125, s. 120).

(*o*) *Jerrat* v. *Caldwell* (1606), Cro. Jac. 184; *Johnson* v. *Underwood* (1618), Cro. Jac. 493. It is customary to add the words "and others their associates."

(*p*) *Smith* v. *R.* (1849), 18 L. J. (M. C.) 207.

(*q*) Stat. (1545) 37 Hen. 8, c. 1, s. 1. Up to that date, 1545, the appointment had been with the Lord Chancellor, a custom that was restored by stat. (1549) 3 & 4 Edw. 6, c. 1, s. 3; but the right of appointment was once more vested in the Sovereign in person by stat. (1688) (1 Will. & Mar. c. 21, s. 4. Upon appointment by the Sovereign the *custos rotulorum* receives his commission from the Lord Chancellor (stat. (1545) 37 Hen. 8, c. 1, s. 2). In the county of Lancaster the appointment is made through the Chancellor of the Duchy (Lancaster County Clerk Act, 1871 (34 & 35 Vict. c. 73), s. 9). Formerly the Archbishop of York had the right to appoint a *custos rotulorum* for certain liberties in Yorkshire and Nottinghamshire, the Bishop of Durham for Durham, and the Bishop of Ely for the Isle of Ely, but their privileges were extinguished and the right transferred to the Crown in the case of the liberties in Yorkshire and Nottinghamshire and the Isle of Ely by the Liberties Act, 1836 (6 & 7 Will. 4, c. 87), and in the case of Durham by the Durham (County Palatine) Act, 1836 (6 & 7 Will. 4, c. 19).

(*r*) *Harcourt* v. *Fox* (1693), 1 Show. 506. In practice the office is almost invariably united with that of lord lieutenant of the county. Formerly he had the right to appoint the clerk of the peace, but this is no longer the case (see title LOCAL GOVERNMENT, p. 343, *ante*, and see the text, *infra*).

(*s*) As to their actual custody, see p. 627, *post*.

(*t*) Stat. (1545) 37 Hen. 8, c. 1, s. 2, which, so far as regards custody of records, he does through the clerk of the peace (see p. 627, *post*).

SECT. 7. Officers of Quarter Sessions.

In the case of counties he is appointed by the standing joint committee of the county council and the quarter sessions (*u*), and may be dismissed by them (*a*).

(i.) in counties;

In boroughs having a separate court of quarter sessions a clerk of the peace is appointed for the borough by the borough council (*b*), and he holds office during good behaviour (*c*).

(ii.) in boroughs.

1321. In counties his salary is calculated and paid to him in his joint capacity as clerk of the peace and clerk to the county council (*d*). All fees and costs which are not excluded from this arrangement are payable to the county fund (*e*).

Salary and fees:

(i.) in counties;

In boroughs he may be paid either by fees or by salary (*f*), but in practice he is almost invariably paid by salary, and the fees authorised to be taken by the clerk of the peace are in that case to be accounted for by him to the borough treasurer (*g*).

(ii.) in boroughs.

1322. The fees which the clerk of the peace is authorised to take are set out in a table settled, in the counties, by the justices at quarter sessions, in the boroughs by the borough council, and approved by the Secretary of State (*h*), and any clerk of the peace

Authorised fees.

(*u*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83 (2). As to the standing joint committee, see title LOCAL GOVERNMENT p. 370, *ante*. Formerly the appointment, in the case of Lancashire, was in the gift of the Chancellor of the Duchy (Lancaster County Clerk Act, 1871 (34 & 35 Vict. c. 73), s. 2). The clerk of the peace in Lancashire is now appointed as in other counties (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83 (9)). The appointment might formerly be made by parol and without deed (*Saunders* v. *Owen* (1698), 2 Salk. 467), but is now by resolution of the standing joint committee.

(*a*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83 (2). The grounds for dismissal are not now defined, but under the former statute, stat. (1689) 1 Will. & Mar. c. 21, refusal to record an order of the court of quarter sessions was held such a misdemeanour in the execution of his office as to warrant the dismissal of the clerk of the peace (*R.* v. *Russell* (1869), 10 B. & S. 91; *Wildes* v. *Russell* (1866), L. R. 1 C. P. 722). Clerks of the peace appointed before 1888 may be dismissed by the justices in quarter sessions, subject to appeal to the Lord Chancellor (Clerks of the Peace Removal Act, 1864 (27 & 28 Vict. c. 65)). Complaint of the misconduct alleged must have been made in writing by two justices and a copy sent to the *custos rotulorum* (*ibid.*).

(*b*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 164 (1).

(*c*) *Ibid.*, s. 164 (2).

(*d*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83 (5). As to his office as clerk to the county council, see title LOCAL GOVERNMENT, p. 343, *ante*.

(*e*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83 (5). As to the county fund, see title LOCAL GOVERNMENT, p. 358, *ante*.

(*f*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 164 (5); Criminal Justice Administration Act, 1851 (14 & 15 Vict. c. 55), s. 9.

(*g*) Criminal Justice Administration Act, 1851 (14 & 15 Vict. c. 55), s. 11. The method of accounting for them is to be such as the borough council may direct (*ibid.*). As to the borough treasurer, see title LOCAL GOVERNMENT, p. 313, *ante*.

(*h*) Clerks of the Peace (Fees) Act, 1817 (57 Geo. 3, c. 91), s. 2; Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 30; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 164 (5), (6). Copies of the table so approved are to be publicly displayed at the place where quarter sessions are held (*ibid.*, s. 234; Clerks of the Peace (Fees) Act, 1817 (57 Geo. 3, c. 91), s. 3).

SECT. 7. Officers of Quarter Sessions.

demanding or receiving any other or greater fee than that prescribed in the table of fees is liable to a penalty, which may be recovered by any person bringing an action therefor in the High Court (*i*).

Compensation for loss of fees.

1323. Compensation is granted to clerks of the peace for the loss of fees in criminal prosecutions in consequence of certain statutes, and where the clerk of the peace is paid by salary the amount of the compensation is payable to the county or borough fund (*k*).

Deputies and assistants: (i.) in counties;

1324. In counties the standing joint committee have power to appoint a deputy clerk of the peace to act in lieu of the clerk of the peace in case of his death, illness or absence, or in such other cases as they may determine (*l*). A deputy so appointed holds office during the pleasure of the standing joint committee and has all the powers of a clerk of the peace (*m*). A suitable remuneration may be assigned to him by the standing joint committee out of the salary of the clerk of the peace (*n*).

The effect of these enactments would seem to be that the clerk of the peace can no longer exercise his functions entirely by deputy (*o*), but he still retains the right to appoint an assistant to act whenever at a court of quarter sessions it is determined to form a second court (*p*).

(ii.) in boroughs.

In boroughs he is entitled in the case of his illness, incapacity, or absence to appoint a deputy to act for him (*q*), but the appointment must be made by him in writing and notified in writing to the council, in whose minutes the appointment must be recorded (*r*). In the event of his death, or being incapable of appointing a deputy, the council may appoint one, and assign him a suitable remuneration out of the clerk's salary (*s*). A deputy has the same powers as the clerk of the peace (*a*).

Where a second court is formed at any quarter sessions the clerk of the peace must at the request of the recorder appoint an assistant clerk of the peace (*b*).

Disqualifications.

1325. The clerk of the peace may not be a clerk to the justices

(*i*) Clerks of the Peace (Fees) Act, 1817 (57 Geo. 3, c. 91), ss. 2, 4; Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 30. The penalty under the former Act is £5; under the latter £20.

(*k*) Criminal Justice Act, 1855 (18 & 19 Vict. c. 126), s. 18.

(*l*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83 (4); Recorders, Stipendiary Magistrates, and Clerks of the Peace Act, 1906 (6 Edw. 7, c. 46), ss. 1 (1), (6); and see also title LOCAL GOVERNMENT, p. 344, *ante*. Clerks of the peace appointed before 1888 retain their right to appoint their own deputy (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 118).

(*m*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83 (4).

(*n*) Recorders, Stipendiary Magistrates, and Clerks of the Peace Act, 1906 (6 Edw. 7, c. 46), s. 1 (1).

(*o*) This right he had subject to the approval of the *custos rotulorum* under stat. (1545) 37 Hen. 8, c. 1, s. 1, which is not repealed.

(*p*) Stipendiary Magistrates Act, 1858 (21 & 22 Vict. c. 73), s. 11; see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83 (4).

(*q*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 164 (3).

(*r*) *Ibid.*, s. 164 (4).

(*s*) Recorders, Stipendiary Magistrates, and Clerks of the Peace Act, 1906 (6 Edw. 7, c. 46), s. 1 (1).

(*a*) *Ibid.*, s. 1 (3). If the office becomes vacant, the deputy may continue to act until it is filled, up to a maximum of six months (*ibid.*, s. 1 (2)).

(*b*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 168 (5).

of any petty sessional division of the county or borough for which he is clerk of the peace (*c*).

Where he has to devote the whole of his time to his duties as clerk of the peace he is not eligible to serve in Parliament (*d*).

Conviction for corrupt practices at an election vacates the office of clerk of the peace and incapacitates the convicted person from holding office for seven years (*e*).

Clerks of the peace in divided counties.

1326. In counties which are divided and have more than one court of quarter sessions a clerk of the peace is appointed for each division (*f*).

In counties which are divided into separate administrative counties, but have only one court of quarter sessions, the clerkship of the peace of each administrative county is a separate office, but the offices may be held by the same person (*g*). Where they are held by different persons, the justices in general sessions may appoint the clerk of the peace of either administrative county to be clerk of the peace of such sessions, and may remove him; and the salary to be paid to him is determined jointly by the standing joint committees of the administrative counties (*h*).

General duties: (i.) in counties; (ii.) in boroughs.

1327. The clerk of the peace in counties (*i*) has charge of and is responsible for the records and documents of the county, subject to the directions of the *custos rotulorum*, the quarter sessions, or the county council (*k*).

In boroughs he is the custodian of the records of the court of quarter sessions of the borough, but otherwise the charters, deeds,

(*c*) Justices Clerks Act, 1877 (40 & 41 Vict. c. 43), s. 7; see also p. 551, *ante*.

(*d*) Local Government Act, 1888 (51 & 52 Vict. c. 41, s. 83 (13).

(*e*) Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), ss. 6, 64.

(*f*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83 (10). The counties affected are Yorkshire and Lincolnshire, which are divided into ridings or parts, Cambridgeshire, part of which, the Isle of Ely, has a separate court of quarter sessions; and Northamptonshire, part of which, the Soke of Peterborough, has a separate court of quarter sessions; see pp. 537, *ante*.

(*g*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83 (7). The counties affected are Suffolk and Sussex.

(*h*) *Ibid.*

(*i*) He acts both as clerk to the county council and as clerk of the peace of the county; see title LOCAL GOVERNMENT, p. 343, *ante*. When acting in relation to any business of the county council, or acting under the statutes relating to the registration of parliamentary voters, or to the deposit of plans, or to jury lists, or to any registration matters, he does so under the direction of the council (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83 (6)). The Acts relating to such matters are to be read as if the clerk of the county council were substituted for clerk of the peace (*ibid.*).

(*k*) *Ibid.*, s. 83 (3). This duty includes such documents as are directed to be deposited with him under the standing orders of either House of Parliament (Parliamentary Documents Deposit Act, 1837 (7 Will. 4 & 1 Vict. c. 83)); special Acts deposited under the Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 66, the Commissioners Clauses Act, 1847 (10 & 11 Vict. c. 16), s. 110, the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 161, the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 45, the Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), s. 97, the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 150, the

SECT. 7. Officers of Quarter Sessions.

records, and documents of the borough are in the custody of the town clerk (*l*).

Duties as to notices.

1328. The clerk of the peace is the proper officer to receive notices of appeal to the court of quarter sessions (*m*). He also issues the notice convening the sessions (*n*), and furnishes the list of jurors required to be summoned (*o*).

Duties at sessions.

When the court is held it is his duty to prepare the indictments, to call over the panels of grand and petty jurors, to swear the juries, receive the bills when found, arraign the prisoners, give them in charge of the jury which is to try them, and receive the verdict (*p*).

He receives the fines imposed and enrols recognisances estreated by the court of quarter sessions (*q*), or the coroner for the county or borough (*r*), and he receives monthly returns of the fines imposed by the justices in petty sessions (*a*).

Duties as taxing officer.

1329. He is the taxing officer of the court of quarter sessions with respect to taxing costs payable out of the county or borough funds (*b*), and, when the amount payable is ascertained, he delivers to the person to whom the court directs the costs to be paid an order upon the county or borough treasurer (*c*). On the hearing of appeals by the court of quarter sessions, costs ordered by the court to be paid are paid over to the clerk of the peace (*d*).

He also acts as the taxing officer in the case of amounts payable out of local funds by the local authorities or guardians, upon application being made to him by the local authority or board of guardians or overseers (*e*).

Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 58, the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 162, the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 214, and the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 90; plans deposited under the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 9; and accounts deposited under the Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 60. As to his duty to make parliamentary returns, see title LOCAL GOVERNMENT, p. 343, *ante*.

(*l*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 17 (3).

(*m*) Compare *R.* v. *Derbyshire Justices* (1852), 22 L. J. (M. C.) 31.

(*n*) By advertisement in the local press.

(*o*) See title JURIES, Vol. XVIII., pp. 233 *et seq.*, 236 *et seq.*, 266, 269. In the event of maiden sessions he must notify the jurors and, in the case of county quarter sessions, all the clerks to the justices; see *ibid.*, p. 239, and p. 620, *ante*. If he has not summoned the jury himself he may direct the sheriff or under-sheriff who has done so to send the notice (Assizes and Quarter Sessions Act, 1908 (8 Edw. 7, c. 41), s. 1 (2)).

(*p*) Archbold, Practice of Quarter Sessions, 6th ed., 75.

(*q*) Levy of Fines Act, 1823 (4 Geo. 4, c. 37); Quarter Sessions Act, 1849 (Baines' Act) (12 & 13 Vict. c. 45).

(*r*) Coroners Act, 1887 (50 & 51 Vict. c. 71), s. 19 (4).

(*a*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 31.

(*b*) See p. 629, *post*.

(*c*) Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15), s. 2.

(*d*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 27.

(*e*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 39. Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 249; and see title POOR LAW. For such work he is entitled to remuneration at a rate fixed by the Master of the Crown Office and declared by the Local Government Board (*ibid.*).

SECT. 7. Officers of Quarter Sessions.

County of London.

1330. In the county of London the clerkship of the peace is a distinct office from that of clerk of the county council, and must be filled by a different person (*f*).

SECT. 8.—*Finances of Quarter Sessions.*

SUB-SECT. 1.—*County Fund; County Treasurer.*

Expenses borne by county fund.

1331. In a county all costs incurred by the quarter sessions or the justices out of sessions, and all costs incurred by any justice, police officer, or constable in defending any legal proceedings brought against him in respect of any order made or act done by him in execution of his duty, are payable out of the county fund (*g*), so far as the amount is sanctioned by the standing joint committee of the county council and of quarter sessions and is not otherwise provided for (*h*). The payment is made by the county treasurer on the order of the county council (*i*).

Costs in criminal cases.

The costs ordered to be paid in criminal cases to the prosecution or defence are payable out of the county fund, and the payment is made by the county treasurer upon the order or certificate of the court of quarter sessions or the justices before whom the matter in respect of which they are payable was heard (*k*).

Fees and fines payable to fund.

The county treasurer receives quarterly from the clerk of the peace and the clerks to justices an account of the fees taken by them, and of fines received by them and unclaimed or not otherwise appropriated (*l*).

SUB-SECT. 2.—*Borough Fund; Borough Treasurer.*

Cost of borough sessions.

1332. In boroughs the borough fund bears the cost of the recorder (*m*) and the clerk of the peace (*n*), and of payments made by order of the court of quarter sessions (*o*), where there is such a court, and of the clerk to justices (*a*), and payments made by

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If the account is presented to the auditor without being taxed its reasonableness cannot afterwards be questioned (*R.* v. *Napton, Warwickshire, Overseers* (1856), 25 L. J. (Q. B.) 296; *R.* v. *Hunt* (1856), 6 E. & B. 408).

(*f*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83 (11); see title METROPOLIS.

(*g*) As to this fund, see, generally, title LOCAL GOVERNMENT, p. 358, *ante*.

(*h*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 66. As to what costs of quarter sessions and petty sessions include, see *ibid.*, s. 100. In the county of London, the City of London is liable to contribute to the costs of sessions for the county (*ibid.*, s. 41 (5)).

(*i*) *Ibid.*, s. 80 (2), (5). As to the county treasurer, see title LOCAL GOVERNMENT, p. 344, *ante*.

(*k*) Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15), ss. 1—3; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 445 *et seq.*

(*l*) Criminal Justice Administration Act, 1851 (14 & 15 Vict. c. 55), s. 11; Justices Clerks Act, 1877 (40 & 41 Vict. c. 43), s. 6; and see pp. 616, 625, *ante*.

(*m*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 140 (1), (2), Sched. V., Part I. As to the recorder, see p. 544, *ante*.

(*n*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), Sched. V., Part II. This is the case if the clerk of the peace is paid by salary in lieu of fees; see p. 625, *ante*.

(*o*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 140 (3) (c).

(*a*) *Ibid.*, s. 140 (1), (2), Sched. V., Part I.

SECT. 8. Finances of Quarter Sessions.

order of a justice in pursuance of the Municipal Corporations Act, 1882 (*b*), where there is a separate commission of the peace (*c*).

Contributions to county sessions.

County boroughs which have a separate court of quarter sessions do not contribute to the cost of the quarter sessions of the county in which they are situated (*d*), but all other boroughs, whether they have a separate court of quarter sessions or not, do contribute (*e*).

Costs in criminal cases.

1333. Costs in criminal cases are payable out of the borough fund of a county borough, but in the case of other boroughs out of the county fund of the county in which they are situated (*f*).

Fees and fines payable to fund.

1334. Penalties imposed by the borough justices or the borough quarter sessions which are unclaimed or not otherwise appropriated (*g*), and the fees payable to the clerk to the justices, where there is a separate commission of the peace (*h*), or to the clerk of the peace, if paid by salary, where there is a separate court of quarter sessions (*i*), are payable to the borough fund.

Such penalties and fees must be accounted for quarterly to the borough treasurer (*k*), by whom all payments to and out of the borough fund are made (*l*).

SECT. 9.—*Duties of the Sheriff.*

The sheriff.

1335. The sheriff (*m*) is the officer to whom the precept of the justices convening quarter sessions in counties is addressed (*n*). He is in theory responsible for the proclamation of the sessions, but this duty is in fact carried out by advertisement in the local press by the clerk of the peace (*a*).

(*b*) 45 & 46 Vict. c. 50, s. 140 (3) (d).

(*c*) In such case the expenses of providing and maintaining a justices room may be payable out of the borough fund (*ibid.*, Sched. V., Part II.).

(*d*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 32 (3).

(*e*) *Ibid.*, s. 35 (5); see note (*f*), p. 540, *ante*, and title LOCAL GOVERNMENT, pp. 353 *et seq.*, *ante*.

(*f*) Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15), s. 2; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 445 *et seq.*

(*g*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 221. This includes, in the case of quarter sessions boroughs, all fines except (a) such as are directed to be paid to the informer or persons aggrieved; (b) such as are specially appropriated under any Act passed since 1835; (c) such as are payable to the revenue (*ibid.*, s. 221 (2); Justices Clerks Act, 1877 (40 & 41 Vict. c. 43), s. 6).

(*h*) Criminal Justice Administration Act, 1851 (14 & 15 Vict. c. 55), s. 11; Justices Clerks Act, 1877 (40 & 41 Vict. c. 43), s. 9.

(*i*) Criminal Justice Administration Act, 1851 (14 & 15 Vict. c. 55), s. 11.

(*k*) *Ibid.*; Justices Clerks Act, 1877 (40 & 41 Vict. c. 43), s. 9.

(*l*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 142. As to the borough treasurer, see title LOCAL GOVERNMENT, p. 313, *ante*.

(*m*) As to boroughs which have the right to appoint a sheriff, see note (*f*), p. 540, *ante*. See, generally, title SHERIFFS AND BAILIFFS.

(*n*) See p. 619, *ante*.

(*a*) See pp. 619, 628, *ante*. In the same manner it is in theory his duty to be present at quarter sessions, but in fact the under-sheriff is usually present in his stead; see title SHERIFFS AND BAILIFFS. As to his duty

SECT. 9. Duties of the Sheriff.

1336. The sheriff is the officer through whom or through whose subordinates fines and forfeited recognisances are recovered, the goods of defaulting persons distrained on, or the persons themselves taken into custody (*b*).

SECT. 10.—*Duties of the Police.*

In counties.

1337. In counties the police are under the control of the standing joint committee of the county council and quarter sessions (*c*), but it is still the duty of the chief constable in counties to attend the court of quarter sessions (*d*), and the justices at sessions may make such orders as they deem expedient with regard to the attendance of police upon them thereat (*e*).

In general.

In boroughs as well as in counties the police perform such duties as quarter sessions may direct (*f*).

SECT. 11.—*Juries.*

County quarter sessions.

1338. Jurors for county quarter sessions are drawn from the jury list compiled by the clerk of the peace (*g*). He makes out a list of those to be summoned for any sessions and transmits it twenty days before the holding of the sessions to the sheriff, by whom, or by whose under-sheriff, the summons is actually issued (*h*).

Jurors in boroughs are summoned directly by the clerk of the peace (*i*).

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in summoning jurors, see title JURIES, Vol. XVIII., pp. 236, 238; and as to the notice required in the event of maiden sessions, see *ibid.*, p. 239, and p. 620, *ante*.

(*b*) Levy of Fines Act, 1822 (3 Geo. 4, c. 46); Levy of Fines Act, 1823 (4 Geo. 4, c. 37); Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 17 (Baines' Act). As to his duties with regard to annual returns, and as to the appointment of under-sheriff and deputy, see title SHERIFFS AND BAILIFFS.

(*c*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 9; see title LOCAL GOVERNMENT, p. 370, *ante*; and see, generally, title POLICE.

(*d*) County Police Act, 1839 (2 & 3 Vict. c. 93), s. 17.

(*e*) County Police Act, 1840 (3 & 4 Vict. c. 88), s. 26.

(*f*) County and Borough Police Act, 1856 (19 & 20 Vict. c. 69), s. 7; see the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 9.

(*g*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 12; Juries Act, 1862 (25 & 26 Vict. c. 107), s. 4; and see title JURIES, Vol. XVIII., pp. 233—235, 236, 238, 239, 266, and see *ibid.*, pp. 229 *et seq.* The clerk of the peace in performing this duty acts as clerk of the county council (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83 (6)). As to notice in the event of maiden sessions, see p. 620, *ante*.

(*h*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 41; and see titles JURIES, Vol. XVIII., p. 236; SHERIFFS AND BAILIFFS.

(*i*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 186 (2), (3); and see title JURIES, Vol. XVIII., p. 239. As to notice in the event of maiden sessions, see p. 620, *ante*.

Part XII.—Jurisdiction of Quarter and General Sessions: Procedure.

SECT. 1.
Original Criminal Jurisdiction.

SECT. 1.—*Original Criminal Jurisdiction.*

SUB-SECT. 1.—*On Indictment.*

Original trial by indictment

1339. The original trial of prisoners by a court of quarter sessions is always begun by indictment (*j*), the course of the proceedings being in all respects similar to that of a trial by a court of assize (*k*).

Offences not triable.

1340. All indictable offences may be tried by quarter sessions except those enumerated below (*l*):

1. Treason.
2. Murder.
3. Any felony the punishment of which may be penal servitude for life, except burglary, which is triable at quarter sessions unless there are circumstances making the case grave or difficult (*m*).
4. Misprision of treason.
5. Offences against the title, prerogative, or person of the Sovereign or Government, or against either House of Parliament.
6. Offences subject to the penalties of *præmunire*.
7. Blasphemy and offences against religion.
8. Administering or taking unlawful oaths.
9. Perjury and subornation of perjury (*n*).
10. Making or suborning any other person to make a false

(*j*) Formerly the trial might be begun either by indictment, information, or presentment, but the proceeding by information has fallen into disuse, and there is no real distinction between presentment and indictment, as on a presentment being made an indictment is drawn to meet it by the clerk of the peace.

(*k*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 329 *et seq.*, 351 *et seq.* Quarter sessions have power, as part of their inherent jurisdiction, to order a convicted person to come up for judgment when called upon, and, therefore, when such a person is bound over under a condition authorised by the Probation of Offenders Act, 1907 (7 Edw. 7, c. 17) (see note (*m*), p. 605, *ante*), and commits a breach of the recognisance, quarter sessions have power to sentence him, even if, as seems probable, the Act referred to does not apply except in the case of courts of summary jurisdiction (*R.* v. *Spratling*, [1911] 1 K. B. 77, C. C. A.).

(*l*) Justices in quarter sessions had at one time jurisdiction to try all offences but forgery or perjury, but this jurisdiction has been from time to time limited. The offences excepted from their jurisdiction were defined by the Quarter Sessions Act, 1842 (5 & 6 Vict. c. 38), s. 1. Those contained in the list given in the text, *supra*, are all enumerated by that Act, except such as are specially noted. Particulars as to the various offences will be found in title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 450 *et seq.*

(*m*) The exception in regard to burglary was made by the Burglary Act, 1896 (59 & 60 Vict. c. 57). An attempt to commit suicide is not an attempt to commit murder, and, not being within the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 11, is not an offence withdrawn from the jurisdiction of quarter sessions (*R.* v. *Burgess* (1862), 32 L. J. (M. C.) 55, C. C. R.).

(*n*) Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), s. 10, Sched. This Act does not come into force until 1st January, 1912.

oath, affirmation, or declaration punishable as perjury or as a misdemeanour (*o*).

11. Forgery.

12. Unlawfully or maliciously setting fire to crops, or to any part of a wood or trees, or to any heath, gorse, furze or fern.

13. Bigamy and offences against the laws relating to marriage.

14. Abduction of women and girls.

15. Endeavouring to conceal the birth of a child.

16. Composing, printing, or publishing blasphemous, seditious, or defamatory libels.

17. Unlawful combinations and conspiracies, except those to commit any offence which the court might have tried if committed by one person.

18. Stealing or fraudulently taking, injuring, or destroying records or documents belonging to any court of law or relating to any proceeding therein.

19. Stealing or fraudulently destroying or concealing wills or testamentary papers, or any documents or written instrument being or containing evidence of title to any interest in land.

20. False personation (*p*).

21. Bribery at elections and otherwise (*q*).

22. Poaching at night by three or more persons, one or more of whom is armed (*r*).

23. Offences indictable under the Criminal Law Amendment Act, 1885 (*s*).

24. Offences by agents, bankers, or factors under the Larceny Acts, 1861 and 1901 (*t*).

25. Offences in regard to official secrets (*u*).

SUB-SECT. 2.—*Articles of the Peace.*

Definition.

1341. Articles of the peace are an application to prevent an apprehended breach of the peace by ordering the offender to give security for his good behaviour, and imprisoning him in default.

Procedure.

The complaint may be made or exhibited to the High Court or to a court of assize as well as to justices (*a*); and if made to justices

(*o*) See note (*n*), p. 632, *ante*.

(*p*) False Personation Act, 1874 (37 & 38 Vict. c. 36), s. 3.

(*q*) Quarter Sessions Act, 1842 (5 & 6 Vict. c. 38), s. 1; Corrupt Practices Prevention Act, 1854 (17 & 18 Vict. c. 102), s. 10; Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 53; Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70), s. 30; City of London Ballot Act, 1887 (50 & 51 Vict. c. xiii.), s. 9; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 48; London Government Act, 1899 (62 & 63 Vict. c. 14), s. 2 (5); Prevention of Corruption Act, 1906 (6 Edw. 7, c. 34), s. 2 (5). But prosecutions under the Public Bodies Corrupt Practices Act, 1889 (52 & 53 Vict. c. 69), may be tried at quarter sessions (*ibid.*, s. 6).

(*r*) Night Poaching Act, 1828 (9 Geo. 4, c. 69), s. 9.

(*s*) 48 & 49 Vict. c. 69, s. 17.

(*t*) 24 & 25 Vict. c. 96, ss. 75—87; 1 Edw. 7, c. 10.

(*u*) Official Secrets Act, 1911 (1 & 2 Geo. 5, c. 28), s. 10 (3): see *ibid.*, s. 13 (2).

(*a*) *R.* v. *Dunn* (1847), 12 Q. B. 1026. In the case of a peer or peeress the complaint must be made to the High Court (4 Bl. Com. 253; compare

SECT. 1. **Original Criminal Jurisdiction.**

may be made to them either when assembled in quarter sessions or not, the jurisdiction to deal with the complaint being derived from the terms of their commission (*b*). The complaint should usually be made locally and not to the High Court, which has refused to hear such a complaint on the ground that it should have been made to the local quarter sessions (*c*); but if complaint has been received and sureties required on insufficient grounds, or if the justices have refused to require sureties to be given, the High Court has power to quash the order (*d*) or to require sureties to be given (*e*).

When not made at quarter sessions.

1342. A distinction is to be drawn between such complaints when made to justices at quarter sessions and at other times. When not made at quarter sessions they are not articles of the peace, but are merely applications to have the defendant bound over to keep the peace; and the procedure is then the same as in the case of any other complaint (*f*), both complainant and defendant being liable to be called, examined and cross-examined, and made subject to costs (*g*).

When made at quarter sessions.

1343. Articles of the peace exhibited at quarter sessions are a complaint made *ex parte* (*h*); the defendant cannot be called nor make answer to the allegations against him by affidavit or otherwise (*i*).

Grounds for complaint.

1344. The complaint must be made upon oath (*j*) and show sufficient grounds for the application (*k*). The proper ground is that the complainant is in fear of bodily injury (*l*), but a libel likely to lead to a breach of the peace has been held sufficient ground (*m*). When satisfied that there is sufficient ground for the application it is the duty of the justices to grant it (*n*); but if the complaint appears

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Ex parte Gifford (*Lord*) (1845), 1 New Sess. Cas. 490). The complaint to the High Court is made *ex parte* to the Divisional Court; see Crown Office Rules, 1906, rr. 246—256.

(*b*) See p. 536, *ante*, and stats. (1360–1) 34 Edw. 3, c. 1; (1487) 3 Hen. 7, c. 2.

(*c*) *R.* v. *Waite* (1759), 2 Burr. 780.

(*d*) *R.* v. *Dunn* (1840), 12 Ad. & El. 599. The court will not, however, interfere to reduce the amount of the security fixed by justices (*R.* v. *Holloway* (1834), 2 Dowl. 525), or to question the decision of the justices as to the reasonableness of the apprehension felt by the complainant (*R.* v. *Tregarthen* (1833), 5 B. & Ad. 678). As to the powers of the High Court, see, further, pp. 661, 666, *post.*

(*e*) *R.* v. *Mallinson* (1851), 16 Q. B. 367.

(*f*) As to such procedure, see p. 607, *ante.*

(*g*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 25; see p. 603, *ante.*

(*h*) *Vane's* (*Lord*) *Case* (1744), 13 East, 172, n.

(*i*) *Ibid.*; *R.* v. *Doherty* (1810), 13 East, 171; *R.* v. *Dunn, supra*; *R.* v. *Mallinson, supra*; *R.* v. *Groves* (1863), 8 L. T. 311.

(*j*) *R.* v. *Dunn, supra.*

(*k*) *Ex parte Hulse* (1851), 21 L. J. (M. C.) 21; *R.* v. *Mallinson, supra.*

(*l*) *Vane's* (*Lord*) *Case, supra*; *Phillips* v. *Gateshead Justices* (1879), *Times*, 15th July. It is insufficient that the complainant should allege that if defendant were not bound over there would be a risk of his committing a breach of the peace himself (*ibid.*).

(*m*) *Haylock* v. *Sparke* (1853), 22 L. J. (M. C.) 67.

(*n*) *Lort* v. *Hutton* (1876), 45 L. J. (M. C.) 95.

to them malicious and untrue they may refuse process and commit the complainant for perjury (*o*).

SECT. 1. Original Criminal Jurisdiction.

Order of the court.

1345. Justices are entitled to require security from the defendant for the keeping of the peace for any time they may think necessary (*p*), but not for an indefinite period (*q*). The taking of sureties and commitment to prison in default are judicial acts, and cannot therefore be performed on Sunday (*r*).

SUB-SECT. 3.—*Incorrigible Rogues.*

Jurisdiction.

1346. The court of quarter sessions has jurisdiction in respect of incorrigible rogues committed by one or more justices to a house of correction until the next general or quarter sessions. The persons included in this category are vagrants who, after a previous conviction for vagrancy, have been convicted a second time, or who have been convicted of breaking or escaping out of prison or of violently resisting the police by whom they are arrested upon a charge of vagrancy on which they are convicted before a justice (*s*).

Persons affected.

Punishment.

The court may inquire into the circumstances of the case and in its discretion order the offender to be further imprisoned and kept to hard labour for any period not exceeding one year, and if a male to be whipped (*t*).

SECT. 2.—*Original Civil Jurisdiction.*

Matters not transferred to the county council.

1347. The greater part of the civil jurisdiction of the court of quarter sessions, which was mainly administrative, has been transferred to the county council (*a*), and where a local Act is in existence under which powers similar to those transferred by statute are exercised by quarter sessions or a committee of quarter sessions such powers may be transferred by order of the Local Government Board (*b*). The matters still within the civil jurisdiction of quarter sessions are noticed below (*c*).

(*o*) *R.* v. *Parnell* (1759), 2 Burr. 806. It is the duty of justices who are aware that a prize fight is to take place to cause the parties to be brought before them and bind them over till the next assizes or sessions (*R.* v. *Billingham* (1825), 2 C. & P. 234).

(*p*) *R.* v. *Bowes* (1787), 1 Term Rep. 696; compare *R.* v. *Little, Ex parte Wise* (1909), 101 L. T. 859.

(*q*) *Pricket* v. *Gratrex* (1846), 8 Q. B. 1020.

(*r*) *R.* v. *Ramsay* (1867), 16 W. R. 191; see title TIME.

(*s*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 5. But the defendant must have been convicted as a rogue and vagabond. A conviction for being idle and disorderly is insufficient (*R* v. *Johnson*, [1909] 1 K. B. 439); and see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 443; POOR LAW.

(*t*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 10; and see title CRIMINAL LAW AND PROCEDURE, pp. 443 (appeals), 448 (costs), 537 (second offence of indecent exposure).

(*a*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 3 *et seq.*; see title LOCAL GOVERNMENT, p. 368, *ante*. Where there is any dispute as to jurisdiction to be transferred the question is to be settled by the High Court (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 29); and there is no appeal from its decision to the Court of Appeal (*ibid.*; *Ex parte Kent County Council and Dover Council, Ex parte Kent County Council and Sandwich Council*, [1891] 1 Q. B. 725, C. A.).

(*b*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 4.

(*c*) See p. 636, *post*.

SECT. 2. Original Civil Jurisdiction.

Army Act, 1881.

1348. The court of quarter sessions is the authority empowered to order an increased rate to be paid for the employment of carriages and animals for military purposes (*d*).

Clergy Discipline Act.

1349. Every three years the justices at county quarter sessions select five of their number as members of the list of assessors for the purpose of hearing certain cases in the Consistory Court (*e*).

Constables for the parish.

1350. The justices have power to pass a resolution, if they think it necessary, for the appointment of one or more parish constables for any parish within their jurisdiction (*f*).

County police.

The control of county police is in the hands of the standing joint committee of the county council and quarter sessions, but the justices in quarter sessions continue to have power to require constables to perform such police duties as they may think proper and maintain supervision of the force, the members of which are bound to obey their lawful orders (*g*).

Coroners in boroughs.

1351. In boroughs having quarter sessions of their own the coroner appointed by the council receives his remuneration by order of the recorder, who consequently has power to disallow fees in cases where he thinks that an inquest was unnecessary or was not duly taken (*h*).

Fines and orders as to money.

1352. The court of quarter sessions is responsible for the levy of all fines, issues, amerciaments, forfeited recognisances, or sums of money due in lieu or satisfaction of them (*i*), the roll of which is compiled (*k*) and sworn to by the clerk of the peace (*l*) before being placed in the hands of the sheriff and his officers to execute (*m*).

Fines etc., not accounted for as recovered by the sheriff or discharged, are re-inserted in the roll until they are recovered or until it has been ascertained to the satisfaction of the Commissioners of the Treasury that the party in default has not any goods or chattels in Great Britain on which distress can be levied and that the party in default himself cannot be found or placed in prison (*n*).

These provisions extend to the recovery of fines imposed by

(*d*) Army Act, 1881 (44 & 45 Vict. c. 58), s. 113, Sched. III.

(*e*) Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 3 (1) (c); and see title ECCLESIASTICAL LAW, Vol. XI., p. 507, note (*f*).

(*f*) Parish Constables Act, 1872 (35 & 36 Vict. c. 92), s. 2. The list of persons eligible to serve as parish constables is made out by justices at special sessions; see p. 570, *ante;* and see, generally, title POLICE.

(*g*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 9, 30; *Re Local Government Act*, 1888, *Ex parte Leicestershire County Council and Standing Joint Committee of the County of Leicester*, [1891] 1 Q. B. 53; and see titles LOCAL GOVERNMENT, p. 370, *ante;* POLICE.

(*h*) See title CORONERS, Vol. VIII., p. 227; but as to the fees payable to the coroner under the Coroners Act, 1887 (50 & 51 Vict. c. 71), s. 27 (2), see title CORONERS, Vol. VIII., p. 227.

(*i*) Levy of Fines Act, 1822 (3 Geo. 4, c. 46), s. 2.

(*k*) *Ibid.*

(*l*) *Ibid.*, s. 3.

(*m*) *Ibid.*, s. 1.

(*n*) Levy of Fines Act, 1823 (4 Geo. 4, c. 37), s. 1.

justices in a court of petty sessions or summary jurisdiction and notified to the clerk of the peace by the clerk to the justices (*o*).

The court is to make orders from time to time for the payment out of money taken from a prisoner arrested by the sheriff or his officers of such sums as may be necessary for the board or lodging for one night of such prisoner (*p*).

Gas and water rates.

1353. Justices at quarter sessions have power to order a rateable reduction in the cost of the gas or water so as to reduce the profit of the gas or water company to the prescribed rate; to make orders as to incidental costs, and to inflict fines for refusal to produce books (*q*).

Highways.

1354. The justices have powers in connection with the improvement, widening, and diverting of highways, and plans and certificates relating to such matters must be deposited with the clerk of the peace (*a*).

Licensing.

1355. In counties and boroughs other than county boroughs the justices of the county in quarter sessions are the compensation authority (*b*).

Lunacy.

1356. The justices of every county and quarter sessions borough appoint out of their number as many fit and proper persons as they consider necessary to act as the judicial authority for lunacy purposes (*c*). They also appoint three or more justices and one medical practitioner or more to act as visitors, and the clerk of the peace or some other person to act as clerk to the visitors (*d*). They may make an order on the county or borough treasurer for the payment out of the county or borough fund of the salary and expenses of the visitors and their clerk (*e*).

In counties they are the licensing authority for houses for the reception of lunatics not in the jurisdiction of the Lunacy Commissioners, and may in their discretion recommend to the Lord Chancellor that existing licences shall be revoked or not renewed (*f*).

(*o*) Quarter Sessions Act, 1849 (Baines' Act) (12 & 13 Vict. c. 45), s. 17. As to such fines, see p. 603, *ante*.

(*p*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 14 (2). A copy of the order must be exhibited in some conspicuous place (*ibid.*, s. 14 (3)); and see title SHERIFFS AND BAILIFFS. Misconduct by a sheriff or his officer in execution of a writ issued by the court of quarter sessions may be dealt with by that court as if it were a contempt (Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 29 (3)).

(*q*) See, generally, titles GAS, Vol. XV., pp. 367, 368; WATER SUPPLY.

(*a*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), ss. 82—93; Highway Act, 1864 (27 & 28 Vict. c. 101), ss. 21, 47, 48; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 76 *et seq.*

(*b*) See title INTOXICATING LIQUORS, Vol. XVIII., pp. 68, 69.

(*c*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 10; and see title LUNATICS AND PERSONS OF UNSOUND MIND, p. 502, *ante*.

(*d*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 177, 178; and see title LUNATICS AND PERSONS OF UNSOUND MIND, p. 468, *ante*.

(*e*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 225.

(*f*) *Ibid.*, ss. 208, 221 (1). In boroughs this jurisdiction is exercised by the justices in special sessions; see p. 570, *ante*; and, generally, title LUNATICS AND PERSONS OF UNSOUND MIND, p. 474, *ante*.

SECT. 2. Original Civil Jurisdiction.

Poor law.

1357. Overseers and others who, under an order of two justices, seize the goods of husbands and parents who leave their wives or children, for the maintenance of such wives and children are liable to account for the money so received by them to quarter sessions (*g*). In counties the expenses of removal of a pauper in a parish which is not part of any union may be ordered by the justices in quarter sessions to be paid out of the county fund (*h*).

The justices in quarter sessions have also power to remove causes of complaint at a workhouse certified to them by justices who have visited the workhouse (*i*).

Prisons.

1358. In counties the justices in quarter sessions are the prison authority (*k*), and appoint the members of the visiting committee (*l*) and the officers of the prison (*m*).

Savings banks.

1359. In both counties and boroughs the court of quarter sessions has authority to make an order for the delivery of savings bank effects in certain circumstances (*n*).

Scientific and loan societies.

1360. The court of quarter sessions receives, through the clerk of the peace, and confirms, the rules made by scientific and loan societies (*o*).

SECT. 3.—*Jurisdiction on Appeal.*

SUB-SECT. 1.—*In General.*

General jurisdiction.

1361. The court of quarter sessions has jurisdiction in all cases where there is a right of appeal from a conviction or order, except a separation order (*p*), made by a court of summary jurisdiction (*q*) or from the dismissal by such a court of an information under the Excise Management Acts, 1827 and 1834 (*r*).

SUB-SECT. 2.—*In Particular Cases.*

Jurisdiction in particular cases.

1362. The court of quarter sessions has also jurisdiction on

(*g*) Poor Relief (Deserted Wives and Children) Act, 1718 (5 Geo. 1, c. 8); and see title POOR LAW.

(*h*) Poor Removal Act, 1845 (8 & 9 Vict. c. 117), s. 5.

(*i*) Workhouses Act, 1790 (30 Geo. 3, c. 49), s. 1.

(*k*) Prison Act, 1865 (28 & 29 Vict. c. 126), ss. 5, 6; Prison Act, 1877 (40 & 41 Vict. c. 21), s. 61; and see title PRISONS.

(*l*) See *ibid.*

(*m*) Prison Act, 1865 (28 & 29 Vict. c. 126), s. 10. In the City of London the prison authority is the Lord Mayor and Aldermen, in other boroughs the borough justices at special sessions; see title PRISONS.

(*n*) Trustee Savings Banks Act, 1863 (26 & 27 Vict. c. 87), s. 13. As to such banks, see title BANKERS AND BANKING, Vol. I., pp. 576 *et seq.*

(*o*) Scientific Societies Act, 1843 (6 & 7 Vict. c. 36), s. 5; Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 4, as to which see titles LITERARY AND SCIENTIFIC INSTITUTIONS, p. 207, *ante*, and LOAN SOCIETIES, p. 219, *ante*.

(*p*) The appeal from a court of summary jurisdiction granting or refusing a separation order is to a Divisional Court of the Probate, Divorce, and Admiralty Division of the High Court; see title HUSBAND AND WIFE, Vol. XVI., p. 602.

(*q*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 19. As to the conditions of the right of appeal, see p. 642, *post.*

(*r*) 7 & 8 Geo. 4, c. 53, s. 82; 4 & 5 Will. 4, c. 51, s. 23; see title REVENUE.

appeal from rates and assessment to rates for relief of the poor (*s*), county (*t*), or borough (*a*) rates, general district rates (*b*), and highway rates (*c*); from orders for the removal of paupers (*d*), orders relating to the settlement of pauper lunatics (*e*), and bastardy orders (*f*); and against appointments of overseers (*g*), orders and certificates of justices in regard to highways (*h*), and awards of inclosure commissioners (*i*). In counties it is the confirming authority in licensing matters (*k*).

SECT. 3. Jurisdiction on Appeal.

SECT. 4.—*Procedure.*

1363. The court of quarter sessions is opened by proclamation made by the crier of the court.

Proclamation.

In boroughs, when the sessions are being held by a deputy for the recorder, the formal appointment of the deputy is then read in open court (*l*).

(*s*) Poor Relief Act, 1601 (43 Eliz. c. 2), s. 2; Poor Relief Act, 1743 (17 Geo. 2, c. 38), s. 4; Poor Rate Act, 1801 (41 Geo. 3, c. 23), ss. 4, 6; Scientific Societies Act, 1843 (6 & 7 Vict. c. 36), s. 6; Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), ss. 32—34; Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), s. 1; see, generally, title RATES AND RATING.

(*t*) County Rates Act, 1852 (15 & 16 Vict. c. 81), s. 21; see, generally, titles LOCAL GOVERNMENT, p. 359, *ante;* RATES AND RATING.

(*a*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 144 (10); see, generally, titles LOCAL GOVERNMENT, p. 320, *ante;* RATES AND RATING.

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 269; see the Local Government Act, 1894 (56 & 57 Vict. c. 73); and, generally, title RATES AND RATING.

(*c*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), ss. 106—108; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 269; see, generally, title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 171, 172.

(*d*) Poor Relief Act, 1662 (14 Car. 2, c. 12), s. 2; Poor Relief Act, 1691 (3 Will. & Mar. c. 11), ss. 8, 10; Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 79; Poor Law Procedure Act, 1848 (11 & 12 Vict. c. 31), ss. 4 *et seq.;* see, generally, title POOR LAW.

(*e*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 303; see title LUNATICS AND PERSONS OF UNSOUND MIND, p. 497, *ante.*

(*f*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 4; Bastardy Act, 1845 (8 & 9 Vict. c. 10), s. 6; see title BASTARDY, Vol. II., p. 453.

(*g*) Poor Relief Act, 1601 (43 Eliz. c. 2), s. 1; but as to rural parishes, see also Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 5, 50; and as to overseers, see, generally, titles LOCAL GOVERNMENT, p. 249, *ante;* POOR LAW.

(*h*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), ss. 88, 105; Highway Act, 1864 (27 & 28 Vict. c. 101), ss. 37—44; see, generally, title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 77, 79, 131, 132.

(*i*) Inclosure Act, 1836 (6 & 7 Will. 4, c. 115), s. 53; Inclosure Act, 1845 (8 & 9 Vict. c. 118), ss. 62, 63; see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 563.

(*k*) See title INTOXICATING LIQUORS, Vol. XVIII., pp. 50, 51.

(*l*) Whether the appointment is made by the recorder himself under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 166, or the authority acting in his place under the Recorders, Stipendiary Magistrates, and Clerks of the Peace Act, 1906 (6 Edw. 7, c. 46), s. 1; see p. 623, *ante.*

SECT. 4.
Procedure.

The grand jury.

1364. The grand jury is then called and sworn by the clerk of the peace and afterwards charged by the chairman or deputy chairman of the court, or the recorder or deputy recorder, as the case may be.

Duties.

The duties of the grand jury are carried out in the same manner as in a court of assize, except that indictments in respect of which they find a true bill are delivered to the clerk of the peace instead of the clerk of assize (*m*).

Order of business.

1365. The order in which business is dealt with by the court is in its discretion, but it is usual to deal first with original civil business, then with appeals, and finally with the trial of prisoners upon indictment.

Second court.

1366. At any court of general or quarter sessions or adjourned quarter sessions the court may be divided and a second court formed whenever such a course seems advisable (*n*).

In counties.

In a county such a court is formed by the appointment thereto of two or more justices by all the justices present at the meeting (*o*).

In boroughs.

In a borough it is formed by the appointment of an assistant recorder by the recorder or his deputy (*p*).

In either case the clerk of the peace appoints an assistant clerk of the peace to be clerk of the second court (*q*).

Adjournment.

1367. At the end of each day of the sessions, if the business is not completed, the court must be formally adjourned. The adjournment is proclaimed by the crier in the presence, in counties, of at least two justices (*r*), and, in boroughs, of the recorder or his deputy (*s*).

For what time.

The sessions may be adjourned until the next day or to any day before that on which the next sessions are to be held (*a*), and the

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(*m*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 345 *et seq.* The grand jury no longer makes a presentment upon any matter except those in respect of which an indictment will be drawn (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 78 (3)).

(*n*) Stipendiary Magistrates Act, 1858 (21 & 22 Vict. c. 73), s. 9. In some counties, if not as a rule in general, the deputy chairman presides over the second court. The Quarter Sessions Act, 1842 (5 & 6 Vict. c. 38), s. 4 (now repealed), provided that, on the formation of a second court, the deputy chairman should be one of the officiating justices. There does not appear to be any statutory authority for or against the holding of a third court; but the Stipendiary Magistrates Act, 1858 (21 & 22 Vict. c. 73), seems to contemplate only a second court. (Note *per* Clerk of the Peace for Northumberland and of Berwick-upon-Tweed.)

(*o*) Stipendiary Magistrates Act, 1858 (21 & 22 Vict. c. 73), s. 9.

(*p*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 166 (1).

(*q*) *Ibid.*, s. 166 (5); Stipendiary Magistrates Act, 1858 (21 & 22 Vict. c. 73), s. 11.

(*r*) *Re Bowman, R.* v. *Middlesex Justices* (1834), 5 B. & Ad. 1113; see *R.* v. *Carmarthen Justices* (1821), 4 B. & Ald. 291.

(*s*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 165, 166; see p. 600, *ante.* In the absence of the recorder or his deputy the mayor may adjourn the sessions; see p. 544, *ante.* The adjournment is noted in the minute book of the clerk of the peace.

(*a*) *St. Michael's Coslany, Norwich* v. *St. Matthew's, Ipswich* (1729), 2 Stra. 831; *R.* v. *Fisher* (1730), 2 Stra. 865.

adjourned sitting may take place at the same place or, in counties, at any other place within the county (*b*).

Whether adjourned or not, the sessions are deemed to take place on one day only, the day on which they are opened (*c*), all business being dealt with in reference to that day (*d*).

Effect of no adjournment.

1368. If the sessions are not adjourned they are closed, and business purporting to be transacted on a day subsequent to the opening day is not legally transacted if there is no adjournment (*e*). The justices may alter their decisions or orders at any time during the sessions (*f*), but not afterwards (*g*), and orders made at one sessions cannot be varied at subsequent sessions (*h*). Business, however, which is not finally determined may be adjourned to the next or a subsequent sessions, whether merely for judgment or for the hearing of the case (*i*).

Right of audience.

1369. It is in the discretion of any court of quarter sessions to decide whether solicitors shall practise before them as advocates or not (*j*), but no solicitor in any event may so practise unless he has been admitted as a solicitor of the Supreme Court (*k*), nor if he or his partner is a justice of the county for which the court is held (*l*). In most cases it is the rule for barristers only to practise before courts of quarter sessions, and an order of justices that in future barristers only should be heard provided that at least four attended has been upheld, even though no barrister had previously attended the court except upon special retainer (*m*).

Contempt of court by counsel.

1370. Counsel who commit contempt (*n*) of the court of quarter sessions are liable to punishment by that court, even where

(*b*) *R.* v. *Hayward* (1837), 6 Ad. & El. 590; *R.* v. *Suffolk Justices* (1847), 4 Dow. & L. 628; see p. 619, *ante*.

(*c*) *R.* v. *Surrey Justices* (1813), 1 M. & S. 479.

(*d*) *St. Andrew's, Holborn* v. *St. Clement's Danes* (1704), 2 Salk. 494, 606.

(*e*) *R.* v. *Polsted* (*Inhabitants*) (1747), 2 Stra. 1263; *R.* v. *Mullaney* (1833), 6 C. & P. 96.

(*f*) *St. Andrew's, Holborn* v. *St. Clement's Danes, supra*; *R.* v. *Leicestershire Justices* (1813), 1 M. & S. 442.

(*g*) *Cockfield* (*Inhabitants*) v. *Boxstead* (*Inhabitants*) (1696), 2 Salk. 477.

(*h*) *R.* v. *Staffordshire Justices* (1857), 7 E. & B. 935.

(*i*) *R.* v. *Wiltshire Justices* (1811), 13 East, 352; *R.* v. *Kimbolton* (*Inhabitants*) (1837), 6 Ad. & El. 603; *Keen* v. *R.* (1847), 10 Q. B. 928; *R.* v. *Westmoreland Justices* (1868), L. R. 3 Q. B. 457. But where special business is required by statute to be transacted at a particular sessions it cannot be adjourned (*Bowman* v. *Blyth* (1856), 7 E. & B. 26; and see *R.* v. *Belton* (1848), 11 Q. B. 379); and where the jurisdiction of quarter sessions in a matter existed under an Act of Parliament which was repealed before the holding of the sessions to which the matter was adjourned the jurisdiction failed with the repeal (*R.* v. *London* (*City*) *Justices* (1764) 3 Burr. 1456).

(*j*) *Ex parte Evans* (1846), 9 Q. B. 279; *Collier* v. *Hicks* (1831), 2 B. & Ad. 663, *per* Lord TENTERDEN, C.J., at p. 669.

(*k*) Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 2; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 87; see title SOLICITORS.

(*l*) Justices of the Peace Act, 1906 (6 Edw. 7, c. 16), s. 3.

(*m*) *Ex parte Evans* (1846), 9 Q. B. 279; and see titles BARRISTERS, Vol. II., pp. 372, 374; SOLICITORS.

(*n*) See, generally, title CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., pp. 280 *et seq.*, 296.

SECT. 4. Procedure.

the contempt is committed in the course of the conduct of a case (*o*).

Contempt in general.

1371. In matters of contempt generally the court of quarter sessions has as part of its jurisdiction an inherent power to punish persons for acts committed in the face of the court, but, if it exceeds its jurisdiction and proceeds unreasonably to treat as a contempt what is not so in fact, the High Court will restrain its action (*p*).

Punishment.

1372. The power is exercised by causing an officer of the court to take the offending party into custody and by the infliction of a fine or a term of imprisonment (*q*). The court, it seems, has no power to deal with contempt committed by one of its constituent members (*r*). Contempt of court not committed in court itself cannot be directly punished by quarter sessions. The offender may, however, be indicted for a misdemeanour at common law and punished by imprisonment or by a fine (*s*), and the High Court, which has power to attach persons guilty of contempt of an inferior court, always protects such a court from inroads upon its jurisdiction (*t*).

Part XIII.—Appeals from Courts of Summary Jurisdiction.

SECT. 1.—*To Quarter Sessions.*

SUB-SECT. 1.—*Who may Appeal.*

Right of appeal in special cases.

1373. The right of appeal from courts of summary jurisdiction to quarter sessions is the creation of statute, and is provided for in many of the Acts which confer upon justices criminal, civil, or administrative powers (*u*).

General right of appeal.

1374. In addition to the right so given, any person adjudged by the conviction or order of a court of summary jurisdiction to imprisonment without the option of a fine, either as punishment for an offence, or for failing to do or abstain from doing an act required to be done or left undone, is entitled to appeal to quarter sessions whether the statute under which the conviction or order is made grants or withholds the right of appeal (*a*).

Where right does not arise.

This does not apply, however, where the penalty is imposed in default of compliance with an order for the payment of money, the finding of securities, the entering into a recognisance, or the giving of security (*b*); nor where the person on whom the penalty is

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(*o*) *Re Pater* (1864), 33 L. J. (M. C.) 142; and see titles BARRISTERS, Vol. II., pp. 385, 386; CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., p. 295, note (*a*).

(*p*) *Re Pater, supra.*

(*q*) See 2 Hawk. P. C., c. 1, s. 15.

(*r*) See 2 Hawk. P. C., c. 8, s. 17.

(*s*) Compare *R.* v. *Lefroy* (1873), L. R. 8 Q. B. 134; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 461.

(*t*) *R.* v. *Parke*, [1903] 2 K. B. 432; *R.* v. *Davies*, [1906] 1 K. B. 32.

(*u*) As to these special rights of appeal, see p. 650, *post.*

(*a*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 19.

(*b*) *Ibid.*

imposed has pleaded guilty to an indictable offence for which he could be and has elected to be dealt with summarily (*c*).

SECT. 1.
To Quarter Sessions.

Appeal from sentence of metropolitan police magistrate.

1375. Persons sentenced by a metropolitan police magistrate to pay a fine exceeding £3 or to be imprisoned for more than one month are entitled to appeal to quarter sessions (*d*).

SUB-SECT. 2.—*To what Court.*

Court to which appeal lies.

1376. The appeal must be made to the prescribed court of general or quarter sessions, or, if no court is prescribed, to the next practicable court of general or quarter sessions held for the area within which the court acted whose decision is appealed against (*e*). The next practicable court means one held not less than fifteen days after the day on which the decision appealed against was given (*f*).

SUB-SECT. 3.—*General Rules of Procedure.*

Rules of procedure.

1377. Appeals from the convictions or orders of petty sessions and courts of summary jurisdiction acting in pursuance of the Summary Jurisdiction Acts are regulated by the rules laid down in these Acts (*g*), which are as follows:—

Notice of appeal.

1378. Notice must be given by the appellant within seven days (*h*) of the date of the decision appealed against (*i*). It must be

(*c*) *R.* v. *London Justices, Ex parte Lambert,* [1892] 1 Q. B. 664. Where, however, a defendant, while admitting the truth of a charge, asks for the case to be heard on the ground that there are extenuating circumstances he is not debarred from the right of appeal (*R.* v. *Essex Justices, Ex parte Stark* (1891), 61 L. J. (M. C.) 120; *R.* v. *Dickinson, Ex parte Davis,* [1910] 1 K. B. 469).

(*d*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 50.

(*e*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31 (1).

(*f*) *Ibid.,* ss. 31 (1), 32. It would appear that in counties which have two distinct quarter sessions held by adjournment from one to the other the fifteen days must be calculated in either district from the first day of the sessions (*R.* v. *Sussex Justices* (1865), 34 L. J. (M. C.) 69).

(*g*) Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 6. Other appeals are regulated by the Quarter Sessions Act, 1849 (Baines' Act) (12 & 13 Vict. c. 45), as to which see pp. 649, 650, *post.* The summary jurisdiction rules do not apply to licensing appeals, since the justices sitting in licensing matters are not a court of summary jurisdiction (*Boulter* v. *Kent Justices,* [1897] A. C. 556), and special rules are provided (see title INTOXICATING LIQUORS, Vol. XVIII., pp. 78 *et seq.*), nor do the rules apply to appeals against poor law orders for removal which are excepted from the operation of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), by *ibid.,* s. 35; see title POOR LAW. Orders in lunacy and bastardy cases are similarly excepted, and special rules for appeals against orders for the maintenance of lunatics are provided by the Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 301—313; see title LUNATICS AND PERSONS OF UNSOUND MIND, p. 494, *ante.* Bastardy orders are, however, expressly brought within the operation of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), by *ibid.,* s. 54, and the rules as to appeals therefrom apply; see *R.* v. *Shingler* (1886), 17 Q. B. D. 49; title BASTARDY, Vol. II., p. 453.

(*h*) The provision contained in the Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 1, that fourteen days' notice of appeal must be given does not apply to any appeal from a court of summary jurisdiction (Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 4, Sched.).

(*i*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31 (2). Where the statute under which the decision is given prescribes a different

SECT. 1. To Quarter Sessions.

Recognisances.

in writing signed by the appellant or his agent on his behalf (*j*), and must be served upon the other party and upon the clerk to the justices (*k*). It must contain the general grounds of the appeal (*l*).

1379. Within three days after giving notice of appeal the appellant must enter into a recognisance before a court of summary jurisdiction to appear at the sessions to which he is appealing, to prosecute the appeal, to abide the judgment of the sessions, and to pay such costs as may be awarded thereat (*m*). The court of

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time for notice, the time so prescribed must be observed (Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31 (2)). In *R.* v. *Glamorganshire Justices* (1889), 22 Q. B. D. 628, the court was of opinion that, although the statute under which that case was decided prescribed a shorter time within which notice was to be given, notice given within seven days was sufficient, the effect of the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 6, being to provide for uniformity of procedure. Inasmuch as the provisions as to prescribed time are contained in the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), obedience to the conditions and regulations in which is enjoined by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 6, it is difficult to suppose that notice given within the prescribed time could be held to be insufficient; and it is clear since the decision in *R.* v. *Glamorganshire Justices, supra,* that notice given within the seven days allowed by the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), would in all cases be held to be sufficient. For forms of notices of appeal to quarter sessions in rating appeals, see Encyclopædia of Forms and Precedents, Vol. XI., pp. 215 *et seq.*

(*j*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31 (7).

(*k*) *Ibid.*, s. 31 (2). The notice need not be served personally (*R.* v. *Somersetshire Justices, Ex parte Talbot* (1900), 69 L. J. (Q. B.) 311). It need not be in any special form, and it may be sent by post as a registered letter, and may be deemed to have been served at the time when it would be delivered in the ordinary course of the post (Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31 (7); see *R.* v. *Essex Justices, Ex parte Holmes,* (1895), 11 T. L. R. 187). It is insufficient to serve notice on the solicitor who represented the "other party" at the hearing, for there is no reason to assume that the authority of the solicitor (see title SOLICITORS) is continued (*R.* v. *Oxfordshire Justices,* [1893] 2 Q. B. 149, C. A.). In an appeal against a conviction under the Revenue Acts notice must be served on the officer who laid the information; a notice served on a clerk in the office is insufficient (*R.* v. *Eaves* (1870), L. R. 5 Exch. 75). Where the "other party" consists of several joint owners, service on one of them is sufficient (*R.* v. *Liverpool* (*Recorder*) (1861), 31 L. J. (M. C.) 127). Notice addressed to the clerk of the justices is sufficient notice to the justices (*R.* v. *Essex Justices,* [1892] 1 Q. B. 490).

(*l*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31 (2); compare *R.* v. *Oxfordshire Justices* (1823), 1 B. & C. 279. As to sufficiency of the grounds of appeal, see p. 646, *post;* and see *Provincial Motor Cab Co.* v. *Dunning,* [1909] 2 K. B. 599, where the form given in Oke's Magisterial Formalist, 8th ed., 53, was approved.

(*m*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31 (3). Where the statute under which the decision is given prescribes a different time for entering into a recognisance, the time as prescribed must be observed (*ibid.*); see note (*i*), p. 643, *ante.* In the case of an appeal by the owner of an animal from any conviction or order of a court of summary jurisdiction under the Protection of Animals Act, 1911 (1 & 2 Geo. 5, c. 27) (this Act comes into force on 1st January, 1912), the court may direct that the recognisance shall include an undertaking not to sell or part with the animal until the appeal is determined or abandoned, and to produce it on the hearing of the appeal if such production is possible without cruelty (*ibid.*, s. 14 (2)). As to recognisances generally, see p. 607, *ante.* The court of summary jurisdiction before which this must be done is any such court, whether in the place where the decision was given or not (*R.* v. *Durham Justices,* [1895] 1 Q. B.

summary jurisdiction may require a surety or sureties to be found by the appellant, or may permit him, instead of entering into a recognisance, to give such other security, by deposit of money with their clerk or otherwise, as they may deem sufficient (*n*).

If he is in custody the court may, if it thinks fit, release him on his entering into the recognisance or giving the other security required (*o*).

Entering the appeal.

1380. Appeals must be entered at the office of the clerk of the peace (*p*). The practice with regard to the time for entering them varies at different sessions, and such rules of practice as exist must be observed (*q*), but the sessions are not entitled to make any such rule as will amount to an additional condition of appeal (*r*). An appeal once entered must be heard at the sessions, or at an adjournment thereof, or must be respited until a subsequent court, otherwise the appeal is lost (*s*).

Effect of death of parties.

1381. Where the proceedings appealed from were begun by an information or complaint the appeal does not necessarily lapse upon the death of the respondent (*t*), but it would seem to be otherwise in the case of the death of the appellant (*a*).

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801), provided that it has all the proper materials before it (*R.* v. *Durham Justices*, [1895] 1 Q. B. 801, *per* WRIGHT, J., at p. 805; and see *R.* v. *Anglesey Justices*, [1892] 2 Q. B. 29). The recognisance must not be entered into before notice of appeal is given (*R.* v. *Cheshire Justices* (1896), 60 J. P. 585), and the justices before whom it is entered into should have the notice of appeal before them so as to be able to judge of the amount to be required (*R.* v. *Anglesey Justices*, *supra*). A recognisance may be entered into by a director or member of a limited liability company on behalf of the company (*Southern Counties Deposit Bank, Ltd.* v. *Boaler* (1895), 59 J. P. 536).

(*n*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31 (3). As to the duties of the clerk to the justices in recording such security, see p. 616, *ante*.

(*o*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31 (4). In a case tried before the enactment of this provision the Court of Queen's Bench declined to order the release of an appellant, on the ground that the right of appeal does not give a suspension of the execution (*Ex parte Willmott* (1861), 30 L. J. (M. C.) 161).

(*p*) See p. 628, *ante*. The appellant's solicitor is liable personally for the fees payable to the clerk of the peace (*Langridge* v. *Lynch* (1876), 34 L. T. 695); and see title SOLICITORS.

(*q*) *R.* v. *Derbyshire Justices* (1852), 22 L. J. (M. C.) 31. It is customary for sessions to require appeals which are not to be respited (see p. 646, *post*), but tried at that sessions, to be entered before the beginning of sessions, that the justices may know how much business there is to transact; see *R.* v. *Pawlett* (1873), L. R. 8 Q. B. 491. Now that the holding of sessions may be dispensed with in the absence of business five days before the day fixed for their commencement (see Assizes and Quarter Sessions Act, 1908 (8 Edw. 7, c. 41), and p. 620, *ante*), it may be necessary, in order to ensure the appeal being heard, to enter it more than five days before the sessions. If an appeal cannot be entered before the holding of sessions is in fact dispensed with, the next sessions to be held for the same area are, presumably, the next "practicable" sessions (see p. 643, *ante*).

(*r*) *R.* v. *Pawlett*, *supra*.

(*s*) *Anon.* (1725), 1 Sess. Cas. (K. B.) 271; Archbold, Practice of Quarter Sessions, 6th ed., 253. As to respiting appeals, see p. 646, *post*.

(*t*) *R.* v. *Truelove* (1880), 5 Q. B. D. 336.

(*a*) See Archbold, Practice of Quarter Sessions, 6th ed., 254, n. *Quære*,

SECT. 1. To Quarter Sessions.

Respiting appeals.

1382. The court of quarter sessions has power to respite the hearing of the appeal or to postpone the giving of its judgment to the next or a subsequent sessions (*b*).

The exercise of this power for the advancement or convenience of justice is in the absolute discretion of quarter sessions (*c*), unless by the statute under which the proceedings are held the hearing is expressly limited to one particular court (*d*).

Effect of informality.

1383. The justices at quarter sessions are the judges, subject to correction by rule by the High Court on a point of law (*e*), of the observance of their rules of practice, the sufficiency of the notice given, and the validity of the grounds of appeal stated (*f*). When the recognisances required are insufficiently entered into or are otherwise defective or invalid they may allow them to be amended on such terms as to time and costs as they may decide (*g*).

Procedure at hearing.

1384. At the hearing of the appeal the conviction or order appealed against is read by the clerk of the peace (*h*). The appellant may then be called upon to prove service of notice of appeal (*i*), and objection may be taken to the grounds of appeal, but no objection which is merely one of form will be allowed, and in other cases the court has power to cause the ground of appeal to be amended (*k*).

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however, where, in consequence of the decision appealed from, the possession of property (which, for example, has been forfeited by the decision) is in dispute.

(*b*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31 (5); see p. 641, *ante*.

(*c*) *R.* v. *Wilts Justices* (1811), 13 East, 352; *R.* v. *Cambridge Union Guardians* (1861), 1 B. & S. 61; *R.* v. *Westmoreland Justices* (1868), 9 B. & S. 288.

(*d*) *Bowman* v. *Blyth* (1857), 7 E. & B. 47, Ex. Ch.; and see *R.* v. *Belton* (1848), 11 Q. B. 379.

(*e*) See pp. 661 *et seq.*, *post*.

(*f*) See note (*k*), *infra*.

(*g*) Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 8.

(*h*) Archbold, Practice of Quarter Sessions, 6th ed., 257. As on appeals counsel as a rule appear for the appellant and respondent respectively, the conviction appealed against is generally taken as read, the original being in court in the charge of the clerk of the peace. The conviction or order of the justices appealed against should be returned to the clerk of the peace by the clerk to the justices (Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 14). Should the return not be made in time before the appeal is to be heard the appellant might in certain circumstances be able to maintain an action against the justices (*Proser* v. *Hyde* (1786), 1 Term Rep. 414); but in that case it is presumed that he would have to prove that the omission was owing to malice, and was without reasonable or probable cause (see Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 1, and p. 556, *ante*; and see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS), or to indict the justices for disobedience to the statute (see *Ex parte Hayward* (1863), 3 B. & S. 546). In the event of there appearing to be a variance between the conviction or order returned by the justices and the note of it supplied by the justices to the appellant at the time, the appellant may apply for time to consider his position, and for the adjournment of the trial for that purpose (*R.* v. *Allen* (1812), 15 East, 333, 346).

(*i*) Where the appellant had given two notices of appeal and had elected to proceed on the second, which proved to be bad, it was held that the first notice still remained available for him to proceed on (*R.* v. *Wolverhampton* (*Recorder*) (1887), 35 W. R. 650).

(*k*) Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 3. The

Objection may also be taken at this stage to the form of conviction if bad upon the face of it; but such defect may, it seems, be amended by order of the court of quarter sessions (*l*).

After such preliminary points are dealt with, the hearing of the matter is proceeded with, the party who began in the court below beginning again and proving his case *de novo* (*m*).

Evidence.

1385. The appellant is within his right in calling any evidence in support of his appeal, whether called by him in the court below or not. An objection to the reception of any such evidence will not be allowed unless the grounds of appeal appear to be so imperfectly or incorrectly set forth as not to enable the respondent to prepare for trial, and even in such a case the court of quarter sessions has power to order the grounds of appeal to be amended upon such terms as to adjournment and costs as seem to it proper (*n*).

Decision of the court.

1386. At county quarter sessions the decision of the court is that of the majority of the justices hearing the matter.

The chairman of the court has no casting vote, and, therefore, where the justices are equally divided the appeal must either be adjourned and reheard (*o*) or one of the justices in favour of the appeal must withdraw, and the original decision be allowed to stand (*p*).

Powers of the courts.

1387. The court of quarter sessions has power to confirm, reverse, or modify the decision appealed against (*q*), or to remit the

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grounds of appeal must not be so imperfectly or incorrectly set forth as to be insufficient to enable the respondent to inquire into the subject of the statement and prepare for trial (Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 3). Where the right of appeal is given to an aggrieved party the grounds of appeal must show that the appellant is aggrieved (*R.* v. *West Riding of Yorkshire Justices* (1828), 1 Man. & Ry. (K. B.) 547; *R.* v. *Blackawton* (*Inhabitants*) (1830), 8 L. J. (O. S.) (M. C.) 123); but it is otherwise where the appellant is appealing against a conviction or order made against himself (*R.* v. *Newcastle-on-Tyne Justices* (1831), 1 B. & Ad. 933), or where by statute the right of appeal is left open to any person (*R.* v. *Somersetshire Justices* (1828), 7 B. & C. 681, n.).

(*l*) *R.* v. *Middlesex Justices* (1877), 2 Q. B. D. 516.

(*m*) *R.* v. *Newbury* (*Inhabitants*) (1791), 4 Term Rep. 475. In practice this means that in appeals against convictions or orders made in proceedings begun by an information or complaint it is the respondent that begins, except in revenue cases, where there is an appeal from acquittal; see p. 638, *ante*. Where there is a rule of practice at sessions that the appellant in a rating appeal, who disputes only the amount of the rate, should begin, the High Court will not interfere with the rule (*R.* v. *Suffolk Justices* (1817), 6 M. & S. 57).

(*n*) Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 3.

(*o*) *Bagg* v. *Colquhoun*, [1904] 1 K. B. 554. That, indeed, has been assumed to be ordinarily the proper course (*Ex parte Evans*, [1894] A. C. 16, *per* Lord HERSCHELL, L.C., at p. 19).

(*p*) Where it was necessary that an appeal should be decided at a particular meeting of sessions, withdrawal of one of the justices in favour of the appeal was approved (*Ex parte Evans, supra*). Where the justices refuse to adjourn, the appeal must be dismissed (compare *R.* v. *Ashplant* (1888), 52 J. P. 474).

(*q*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31 (5). Where on an appeal against a conviction the sentence imposed by the court of summary jurisdiction is modified by quarter sessions, a fresh warrant of commitment is required, and an action may be maintained

SECT. 1. To Quarter Sessions.

matter, with the opinion of that court on it, to a court of summary jurisdiction acting for the same area as the court whose decision was appealed against (*r*), or to make such other order in the matter as it may think just (*s*). In making any such order the court of quarter sessions may exercise any power which the court of summary jurisdiction might have exercised, and the order has the same effect and may be enforced in the same manner as if it had been made by the court of summary jurisdiction (*t*).

Indorsement of conviction or order.

1388. Whenever a decision appealed against is not confirmed it is the duty of the clerk of the peace to indorse, on the conviction or order appealed against, a memorandum of the decision of quarter sessions, and to send a similar memorandum to the clerk to the justices whose decision was appealed against, for entry in his register (*a*).

Enforcement of order of court.

1389. If the decision appealed against is confirmed, any justice acting for the area in which the conviction or order was made may issue a warrant of commitment or distress in execution of it as if no appeal had been brought (*b*).

Finality of order of court.

1390. The decision of quarter sessions, when given upon the merits, is conclusive, and precludes the raising of the same matter again before a court of summary jurisdiction (*c*).

Costs.

1391. The court of quarter sessions has power to make any order in its discretion for payment of the costs by either side (*d*). If an appeal is not prosecuted they may be awarded to a respondent who has received notice of appeal (*e*); and if, in his notice of appeal, the appellant has included grounds which in the opinion of the court are frivolous or vexatious, the whole or any part of the costs incurred by the respondent in disputing such grounds may be

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against the governor of a prison who detains a person without such fresh warrant (*Demer* v. *Cook* (1903) 88 L. T. 629). As to the issue of such warrants, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 322, note (*o*).

(*r*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31 (5). The case need not be remitted to the same court of summary jurisdiction as heard it before, unless, as in bastardy proceedings, the summons must be heard in a particular petty sessional division: see p. 566, *ante*.

(*s*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31 (5).

(*t*) *Ibid.*

(*a*) *Ibid.*, s. 31 (6). The memorandum must be embodied in any copy or certificate, made at any subsequent time, of the conviction or order and may be received as evidence in the same manner as the rest of the copy or certificate (*ibid.*).

(*b*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 27. As to the issue of warrants of distress, see p. 604, *ante*.

(*c*) *R.* v. *Glynne* (1871), L. R. 7 Q. B. 16; *R.* v. *May* (1880), 5 Q. B. D. 382.

(*d*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 27; Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31 (5); see the Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), ss. 3, 5. Costs, however, cannot be given against the Crown in excise cases where the Crown is not named (*R.* v. *Beadle* (1857), 7 E. & B. 492; and see *Moore* v. *Smith* (1859), 28 L. J. (M. C.) 126).

(*e*) Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 6.

awarded to him (*f*). Costs may also be awarded in cases where an appeal is dismissed for want of jurisdiction (*g*). The order to pay costs must state within what time they are to be paid, and direct them to be paid to the clerk of the peace and by him to the party entitled to them (*h*). If they are not paid within the required time, and the party ordered to pay them is not under a recognisance to do so, the party entitled to them, or any person on his behalf, may obtain a certificate from the clerk of the peace, upon production of which any justice acting for the area in which judgment was obtained may issue a warrant of distress (*i*).

SUB-SECT. 4.—*Reference to Arbitration.*

Reference to arbitration.

1392. In the case of appeals which are not against a conviction by a court of summary jurisdiction, nor against orders in bastardy, nor in revenue proceedings, the matter may be referred to arbitration either upon application made by the parties to the High Court and an order of that court, or by order of the court of quarter sessions made with the consent of the parties (*k*). Costs may be awarded in either case, and the order of quarter sessions may include power to the arbitrator to grant them (*l*).

(*f*) Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 4.

(*g*) *R.* v. *Padwick* (1858), 8 E. & B. 704.

(*h*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 27; see Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 5. The powers under the latter Act to order one party to pay costs to the other does not abolish the intervention of the clerk of the peace (*Gay* v. *Matthews* (1863), 4 B. & S. 425, 440, Ex. Ch.).

(*i*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 27. As to the issue of such warrants, see p. 604, *ante*, and title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 322, note (*o*).

(*k*) Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), ss. 12, 13. If the arbitration is ordered by the High Court upon the application of the parties, they must bind themselves to submit to the award. The procedure to be followed at the arbitration is that prescribed by the Arbitration Act, 1889 (52 & 53 Vict. c. 49) (see title ARBITRATION, Vol. I., pp. 438 *et seq.*). If the arbitration is ordered by quarter sessions, that court settles the terms upon which it takes place, but the order may upon the application of either party be made a rule of the High Court (Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 13). In either case the award is as binding and effectual as if it were the judgment of quarter sessions, and may be enrolled on the application of either party in its records, but in the latter case such enrolment must take place at the next sessions, or next but one, after the publication of the award or the order, if any, of the High Court setting it aside; otherwise, on the application of either party in the next term after publication of the award, the High Court may refer the matter back to the arbitrator or set the award aside and order the quarter sessions to enter continuances and hear the appeal. As to the application of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), to such proceedings, see title ARBITRATION, Vol. I., pp. 492, 493, and see *ibid.*, pp. 439, note (*c*), 446, 447.

(*l*) If the arbitrator is to have power to award costs, the order of reference must include the power (*West London Rail. Co.* v. *Fulham* (1870), L. R. 5 Q. B. 361). Where the arbitrator has power given him, the costs may be taxed after the close of the sessions (*Southampton Gas Co.* v. *Southampton Guardiams* (1877), 2 Q. B. D. 371). Otherwise an order made by sessions as to costs in a matter referred to an arbitrator must be made at the sessions at which the award is made (*R.* v. *Middlesex Justices* (1871), L. R. 6 Q. B. 220).

SECT. 1.

To Quarter Sessions.

Special procedure.

SUB-SECT. 5.—*Procedure in Particular Cases.*

1393. The number of statutes under which the right of appeal to quarter sessions is expressly given is very large, and reference must be made to the titles (*m*) under which they are dealt with for the peculiarities of procedure which exist in many particular cases.

Appeals against the decisions of justices in licensing (*n*), pauper removal (*o*), and pauper lunatic (*p*) matters are not governed by the Summary Jurisdiction Rules, but by the provisions of the statutes passed in regard to them.

Appeals against the decisions of justices sitting in special sessions (*q*), and rating appeals, other than appeals from the decisions of justices at special sessions, are also regulated by the statutes creating the right of appeal (*r*). In all these cases, however, regard must be paid to the provisions of the Quarter Sessions Act, 1849 (*s*), and in particular fourteen clear days' notice of appeal must be given in all appeals against rates (*t*).

SECT. 2.—*Appeals to the High Court.*

When the right of appeal exists.

1394. The right of appeal to the High Court by special case is given by statute (*u*) to any person who is aggrieved by a conviction,

(*m*) See titles *passim*.

(*n*) See, generally, title INTOXICATING LIQUORS, Vol. XVIII., pp. 81, 82.

(*o*) See the Poor Relief Act, 1662 (14 Car. 2, c. 12), s. 2; Poor Relief Act, 1691 (3 Will. & Mar. c. 11), s. 2; stat. (1697) 8 & 9 Will. 3, c. 30, ss. 3, 6; Poor Relief Act, 1722 (9 Geo. 1, c. 7), s. 8; Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), ss. 81 *et seq.*; Poor Law Procedure Act, 1848 (11 & 12 Vict. c. 31); Union Chargeability Act, 1865 (28 & 29 Vict. c. 79); and titles POOR LAW; RATES AND RATING.

(*p*) See Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 301—313; and, generally, title LUNATICS AND PERSONS OF UNSOUND MIND, p. 494, *ante*.

(*q*) As to special sessions, see p. 568, *ante*; see also the Parochial Assessments Act, 1836 (6 & 7 Will. 4, c. 96), s. 6 (for which see title RATES AND RATING); Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 105 (for which see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 168, 171).

(*r*) County Rates Act, 1852 (15 & 6 Vict. c. 81), ss. 17, 22 *et seq.*; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 144; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 269; Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 105; Highway Act, 1864 (27 & 28 Vict. c. 101), s. 37; Poor Relief Act, 1601 (43 Eliz. c. 2), s. 6; Poor Relief Act, 1743 (17 Geo. 2, c. 38), ss. 4 *et seq.*; Poor Rate Act, 1801 (41 Geo. 3, c. 23); Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), s. 32; Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39); see, generally, titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 171, 172; POOR LAW; RATES AND RATING.

(*s*) Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45).

(*t*) *Ibid.*, s. 1; see title RATES AND RATING.

(*u*) The statutes giving the right are the Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), and the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49). The latter Act (*ibid.*, s. 33) incorporates the former Act as far as it is applicable, and the procedure by special case is now regulated by these two statutes combined and by the Rule dated 20th March, 1906, made in substitution for the Summary Jurisdiction Rules, 1886, r. 18 (Statutory Rules and Orders (Summary Proceedings), England, 1906, p. 599). In cases where the provisions of the two Acts are inconsistent, those of the latter Act must be observed (*Stokes* v. *Mitcheson*, [1902] 1 K. B. 857). Even where justices purport to have stated a case under the former statute alone, they may be taken to have stated it in the exercise of all their powers, including those conferred by the Summary Jurisdiction Act, 1879

SECT. 2.
Appeals to the High Court.

order, determination, or other proceeding of a court of summary jurisdiction (*v*) on the ground that it is erroneous in point of law or is in excess of jurisdiction (*a*).

The person claiming to be aggrieved must be a person whose legal rights are directly affected by the justices' action (*b*).

Person aggrieved.

1395. If a person entitled by law to appeal against the decision of justices to quarter sessions chooses to appeal by way of special case to the High Court he thereby abandons his right of appeal to quarter sessions finally and conclusively and to all intents and purposes (*c*).

Appellant loses right of appeal to quarter sessions.

1396. If the justices consider that the application for a case to be stated is merely frivolous they may refuse it, but not otherwise (*d*), and they must on the request of the appellant sign and deliver to him a certificate of their refusal (*e*). Where they have refused, the High Court upon the application of the person aggrieved may

Duty of justices to state a case.

(42 & 43 Vict. c. 49) (*Rochdale Building Society* v. *Rochdale Corporation* (1886), 51 J. P. 134).

(*v*) As to when justices are sitting as a court of summary jurisdiction, see pp. 567, 568, *ante*. Justices sitting in licensing sessions are not a court of summary jurisdiction (*Boulter* v. *Kent Justices*, [1897] A. C. 556), and have therefore no power to state a case, nor have they such power when sitting in special sessions for any other purpose, as, for instance, when sitting to revise jury lists (*Hagmaier* v. *Willesden Overseers*, [1904] 2 K. B. 316), or when sitting in special sessions for hearing appeals against poor rates (*Wheeler* v. *Burmington Overseers* (1860), 29 L. J. (M. C.) 175), or when exercising special powers under the Lunacy Acts (*Re Bethel's Application* (1899), 80 L. T. 492), or when holding an inquiry into an indictable offence which they have no power to deal with summarily (*Foss* v. *Best*, [1906] 2 K. B. 105, *per* CHANNELL, J., at p. 110). On the other hand, it has been held that justices sitting, not under the Summary Jurisdiction Acts, but under a private Act, could state a case (*Leicester Borough Freemen* (*Deputies*) v. *Lewitt* (1893), 68 L. T. 201). Under the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 11, justices have no power to state a case (*Manders* v. *Manders*, [1897] 1 Q. B. 474), and where justices have refused to enforce a highway rate the proper method of proceeding is not by special case (*Walker* v. *Great Western Rail. Co.* (1859), 29 L. J. (M. C.) 107); and see title RATES AND RATING.

(*a*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33. Under the Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), an aggrieved party could only apply for a special case upon a point of law after the hearing and determination of an information or complaint; but see note (*v*), *supra*. A provision in a statute, passed before the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), came into operation, declaring the decision of jusitces to be final, was held not to be a bar to the stating of a case under *ibid.*, s. 33 (*R.* v. *Bridge* (1890), 24 Q. B. D. 609); but a similar provision in a statute passed since that Act came into operation precludes the stating of a case (*Westminster Corporation* v. *Gordon Hotels, Ltd.*, [1907] 2 K. B. 910), unless, perhaps, in the event of the justices giving their decision subject to a case for the opinion of the High Court (*ibid.*, *per* BUCKLEY, L.J., at p. 915).

(*b*) *Drapers' Co.* v. *Haddon* (1892), 9 T. L. R. 36.

(*c*) Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 14.

(*d*) *Ibid.*, s. 4. In no case can they refuse the application of the Attorney-General (*ibid.*). But where a magistrate refused to allow proceedings against a defendant to be withdrawn unless the defendant entered into a recognisance, which he declined to do, it was held that the magistrate could properly refuse to state a case, if he exercised his discretion on good grounds (*R.* v. *Little, Ex parte Wise* (1909), 74 J. P. 7).

(*e*) Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 4. The certificate should state that the application was merely frivolous.

SECT. 2. Appeals to the High Court.

issue a rule calling upon them and upon the respondent to show cause why they should not state a case (*f*). But justices cannot be compelled to state a case, and if stated the High Court will not entertain it, where the only issue is one of fact (*g*). Where justices have declined to hear a matter for want of jurisdiction they cannot state a case upon it (*h*), but it is otherwise if, having heard the matter, they then decline jurisdiction to determine it (*i*).

Procedure: application to justices.

1397. The course of procedure to be observed on applying for a special case to be stated is as follows:—the aggrieved party must apply to the court of summary jurisdiction whose proceedings are complained of within seven days from the date of the proceedings (*k*). The application must be made in writing and be left with the clerk of the court, together with copies of it for the justices who constituted the court (*l*).

Recognisances.

1398. The applicant is required to enter into a recognisance, with or without sureties, for such a sum as the justice or justices to whom he applies, or some other justices exercising the same jurisdiction, may deem meet, before the case is delivered to him, to prosecute his appeal without delay, to submit to the judgment of the court appealed to, and to pay the costs, if any, awarded by such court (*m*). He must pay to the clerk of the court of summary jurisdiction the fees to which the clerk is entitled (*n*). He will

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(*f*) Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 5; Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33. As to the proceedings on the application for a rule, see title CROWN PRACTICE, Vol. X., pp. 110 *et seq.*

(*g*) *R.* v. *Yeomans* (1860), 24 J. P. 149; *Dyer* v. *Park* (1874), 38 J. P. 294; *Re Basingstoke School* (1877), 41 J. P. 118.

(*h*) *R.* v. *West Riding of Yorkshire Justices* (1866), 6 B. & S. 802.

(*i*) *Muir* v. *Hore* (1877), 47 L. J. (M. C.) 17.

(*k*) Rule dated 20th March, 1906, made in substitution for the Summary Jurisdiction Rules, 1886, r. 18; see note (*u*), p. 650, *ante*. This rule supersedes the provision of the Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 2, which prescribes an interval of three days only. The seven days must, however, be seven clear days. Sunday, even if the last of the prescribed days, must be reckoned as one of them (*Peacock* v. *R.* (1858), 4 C. B. (N. S.) 264; *Wynne* v. *Ronaldson* (1865), 12 L. T. 711).

(*l*) Rule dated 20th March, 1906, made in substitution for the Summary Jurisdiction Rules, 1886, r. 18; see note (*u*), p. 650, *ante*. A written application must be served upon the justices (*South Staffordshire Waterworks Co.* v. *Stone* (1887), 19 Q. B. D. 168; *Lockhart* v. *St. Albans Corporation* (1888), 21 Q. B. D. 188, C. A.), and this must include all the justices composing the court whose decision is complained of (*Westmore* v. *Pain*, [1891] 1 Q. B. 482). The copy to be left with the clerk must also be left within seven days (*R.* v. *Knill* (1893), 57 J. P. 277); and see note (*k*), *supra*. It is now the duty of the clerk of the justices to forward to the justices the copies of the application left with him for them (Rule dated 20th March, 1906, *supra*). But where an applicant served each of the justices personally with the copy, and left with the assistant clerk to the justices another copy addressed to the clerk to the justices it was held that the rule had been sufficiently complied with (*R.* v. *Woodcock*, [1907] 2 K. B. 104).

(*m*) Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 3.

(*n*) *Ibid.* As to these fees, see pp. 613, 614, *ante*, and Justices Clerks Act, 1877 (40 & 41 Vict. c. 43), s. 8. Where the recognisance is not entered into until after the case is delivered, the High Court cannot entertain the case (*Walker* v. *Delacombe* (1894), 63 L. J. (M. C.) 77).

then, if in custody, be liberated upon his recognisance to appear before the same justice or justices, or other justice exercising the same jurisdiction, within ten days after the judgment of the High Court is given, unless the decision appealed against is reversed (*o*).

Discharge from custody.

If the conditions of the recognisance are not complied with, the justices may indorse particulars of the default upon it, and forward it to the clerk of the peace for the area within which they exercise jurisdiction to be enforced in the usual manner (*p*).

Limitation of time.

1399. When justices grant a special case it should be stated within three calendar months after the date of the application (*q*); and the applicant, on receiving the case from the justices, must transmit it to the High Court within three days (*r*), after first giving notice of appeal to the other party (*s*).

(*o*) Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 3.

(*p*) *Ibid.*, s. 13. As to the manner of enforcing recognisances, see pp. 607, 608, *ante*.

(*q*) Rule dated 20th March, 1906, made in substitution for the Summary Jurisdiction Rules, 1886, r. 18; see note (*u*), p. 650, *ante*. This rule has been held to be directory and not a condition precedent, so that where, through no fault of the applicant, the case was not delivered within three months, the High Court held that it had jurisdiction to entertain it (*Hughes* v. *Wavertree Local Board* (1894), 10 T. L. R. 357).

(*r*) Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 2. The performance of this duty is a condition precedent, in default of which, without compelling circumstances, the High Court cannot hear the case (*Woodhouse* v. *Woods* (1859), 29 L. J. (M. C.) 149; *Morgan* v. *Edwards* (1860), 29 L. J. (M. C.) 108; *Re Banks* v. *Goodwin* (1863), 3 B. & S. 548; *Great Northern Committee* v. *Inett* (1877), 2 Q. B. D. 284). Sunday is not excluded in calculating these three days (*Aspinall* v. *Sutton*, [1894] 2 Q. B. 349), and delay caused by sending the case back to the clerk to the justices for correction is no excuse (*Gloucester Local Board of Health* v. *Chandler* (1863), 32 L. J. (M. C.) 66). But where the courts are closed delay in transmission may be excused. Thus, a case received on Good Friday and transmitted on Wednesday, when the courts reopened, was held to have been duly transmitted (*Mayer* v. *Harding* (1867), L. R. 2 Q. B. 410); and unavoidable delay in the course of transmission, as for instance, by the post, might be excused (compare *Re Banks* v. *Goodwin, supra, per* BLACKBURN, J., at p. 555); but not so where the delay in transmission is caused by the neglect of a London agent of the appellant's solicitor (*Pennell* v. *Uxbridge* (*Churchwardens*) (1862), 31 L. J. (M. C.) 92). Where a case which has not been transmitted within the required time has been set down for hearing by the appellant, costs will be given against him (*Great Northern Committee* v. *Inett, supra*).

(*s*) This also is a condition precedent, in default of compliance with which the High Court has no jurisdiction to hear the case (*Edwards* v. *Roberts*, [1891] 1 Q. B. 302; *Foss* v. *Best*, [1906] 2 K. B. 105). Where the respondent cannot be found after every effort to find him has been tried, service upon the solicitor who represented him before the justices will be deemed sufficient (*Syred* v. *Carruthers* (1858), E. B. & E. 469; *Gloucester Local Board of Health* v. *Chandler* (1863), 32 L. J. (M. C.) 66), and this was so held where the solicitor had ceased to act for the respondent, the latter being served with the notice at a date long subsequent (*Anderson* v. *Reid* (1902), 86 L. T. 713). See also *Teddington Urban District Council* v. *Vile* (1906), 70 J. P. 381, where the court was satisfied that every effort had been made to serve the respondent with notice, and that he actually knew of the appeal; but notice given to the respondent's solicitors without an effort to serve the respondent himself, even where the solicitors expressly accept service on his behalf, is insufficient (*Rust* v. *St. Botolph, Bishopsgate* (*Churchwardens etc.*) (1906), 94 L. T. 575). Notice given within the three days, but not till after the case is transmitted to the High Court, is given too late (*Ashdown*

SECT. 2. Appeals to the High Court.

Form of special case.

1400. The special case (*t*) should contain all the points which it is desired to raise, since the High Court will not hear argument on any point not raised before the justices (*a*), unless, indeed, it arises upon the face of the facts as stated (*b*); nor will it admit doubts as to the accuracy of the case, unless there is a patent defect in it (*c*).

The usual practice is for the case to be drafted by the party applying for it, and, after it has been considered by the respondent, for its terms to be finally settled by the justices by whom the case was heard.

The case must be signed by all the justices who heard the matter, whether they agreed with the decision given or not (*d*), and in the case of justices who cannot be communicated with in time to obtain their signatures within three months an extension of time will be granted (*e*).

The case must be divided into numbered paragraphs, each dealing with distinct portions of the subject (*f*), and copies must be provided for the use of the judges at least two days before the day appointed for hearing (*g*). The court has power to send a case back to the justices to be amended (*h*).

Entering the special case.

1401. Special cases are to be entered at the Crown Office for hearing, at the request of either party, eight clear days before the day on which they are set down for argument, and notice thereof is to be given forthwith to the other party (*i*).

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v. *Curtis* (1862), 31 L. J. (M. C.) 216; *Edwards* v. *Roberts*, [1891] 1 Q. B. 302. Where an appellant merely sent to the respondent a copy of his application to the justices for a case, and a copy of the case stated, the notice so given was held sufficient (*Dickeson* v. *Mayes*, [1910] 1 K. B. 452).

(*t*) Cases stated in criminal matters are regulated by the Crown Office Rules, 1906 (Statutory Rules and Orders, 1906, pp. 605 *et seq.*), and in other matters by R. S. C., Ord. 34; see Crown Office Rules, r. 129.

(*a*) *Purkis* v. *Huxtable* (1859), 1 E. & E. 780; *Motteram* v. *Eastern Counties Rail. Co.* (1869), 7 C. B. (N. S.) 58; *Marshall* v. *Smith* (1873), L. R. 8 C. P. 416.

(*b*) *Ex parte Markham* (1869), 21 L. T. 748; *Knight* v. *Halliwell* (1874), L. R. 9 Q. B. 412.

(*c*) *Musther* v. *Musther* (1894), 58 J. P. 53.

(*d*) *Barker* v. *Hodgson* (1904), 68 J. P. 310.

(*e*) *Nantyglo Urban District Council* v. *Ebly* (1905), 69 J. P. (Journal) 40. But a case may be verbally stated by one of the justices who heard it only, the other justices having died in the interval (*Kean* v. *Robinson*, [1910] 2 I. R. 306).

(*f*) Crown Office Rules, 1906, r. 131 (Statutory Rules and Orders, 1906, pp. 605 *et seq.*). The costs of drawing and copying any case where this rule is not observed will not be allowed by the taxing officer without the special order of the court (*ibid.*).

(*g*) *Ibid.*, r. 132. A complete set of papers must be provided for each judge (*ibid.*). If the appellant does not deliver copies of the special case the respondent may do so, and the appellant will not be heard till he has paid for them or deposited at the Crown Office a sum sufficient to do so. If neither party delivers the required papers the case will be struck out, unless otherwise ordered (*ibid.*, r. 135).

(*h*) Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 7. This power may be exercised before the case is argued (*Yorkshire Tire and Axle Co.* v. *Rotherham Board of Health* (1858), 4 C. B. (N. S.) 362). Where a case is sent back for amendment, judgment will be delivered on the case being returned amended (Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 7). Where, after being sent back for amendment, the case is abandoned by the appellant, the court may order him to pay the respondent's costs (*Crowther* v. *Boult* (1884), 13 Q. B. D. 680).

(*i*) Crown Office Rules, 1906, r. 130. This rule does not dispense with

Right of justices to appear.

1402. On the hearing of a special case justices, where not made parties to the case, have no right to appear (*j*), and are not liable to costs in respect of or by reason of any appeal against their decision (*k*), but, if in such a case they do appear, costs may be given against them (*l*). Where they are made parties to the case costs may be given for or against them (*m*).

Powers of the High Court.

1403. The powers of the High Court in respect of the hearing of special cases are exercised by a Divisional Court of the King's Bench Division (*n*).

The court will only hear one counsel on each side (*o*). It will hear and determine the question or questions of law arising on the case, and will reverse, affirm, or amend the decision appealed from (*p*), or it may in its discretion remit the matter to the justices with its opinion thereon (*q*), or make such order in regard to the matter as it may think fit (*r*).

Appeal to Court of Appeal.

1404. The decision of the High Court (that is, a Divisional Court of the King's Bench Division), in respect of a special case upon any criminal cause or matter, is final and conclusive (*s*), but

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the duty (see p. 653, *ante*) on the part of the applicant to transmit the case to the court within three days of receiving it (*Phillips* v. *Jones* (1888), 57 J. P. 84).

(*j*) *Smith* v. *Butler* (1885), 16 Q. B. D. 349.

(*k*) Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 6.

(*l*) *Heywood* v. *Whitehead* (1897), 76 L. T. 781.

(*m*) *Ellis* v. *Lincoln Licensing Justices* (1888), 52 J. P. 88.

(*n*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 45; see title COURTS, Vol. IX., p. 59. There is in the Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 8, provision for the powers of the Divisional Court to be exercised by order of the court by a judge in chambers, but this provision is not commonly invoked.

(*o*) *Howes* v. *Peake* (1876), 33 L. T. 818; *Spurling* v. *Bantoft*, [1891] 2 Q. B. 384; *Bedfordshire Justices* v. *St. Paul, Bedford* (*Churchwardens etc.*) 1852), 7 Exch. 650.

(*p*) Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 6. Where there is a joint conviction of several persons the conviction may be affirmed against some and reversed against others (*Brown* v. *Turner* (1863), 13 C. B. (N. S.) 485; *O'Neill and Galbraith* v. *Longman* (1863), 32 L. J. (M. C.) 259). The court cannot, however, on a special case reduce the penalty imposed by the justices (*Evans* v. *Hemingway* (1887), 52 J. P. 134). When there is evidence to show that an offence within the jurisdiction of the justices was or might have been committed, the court will not in general disturb the justices' decision; see *R.* v. *Davis* (1795), 6 Term Rep. 177; *R.* v. *Reason* (1795), 6 Term Rep. 375; *Blackpool Local Board of Health* v. *Fenwick* (1859), 4 H. & N. 127. But it may quash a conviction where there is no evidence to support it (*Watkin* v. *Fenwick* (1858), 7 W. R. 16).

(*q*) Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 6. Where a magistrate having dismissed a summons, the court, upon case stated, remitted the matter with an opinion that he should have convicted, and on an application being made to the magistrate to reinstate the case and convict, the magistrate held that he had no power to do so, the court by mandamus compelled him to comply with its order (*R.* v. *Haden Corser* (1892), 8 T. L. R. 563).

(*r*) Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 6.

(*s*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 47. Where a case raising an important point of law is argued before a Divisional Court, advantage is occasionally taken of the provision of the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 17, to hear the case re-argued

SECT. 2. Appeals to the High Court.

upon civil matters there is a right of appeal to the Court of Appeal, subject to the leave of the Divisional Court being obtained (*t*).

What is a criminal cause or matter.

The proceeding will be deemed to be a criminal cause or matter wherever the subject-matter is such that the hearing before the justices might have resulted in the infliction of imprisonment (*a*), or, in the case of a sum of money claimed to be due, when it is recoverable upon information as well as upon complaint (*b*).

Costs.

1405. The court may make such order as to costs as it thinks fit (*c*), and in practice usually allows them to the successful party (*d*). The costs given include the costs of preparing the special case (*e*), but not those incurred by the hearing before the

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before a larger court; compare *Saunders* v. *Richardson* (1881), 7 Q. B. D. 388.

(*t*) Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), ss. 1, 2; see *Walsall Overseers* v. *London and North Western Rail. Co.* (1878), 4 App. Cas. 30.

(*a*) *Robson* v. *Biggar*, [1908] 1 K. B. 672, C. A.; compare *Mellor* v. *Denham* (1880), 5 Q. B. D. 467, C. A.; *R.* v. *Whitchurch* (1881), 7 Q. B. D. 534, C. A.; *Payne* v. *Wright* (1892), 61 L. J. (M. C.) 114, C. A.; *Ex parte Schofield*, [1891] 2 Q. B. 428, C. A.; *Seaman* v. *Burley*, [1896] 2 Q. B. 344, C. A.

(*b*) Sums of money recoverable upon complaint but not upon information are deemed to be a civil debt (Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), ss. 6, 35); see p. 609, *ante*. An amount due for district rate has been held to be covered by this provision, and a case in regard to it as a civil, not a criminal, matter (*Southwark and Vauxhall Water Co.* v. *Hampton Urban Council*, [1899] 1 Q. B. 273, C. A.). But a case arising on a warrant of distress for default in payment of poor rate is a criminal cause or matter, the procedure in regard to the recovery of poor rate being unaffected by the Summary Jurisdiction Acts (Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 10; and see *Seaman* v. *Burley*, [1896] 2 Q. B. 344, C. A.).

(*c*) Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 6. R. S. C., Ord. 65, is ordered to apply both to civil and criminal proceedings on the Crown side by the Crown Office Rules, 1906, rr. 261, 262.

(*d*) The court will in general give costs to a successful appellant (*Venables* v. *Hardman* (1858), 28 L. J. (M. C.) 33; *Youdan* v. *Crookes* (1858), 22 J. P. 287), and this is the case where the Crown is the unsuccessful party (*Moore* v. *Smith* (1859), 1 E. & E. 597; and see *Walsh* v. *R.* (1888), 16 Cox, C. C. 435). Where the respondent was successful, costs have been refused in a case which was deemed fairly arguable (*Caswell* v. *Cook* (1862), 12 C. B. (N. S.) 242). Where a conviction was quashed upon the ground of an objection not brought to the justices' notice costs were refused (*Stinson* v. *Browning* (1866), L. R. 1 C. P. 321). Where the respondent does not appear, the practice is not uniform, but in *Smith* v. *Butler* (1885), 16 Q. B. D. 349, it was held by the court to be unusual to give costs in such circumstances; see also *Lee* v. *Strain* (1859), 28 L. J. (M. C.) 221; *contra*, *Wednesbury Local Board of Health* v. *Stephenson* (1864), 33 L. J. (M. C.) 111; *Halse* v. *Alder* (1874), 38 J. P. 407; *Greenbank* v. *Sanderson* (1884), 49 J. P. 40; *Shepherd* v. *Folland* (1884), 49 J. P. 165; *Lee* v. *Barton* (1909), 101 L. T. 600, 603, n. (a). Where, however, the court was of opinion that the respondent, although not appearing before it, had taken proceedings with a view of getting a point of law decided, costs were given against him (*Gordon* v. *Cann* (1899), 68 L. J. (Q. B.) 434). As to costs where the justices appear, see p. 655, *ante*.

(*e*) *Glover* v. *Booth* (1862), 31 L. J. (M. C.) 270. This includes the cost of preparing the case beyond the fees allowed to the justices' clerk under the Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 3.

justices (*f*). Application should be made for them immediately upon the determination of the case (*g*).

SECT. 2. Appeals to the High Court.

Enforcement of judgment of the High Court.

1406. After the determination of the case by the High Court, the justices whose decision was appealed from, or any other justices exercising the same jurisdiction, have authority to enforce the conviction or order if and as upheld or amended by the High Court, in the same manner as it might have been enforced, but for the appeal, by the justices who made it (*h*).

SECT. 3.—*Mandamus.*

When mandamus will lie.

1407. In addition to the prerogative powers inherent in the High Court to issue the writ of mandamus (*i*), provision is made by statute for the issue of the writ to justices who refuse to state a case (*k*), or to do any act relating to the duties of their office as justices (*l*).

Principles upon which rule granted.

Judicial acts.

1408. A distinction may be made between the principles upon which a rule will be granted where the act is a judicial and where it is a ministerial act. Where the justices are given a discretion in the exercise of their judicial powers and have exercised it, the court will not interfere with their decision (*m*). Thus the court will not compel them to grant process where they have deliberately refused it (*n*), nor prescribe the conduct to be observed by them in

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(*f*) *Slaughter* v. *Sunderland Corporation* (1891), 60 L. J. (M. C.) 91.

(*g*) *Budenberg* v. *Roberts* (1867), L. R. 2 C. P. 292; see *Caswell* v. *Cook* (1862), 12 C. B. (N. S.) 242.

(*h*) Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 9. The justices who enforce the decision of the High Court are protected by statute from proceedings being taken against them in consequence of any defect in the conviction or order (*ibid.*).

(*i*) See title CROWN PRACTICE, Vol. X., pp. 77 *et seq.*

(*k*) Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 5. But a case can only be stated upon a point of law (*ibid.*; and see p. 650, *ante*). The issue of a rule is in the discretion of the court, even where the decision of the justices is wrong in law, so that, where a person upon whom a nominal penalty should have been inflicted has been in fact acquitted by the justices, the court may decide not to require a case to be stated; but if an innocent person were convicted and even a nominal penalty inflicted a special case would no doubt be required by the court (*R.* v. *Davy*, [1899] 2 Q. B. 301, *per* CHANNELL, J., at p. 307). Where justices have decided a case in accordance with a decision of the High Court from which there was no appeal, they will not be compelled to state a case (*R.* v. *Sheil* (1900), 82 L. T. 587, C. A.).

(*l*) Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 5.

(*m*) *R.* v. *Ingham* (1889), 14 Q. B. 396; *R.* v. *Adamson* (1875), 1 Q. B. D. 201; *Ex parte Lewis* (1888), 21 Q. B. D. 191; *R.* v. *Gravesend Justices* (1891), 55 J. P. 277; see also *R.* v. *Paynter* (1857), 26 L. J. (M. C.) 102; *R.* v. *Dayman* (1857), 26 L. J. (M. C.) 128.

(*n*) *Ex parte West* (1865), 29 J. P. 310; *Re Leeds Stipendiary Magistrate* (1877), 43 J. P. 743; *Ex parte Macmahon* (1883), 48 J. P. 70. This applies where the justice refuses to grant process upon the ground that the application is vexatious, even if there is *primâ facie* evidence of the commission of an offence (*R.* v. *Kennedy* (1902), 86 L. T. 753; and compare *R.* v. *Bros* (1901), 85 L. T. 581). Where one justice has refused to issue a summons upon complaint, other justices may subsequently refuse to hear an

SECT. 3.
Mandamus.

hearing a case, nor in the reception or rejection of evidence (*o*). But the court will compel the exercise of their discretion (*p*).

Ministerial acts.

Where the act is a ministerial act, the court will hold that the parties are bound to do it and will compel them to do so (*q*).

Where mandamus refused.

1409. Where a special case is the more convenient remedy a rule for a mandamus will be refused (*r*); and a rule will not be issued to a clerk to justices, as he is merely the servant of the justices (*s*).

Application, how made.

1410. The application for a writ of mandamus must be made to a Divisional Court of the King's Bench Division by motion for an order *nisi*, and in vacation to a judge in chambers for a summons to show cause, upon the urgency of the matter being made apparent to the judge (*t*).

SECT. 4.—*Certiorari.*

Appropriate remedy when jurisdiction impugned.

1411. The judicial decisions of justices may also be reviewed by the High Court on a writ of *certiorari* (*a*), which is the appropriate remedy when the jurisdiction of the justices is impugned (*b*). The question whether it will issue is in the discretion of the High Court, except in the case of a statute which expressly takes away (*c*) the right of applying for it (*d*).

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information and take the recognisances of a prosecutor to proceed (*R.* v. *Bather* (1880), 42 L. T. 532).

(*o*) *R.* v. *Carden* (1879), 5 Q. B. D. 1; *R.* v. *Yorkshire Justices, Ex parte Gill* (1885), 53 L. T. 728.

(*p*) *R.* v. *Boteler* (1864), 4 B. & S. 959; *R.* v. *Byrde and Pontypool Gas Co., Ex parte Williams* (1890), 60 L. J. (M. C.) 17; *R.* v. *Adamson* (1875), 1 Q. B. D. 201; *R.* v. *Brown* (1857), 26 L. J. (M. C.) 183.

(*q*) Thus an order which is not appealed against must be enforced, even though there appear to the justices to be doubts as to its validity (*R.* v. *Swindon Justices* (1878), 42 J. P. 407). The issue of a distress warrant for levying rates is a ministerial act which the justices will be compelled to do (*R.* v. *Oxfordshire Justices* (1849), 18 L. J. (M. C.) 222; *R.* v. *Jefferson* (1884), 48 J. P. 393; *R.* v. *Marsham* (1883), 48 J. P. 408, C. A.).

(*r*) *R.* v. *Wisbech Justices* (1890), 54 J. P. 743.

(*s*) *Ex parte Hayward* (1863), 32 L. J. (M. C.) 89.

(*t*) Crown Office Rules, 1906. For details of the procedure, see title CROWN PRACTICE, Vol. X., pp. 110 *et seq.*

(*a*) See, further, title CROWN PRACTICE, Vol. X., pp. 155 *et seq.*, 186.

(*b*) See *R.* v. *Kent Justices* (1880), 44 J. P. 298. A writ will be issued to quash a warrant of commitment issued by a justice under a mistake (*R.* v. *Doherty, Ex parte Isaacs* (1909), 26 T. L. R. 502).

(*c*) See title CROWN PRACTICE, Vol. X., p 175. Among the more important statutes which include such a provision are the Larceny Act, 1861 (24 & 25 Vict. c. 96), see s. 111; the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), see s. 69; and the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), see s. 72; but there are many others which will be found cited in appropriate titles *passim*. The right cannot, however, be taken away by any general words, but only by an express enactment (*R.* v. *Reeve* (1760), 1 Wm. Bl. 231); and in the case of the Crown the right is in no circumstances taken away unless the Crown is specially mentioned (*R.* v. *Boultbee* (1836), 6 Nev. & M. (K. B.) 26; *Mountjoy* v. *Wood* (1856), 1 H. & N. 58). Even where the right is said to be taken away by statute, the court is not prevented from quashing an order founded upon a manifest defect of jurisdiction or manifest fraud in the party procuring the order (*Colonial Bank of Australasia* v. *Willan* (1874), L. R. 5 P. C. 417; see *Ex parte Bradlaugh* (1878), 3 Q. B. D. 509).

(*d*) A writ of *certiorari* will not be granted to question the decision of

Application must be made within six months of the date of the order or conviction which it is desired to remove (*e*).

SECT. 5.—*Prohibition.*

When remedy appropriate.

1412. A writ of prohibition (*f*) will issue to justices if they act in absence or excess of jurisdiction, or in contravention of some statute or of the common law (*g*).

The point in respect of which it is applied for need not have been taken before justices (*h*), but it must be material (*i*), and must have arisen actually and not prospectively (*k*).

When granted.

Except where the justices have acted palpably in absence or excess of jurisdiction (*l*), an application for a writ will not usually be granted after the proceedings in respect of which it is asked for have been determined (*m*).

SECT. 6.—*Habeas Corpus.*

Purpose for which granted.

1413. A rule will be granted calling on justices to show cause why a writ of *habeas corpus* (*n*) should not issue in the case of a prisoner who has been committed to prison under a defective warrant of commitment (*o*); but if before the rule is obtained a good warrant is delivered to the gaoler that is a sufficient answer to the rule (*p*).

In extradition proceedings.

It is customary in extradition proceedings, where it is desired to appeal to the High Court, to issue a rule to the metropolitan police magistrate who made the order for extradition to show cause why a writ of *habeas corpus* should not issue (*q*).

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the justices on a claim of right (*Ex parte Smith* (1890), 7 T. L. R. 42), nor in general where the proper mode of redress is by appeal to quarter sessions (*Re Pudding Norton Overseers* (1864), 33 L. J. (M. C.) 136).

(*e*) *R.* v. *Boughey* (1791), 4 Term Rep. 281.

(*f*) See, further, title CROWN PRACTICE, Vol. X., pp. 141 *et seq.* The issue of a writ is in the discretion of the court except where there was an absence or excess of jurisdiction apparent on the face of the proceedings, in which case it is of right (*Farquharson* v. *Morgan*, [1894] 1 Q. B. 552, C. A., and the cases there cited). It will issue to prevent a justice interested in the subject-matter of a case from hearing it (*R.* v. *Farrant* (1887), 20 Q. B. D. 58), but the fact that a justice has been subpœnaed as a witness in a case is not sufficient evidence of interest to warrant the issue (*ibid.*).

(*g*) *Mackonochie* v. *Penzance* (*Lord*) (1881), 6 App. Cas. 424; and see the cases cited in title CROWN PRACTICE, Vol. X., p. 142.

(*h*) Compare *De Haber* v. *Portugal* (*Queen*) (1851), 17 Q. B. 171, 196.

(*i*) *Butterworth and Barker* v. *Walker and Waterhouse* (1765), 3 Burr. 1689.

(*k*) *R.* v. *Kent Justices* (1889), 24 Q. B. D. 181.

(*l*) *Buggin* v. *Bennett* (1767), 4 Burr. 2035; *Farquharson* v. *Morgan*, [1894] 1 Q. B. 552, C. A.

(*m*) *Ricardo* v. *Maidenhead Local Board of Health* (1857), 2 H. & N. 257.

(*n*) See title CROWN PRACTICE, Vol. X., pp. 39 *et seq.*

(*o*) *Ex parte Cross* (1857), 2 H. & N. 354; *Re Timson* (1870), L. R. 5 Exch. 257.

(*p*) *Ex parte Cross, supra.*

(*q*) See title EXTRADITION, Vol. XIV., pp. 415, 416.

Part XIV.—Appeals from Quarter Sessions.

SECT. 1.

To the Court of Criminal Appeal.

SECT. 1.—*To the Court of Criminal Appeal.*

When the appeal lies.

1414. An appeal to the Court of Criminal Appeal from a court of quarter sessions lies in the case of every person convicted before it of a criminal offence upon indictment (*r*), or dealt with by it as an incorrigible rogue (*a*). The grounds and conditions of appeal are the same as in the case of an appeal from the Central Criminal Court or a court of assize (*b*).

The case is dealt with finally by the Court of Criminal Appeal, and in no event is it remitted to the court of quarter sessions (*c*).

Jurisdiction of court.

1415. The jurisdiction of the judges of the High Court in regard to Crown cases reserved is now vested in the Court of Criminal Appeal (*d*), and the procedure provided by the Criminal Appeal Act has to a great extent superseded that previously existing, but the Court of Criminal Appeal has still power to require a case to be stated in the same manner as if, under the former procedure, a question of law had been reserved (*e*).

SECT. 2.—*Prohibition.*

When the writ will issue.

1416. A writ of prohibition will issue to any court of quarter sessions in the same manner and on the same grounds as to any inferior court which acts without or in excess of its jurisdiction, or

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(*r*) Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 3. There is, however, no appeal against the part of a special verdict under the Trial of Lunatics Act, 1883 (46 & 47 Vict. c. 48), s. 2, finding a prisoner to be insane (*R.* v. *Machardy*, [1911] W. N. 193). As to persons convicted on indictment at common law in relation to the non-repair or obstruction of a highway, public bridge, or navigable river, see p. 665, *post.*

(*a*) Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 20; see the Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 5, p. 635, *ante.*

(*b*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 433 *et seq.* The time within which notice of appeal must be given is ten days (Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 7). The chairman of the court must, when required, furnish the registrar of the Court of Criminal Appeal with his notes of the trial, and with a report giving his opinion upon the case or upon any point arising in it (*ibid.*, s. 8).

(*c*) *Ibid.*, ss. 4, 5, 9. The conditions as to bail and as to costs are the same as in the case of appeals from the Central Criminal Court or a court of assize (*ibid.*, ss. 13, 14).

(*d*) *Ibid.*, s. 20 (4). The former procedure was regulated by the Crown Cases Act, 1848 (11 & 12 Vict. c. 78). The constitution of the court formed to hear Crown cases reserved was ultimately five judges of the High Court, of whom, unless prevented by illness, the Lord Chief Justice of England had to be one (Judicature Act, 1881 (44 & 45 Vict. c. 68), s. 15).

(*e*) Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 20 (4). For procedure on a case so stated, see, further, title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 433, note (*k*). Writs of error and the power and practice of moving for a new trial in criminal matters are abolished (Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 20 (1)); but the High Court still exercises control over the court of quarter sessions by means of writs of prohibition, *certiorari*, and mandamus in certain cases and within defined limits; see the text, *supra*, and pp. 661, 662, *post.*

which makes an order in contravention of some statute or the principles of the common law (*f*). SECT. 2. Prohibition.

SECT. 3.—*Certiorari.*

1417. The issue of a writ of *certiorari* to remove a matter for hearing and determination to the High Court is in the discretion of the High Court itself (*g*), except in those cases where that course is expressly forbidden by statute (*h*). When the writ will issue.

The principles on which the writ is issued to a court of quarter sessions are similar to those on which it would be issued to justices out of session (*i*).

1418. Where an order of justices is confirmed by quarter sessions, the time within which an application for a writ will run dates from the time of confirmation (*k*). When time runs.

1419. In the case of indictments, removal to the High Court by *certiorari* is governed by the following conditions. Except indictments against bodies corporate, which are not authorised to appear by solicitor at quarter sessions (*l*), indictments are not to be removed, either at the instance of the prosecutor or defendant, unless it is made to appear to the court on behalf of the applicant that a fair and impartial trial cannot be had at quarter sessions, or that some question of law of more than usual difficulty and importance is likely to arise at the trial, or that a view of the premises in respect whereof the indictment is preferred, or a special jury, is required for a satisfactory trial of the case (*m*). Conditions governing removal of indictments.

The party, whether prosecutor or defendant, applying for a writ of *certiorari* to remove an indictment is required to enter into recognisances to appear at the trial and pay the costs if unsuccessful (*n*). Recognisances.

Neither of these conditions binds the Attorney-General acting on behalf of the Crown (*a*). Attorney-General.

(*f*) See title CROWN PRACTICE, Vol. X., pp. 141 *et seq.*, and p. 659. *ante*. The grounds for its issue would include the acting of an interested party as a member of the court (title CROWN PRACTICE, Vol. X., p. 143; compare *R.* v. *Cambridge* (*Recorder*) (1857), 8 E. & B. 637).

(*g*) *R.* v. *Walsall Overseers* (1878), 3 Q. B. D. 457, C.A., *per* COCKBURN, C.J., at p. 471; see *R.* v. *Leicester Justices and Compton* (1860), 29 L. J. (M. C.) 203; *R.* v. *Surrey Justices* (1870), L. R. 5 Q. B. 466; *R.* v. *Sheward* (1880), 9 Q. B. D. 741, C. A.

(*h*) *R.* v. *Moreley* (1760), 2 Burr. 1040. Among statutes which expressly take away the right of applying for *certiorari* are the Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 45; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 262; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 220; and see p. 658, *ante*.

(*i*) See p. 658, *ante*.

(*k*) *R.* v. *Morice* (1845), 14 L. J. (M. C.) 75; *R.* v. *Middlesex Justices* (1836), 5 Ad. & El. 626.

(*l*) See, for instance, titles COUNTY COURTS, Vol. VIII., p. 610; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 142, 143.

(*m*) Crown Office Rules, 1906, r. 13.

(*n*) *Ibid.*, rr. 14, 15.

(*a*) *Ibid.*, rr. 13, 15.

SECT. 3. Certiorari.

How returned.

1420. A writ of *certiorari* when issued to quarter sessions in counties is directed to the justices collectively and returned by the chairman or some other justice acting on his behalf; in boroughs it is directed to and returned by the recorder (*b*). The return cannot be made by the clerk of the peace (*c*).

When not required.

1421. No *certiorari* is required for the removal of any conviction, order, or other determination in relation to which a special case is stated by quarter sessions (*d*).

SECT. 4.—*Mandamus.*

When the writ will not issue.

1422. A writ of mandamus (*e*) will not issue to a court of quarter sessions in respect of any matter in which it has exercised its jurisdiction (*f*). In such cases, whether the decision of the quarter sessions is right or wrong (*g*), or whether the matter is one of law or fact (*h*), the writ will not issue.

Discretion of quarter sessions to state case.

It is within the discretion of quarter sessions to state a case for the opinion of the High Court (*i*), but if they do not state a case the High Court will not compel them by mandamus to do so (*k*), nor intervene to review their decision by compelling them to state the reasons for it (*l*), or to alter the form of the record (*m*). Similarly, in matters wherein the quarter sessions have a discretion and exercise it, the writ will not issue (*n*).

When the writ will issue.

It is otherwise where the court of quarter sessions has declined jurisdiction altogether (*o*), or has come to a decision wrong in point of law upon a preliminary objection (*p*), or has failed to exercise its

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(*b*) *Anon.* (1703), 6 Mod. Rep. 43; see Archbold, Practice of Quarter Sessions, 6th ed., 137.

(*c*) *Ashley's Case* (1697), 2 Salk. 479.

(*d*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 43), s. 40. As to special case, see p. 650, *ante*, and p. 663, *post*.

(*e*) See, further, title CROWN PRACTICE, Vol. X., pp. 77 *et seq.*, 89, 90.

(*f*) *R.* v. *Worcestershire Justices* (1854), 3 E. & B. 477; *R.* v. *Middlesex Justices* (1877), 2 Q. B. D. 516; see *R.* v. *Surrey Justices* (1824), 5 Dow. & Ry. (K. B.) 308; *Ex parte Martin* (1876), 40 J. P. 133.

(*g*) *R.* v. *Carnarvonshire Justices* (1820), 4 B. & Ald. 86.

(*h*) *Re Pratt* (1837), 7 Ad. & El. 27.

(*i*) *R.* v. *Cottingham* (*Inhabitants*) (1834), 4 Nev. & M. (K. B.) 215; and see p. 664, *post*.

(*k*) *R.* v. *Frieston* (*Inhabitants*) (1833), 5 B. & Ad. 597; *Re Pratt, supra; Ex parte Jarvin* (*Inhabitants*) (1849), 9 Dowl. 120.

(*l*) *R.* v. *Devon Justices* (1819), 1 Chit. 34; *R.* v. *Cottingham* (*Inhabitants*), *supra*.

(*m*) *R.* v. *Suffolk Justices* (1835), 5 Nev. & M. (K. B.) 139; *Ex parte Ackworth Overseers* (1843), 3 Q. B. 397; *R.* v. *Middlesex Justices, supra*. A mandamus will, however, issue to direct alteration of an entry which is manifestly false where there is no jurisdiction to make it (*R.* v. *West Riding of Yorkshire Justices* (1843), 5 Q. B. 1).

(*n*) *R.* v. *West Riding of Yorkshire Justices* (1834), 5 B. & Ad. 1003; *R.* v. *Derbyshire Justices* (1852), 22 L. J. (M. C.) 31; and see *R.* v. *North Riding of Yorkshire Justices* (1823), 2 B. & C. 286.

(*o*) *R.* v. *Kent Justices* (1811), 14 East, 395; *R.* v. *Colchester Justices* (1822), 5 B. & Ald. 535; *R.* v. *Wiltshire Justices* (1828), 8 B. & C. 380.

(*p*) *R.* v. *Kesteven Justices* (1844), 3 Q. B. 810; *R.* v. *Oxfordshire Justices* (1843), 4 Q. B. 177. Where the court of quarter sessions declines to act on the ground that the notice of appeal is insufficient, the High Court will

discretion (*q*). But a mandamus in any case will merely direct the court of quarter sessions to exercise its jurisdiction or discretion, and will not specify the manner in which it is to exercise it (*r*).

It is within the competence of the court of quarter sessions to formulate its own rules of practice, but the High Court will issue a mandamus in cases where adherence to such rules can be shown to involve a failure of justice (*s*).

SECT. 5.—*Special Case.*

By consent of the parties.

1423. On an appeal to quarter sessions, the parties may, at any time after the notice of appeal, consent to a special case being drawn under the order of a judge of the High Court and submitted to the High Court for its decision (*t*).

Entry of judgment.

The judgment of the High Court may then be entered on motion by either party at the sessions next or next but one after it is given, and is of the same effect as if it had been given by the court of quarter sessions upon an appeal duly entered and continued (*a*). It is, however, essential that the case should state the agreement of the parties to this procedure (*b*); and a case may not be so stated upon an appeal against an order in bastardy, nor in proceedings under the statutes relating to the Revenue, Excise, or Post Office (*c*).

Where a case has been stated under these provisions the party supporting the order of the justices is entitled to begin (*d*). An

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determine the question and issue a mandamus if required (*Ex parte Curtis* (1877), 3 Q. B. D. 13). Where in London the court of quarter sessions had refused to hear a rating appeal on the ground that it should have been entered at general, not quarter, sessions, for which notice might have been given in time, the court granted a mandamus to the justices to hear the case, holding that the appellant was not bound to enter the appeal except at a quarter sessions (*R.* v. *London Justices* (1812), 15 East, 632). The court will intervene to secure the hearing of an appeal which the court of quarter sessions has respited (see p. 646, *ante*) and at the next sessions has refused to hear upon the ground of an objection which might have been raised at the hearing of the case when first entered (*R.* v. *Wiltshire Justices* (1828), 8 B. & C. 380); or to prevent injustice being done to an appellant who had agreed to abide by the decision of a similar case when the respondent in that case disobeyed the decision of the court (*R.* v. *Wiltshire Justices* (1801), 1 East, 683).

(*q*) *R.* v. *Glamorganshire Justices* (1850), 19 L. J. (M. C.) 172; *R.* v. *Derbyshire Justices* (1852), 22 L. J. (M. C.) 31.

(*r*) *Ibid.*; *R.* v. *West Riding of Yorkshire Justices* (1833), 5 B. & Ad. 667; *R.* v. *Hewes* (1835), 3 Ad. & El. 725; *Ex parte Ackworth Overseers* (1843), 3 Q. B. 397.

(*s*) *R.* v. *Suffolk Justices* (1817), 6 M. & S. 57; *R.* v. *Norfolk Justices* (1834), 5 B. & Ad. 990; *Re Blues* (1855), 5 E. & B. 291; *R.* v. *Pawlett* (1873), L. R. 8 Q. B. 491.

(*t*) Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 11.

(*a*) This procedure, though technically an appeal from quarter sessions, is to be distinguished from cases stated by the court of quarter sessions itself (as to which see pp. 664, 665, *post*), and is not affected by the provisions of the Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 2.

(*b*) *Peterborough Corporation* v. *Thurlby Overseers* (1882), 8 Q. B. D. 586.

(*c*) Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 11.

(*d*) *R.* v. *Holbeck Overseers* (1851), 16 Q. B. 404; *Bedfordshire Justices* v. *St. Paul, Bedford* (*Churchwardens etc.*) (1852), 7 Exch. 650.

SECT. 5. Special Case.

appeal lies to the Court of Appeal from the decision of the High Court (*e*), and this is so even after judgment has been entered at quarter sessions in accordance with the decision (*f*).

The practice is to give costs as between party and party (*g*).

At the discretion of the justices.

1424. With the exception of the above provisions, which only deal with matters not already heard by quarter sessions, there was formerly no means of obtaining the decision of the High Court on a special case stated by quarter sessions except after obtaining a writ of *certiorari* (*h*). While this method of procedure still subsists, it is now within the competence of quarter sessions to state a case without any such procedure (*i*). The discretion of quarter sessions in regard to the granting of special cases is, however, absolute. There is no means of compelling the justices to state one, even though in the particular circumstances a proper exercise of their discretion would undoubtedly lead them to do so (*k*).

Comparison with case stated at petty sessions.

A case stated by quarter sessions is therefore wholly different from a case stated by justices at petty sessions, in that it is the magistrates and not the aggrieved party who seek the assistance of the court: and, in consequence of this, the opinion of superior tribunals can be obtained even in cases where, under the particular statute involved, the decision of quarter sessions is ordered to be final (*l*).

(*e*) *Peterborough Corporation* v. *Wilsthorpe Overseers* (1883), 12 Q. B. D. 1, C. A.; *Holborn Guardians* v. *Chertsey Guardians* (1885), 15 Q. B. D. 76, C. A.; *Dewsbury and Heckmondwike Waterworks Board* v. *Penistone Union Assessment Committee* (1886), 2 T. L. R. 375, C. A.

(*f*) *Lodge* v. *Huddersfield Corporation*, [1898] 1 Q. B. 859, C. A.

(*g*) *Clarendon* (*Earl*) v. *St. James, Westminster* (*Rector etc.*) (1851), 10 C. B. 806; *Holy Trinity, Exeter* v. *Ide* (*Churchwardens etc.*) (1851), 16 L. T. (o. s.) 363.

(*h*) *R.* v. *Chantrell* (1875), L. R. 10 Q. B. 587; *Walsall Overseers* v. *London and North Western Rail. Co.* (1878), 4 App. Cas. 30. Under that procedure the court of quarter sessions embodied the material and grounds of its decision in the decision itself, with the result that any error in law became manifest on the face of the record, and therefore cognisable by the superior courts (*Kydd* v. *Liverpool Watch Committee*, [1907] 2 K. B. 591, C. A., *per* FLETCHER MOULTON, L.J., at p. 603). But it could not be adopted in cases where the right to *certiorari* was removed by statute (see pp. 658, 661, *ante*). The ancient practice open to the court of quarter sessions of consulting the judge of assize and asking his assistance and advice in making an order (as to which see *Walsall Overseers* v. *London and North Western Rail. Co., supra, per* Earl CAIRNS, L.C., at p. 40) is to be distinguished in that the court still retained and exercised its jurisdiction after the consultation had taken place. See, further, title CROWN PRACTICE, Vol. X., p. 166.

(*i*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 40.

(*k*) *Ex parte Jarvin* (*Inhabitants*) (1840), 9 Dowl. 120; *R.* v. *Oulton* (*Inhabitants*) (1735), Burr. S. C. 64; *Walsall Overseers* v. *London and North Western Rail. Co., supra*; S. C., *sub nom. R.* v. *Walsall Overseers* (1878), 3 Q. B. D. 457, C. A., *per* COCKBURN, C.J., at p. 473; *Kydd* v. *Liverpool Watch Committee, supra, per* BUCKLEY, L.J., at p. 609.

(*l*) *Kydd* v. *Liverpool Watch Committee, supra*; *Upperton* v. *Ridley*, [1903] A. C. 281; *Garbutt* v. *Durham Joint Committee*, [1906] A. C. 291; compare *Westminster Corporation* v. *Gordon Hotels, Ltd.*, [1907] 1 K. B. 910, C. A., as to the impossibility of having a petty sessional court's decision reviewed where its decision is made final by statute.

SECT. 5.
Special Case.

When justices must state case.

1425. Where the court of quarter sessions comes to a decision in a matter, subject to a special case to be stated on some particular question, the High Court will issue a mandamus to compel the justices either to state the case (*m*), or to enter continuances and hear and determine the matter (*n*): but it is otherwise where the justices, although having agreed in general terms to state a case, decide against the party desiring the case on the facts on which the point of law depends (*o*).

When justices may state case.

1426. The court of quarter sessions has no power to state a special case upon the trial of any indictment (*p*), other than an indictment at common law in relation to the non-repair or obstruction of a highway, public bridge, or navigable river (*q*); but it may state a case upon any other matter which comes before it for final decision (*r*), including appeals against convictions for non-indictable offences (*s*), and appeals to it as the confirming authority in licensing matters (*t*).

Form.

1427. The High Court is entitled to prescribe the form in which the special case is to be presented to it, and, formerly at all events, refused to deal with cases not drawn in a form suited to the procedure of *certiorari*, where the judgment of the court must be either to quash or to refuse to quash the order of quarter sessions (*a*). If the case is improperly or insufficiently stated the High Court may remit it to be restated (*b*).

The case should be signed by the chairman of the court or the recorder, and must conform to the rules laid down by the High Court (*c*).

Time.

1428. Where the court of quarter sessions grants a special case, it must be settled and stated within a reasonable time, which formerly, owing to the practice in *certiorari*, was limited to six months (*d*).

(*m*) *R.* v. *Bloxam* (1834), 1 Ad. & El. 386.

(*n*) *R.* v. *Suffolk Justices* (1832), 1 Dowl. 163.

(*o*) *R.* v. *Pembrokeshire Justices* (1831), 2 B. & Ad. 391; *Ex parte Jarvin* (*Inhabitants*) (1840), 9 Dowl. 120.

(*p*) Unless called upon to do so by the Court of Criminal Appeal; see the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 20 (1), and p. 660, *ante*; see also *R.* v. *Salop* (*Inhabitants*) (1810), 13 East, 95. Cases relating to incorrigible rogues are treated in this respect as if they were indictable offences (Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 20 (2)).

(*q*) *Ibid.*, s. 20 (3).

(*r*) Where the court of quarter sessions states a case the decision on which will not finally determine the matter, the High Court will not entertain the case (*R.* v. *Sutton Coldfield* (1874), L. R. 9 Q. B. 153; *R.* v. *Southampton Licensing Justices*, [1906] 1 K. B. 446, *per* Lord ALVERSTONE, C.J., at p. 449).

(*s*) *R.* v. *Allen* (1812), 15 East, 333; *R.* v. *Handley* (1864), 9 L. T. 827.

(*t*) *R.* v. *Southampton Licensing Justices, Ex parte Cardy*, [1906] 1 K. B. 446.

(*a*) *Kydd* v. *Liverpool Watch Committee*, [1907] 2 K. B. 591, C. A., *per* FLETCHER MOULTON, L.J., at p. 607; see Crown Office Rules, 1906, and title CROWN PRACTICE, Vol. X., pp. 160 *et seq.*

(*b*) Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 2 (2); see *R.* v. *St. Peter, Mancroft in Norwich* (*Inhabitants*) (1800), 8 Term Rep. 477; *R.* v. *Tillingham* (*Inhabitants*) (1830), 1 B. & Ad. 180.

(*c*) See p. 654, *ante*.

(*d*) *R.* v. *Staffordshire Justices* (1832), 1 Dowl. 484; see Archbold, Practice of Quarter Sessions, 6th ed., 453.

SECT. 5. Special Case.

Function of High Court.

1429. The High Court may draw any inference of fact which might have been drawn by the court of quarter sessions, and may give any judgment or make any order which that court would have been competent to make, or may remit the case, with its opinion and direction thereon, for the court of quarter sessions to hear and determine the case afresh (*e*). But the case as stated by the court of quarter sessions should contain its conclusions of fact and not merely the evidence on which the conclusions were drawn (*f*), and should show that it has already decided the matter subject to the decision of the High Court, so that upon the latter being given the matter may be finally determined (*g*).

Inferences of fact drawn by the court of quarter sessions, even if the facts are doubtful in themselves, will not be lightly disregarded by the High Court (*h*).

Appeal.

1430. Every such case is now deemed to be an appeal, and is heard and determined accordingly (*i*). There is in consequence no appeal from the decision of the High Court except by leave of that court or of the Court of Appeal (*k*).

Entry of judgment.

1431. The judgment of the High Court or the case itself, if remitted for a fresh hearing, is to be entered at the sessions next or next but one after the decision of the High Court, and unless the High Court directs otherwise, is to be deemed to have been entered at the sessions at which the decision appealed from was given, further entry and continuances being dispensed with (*l*).

Costs.

1432. The High Court, or, if leave to appeal is given, the Court of Appeal, has power to award costs of the hearing both in that court and before the court of quarter sessions (*m*).

(*e*) Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 2 (2).

(*f*) *R.* v. *St. Cuthbert, Wells* (*Inhabitants*) (1834), 5 B. & Ad. 939; *R.* v. *Pilkington* (*Inhabitants*) (1844), 5 Q. B. 662. Where on the facts of a particular case there may or may not have been fraud, the High Court will not presume fraud unless specifically found by quarter sessions (*R.* v. *Fillongley* (*Inhabitants*) (1788), 2 Term Rep. 709; *R.* v. *Tillingham* (*Inhabitants*) (1830), 1 B. & Ad. 180).

(*g*) *R.* v. *Wistow* (*Inhabitants*) (1841), 3 Q. B. 815, n.; *R.* v. *Worth* (1843), 4 Q. B. 132; *R.* v. *Westhoughton* (*Inhabitants*) (1843), 5 Q. B. 300; *R.* v. *Stoke upon Trent* (*Inhabitants*) (1843), 5 Q. B. 303; *R.* v. *Marton cum Grafton* (*Inhabitants*) (1847), 10 Q. B. 971; *R.* v. *Headington Union Guardians* (1884), 50 L. T. 444, C. A.

(*h*) *R.* v. *St. Andrew the Great, Cambridge* (1828), 8 B. & C. 664; *R.* v. *Rosliston* (*Inhabitants*) (1828), 8 B. & C. 668; *R.* v. *St. Martin, Leicester* (1828), 8 B. & C. 674; *R.* v. *Kesteven Justices* (1844), 3 Q. B. 810. But in a case where the inference was one of mixed fact and law the High Court reversed the decision of quarter sessions (*R.* v. *Great Glenn* (*Inhabitants*) (1833), 5 B. & Ad. 188).

(*i*) Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 2 (1).

(*k*) *Ibid.*, s. 1 (5).

(*l*) *Ibid.*, s. 2 (4).

(*m*) *Ibid.*, s. 2 (3).

MAIN ROADS.

See Highways, Streets, and Bridges.

MAINTENANCE.

See Bastardy; Husband and Wife; Infants and Children; Lunatics and Persons of Unsound Mind; Poor Law; Settlements; Wills.

MAINTENANCE AND CHAMPERTY.

See ACTION.

MALICIOUS DAMAGE.

See AGRICULTURE; CRIMINAL LAW AND PROCEDURE; DAMAGES; TORT.

MALICIOUS PROSECUTION AND PROCEDURE.

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Part I.—Malicious Prosecution and Abuse of Criminal Proceedings.

SECT. 1.—*What is a Prosecution.*

What is a prosecution.

1433. A prosecution exists where a criminal charge (*a*) is made before a judicial officer or tribunal (*b*), and any person who makes

(*a*) *Rawlins* v. *Jenkins* (1843), 4 Q. B. 419; *Rayson* v. *South London Tramways Co.*, [1893] 2 Q. B. 304, C. A. The Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 51, creates a criminal offence (*ibid.*). As to the malicious abuse of civil proceedings, see p. 689, *post*.

(*b*) See *Austin* v. *Dowling* (1870), L. R. 5 C. P. 534, 538, 540.

SECT. 1. What is a Prosecution.

or is actively instrumental in the making or prosecuting of (*c*) such a charge is deemed to prosecute it, and is called the prosecutor (*d*). Thus a person who lays before a magistrate an information stating that he suspects and has good reason to suspect another (*e*), or who prefers a bill against him before a grand jury (*f*), is engaged in a prosecution; and he may be responsible for the prosecution, even though the charge made before the magistrate is an oral one (*g*), and though, after the making of the charge before the magistrate, or even without making one (*h*), he is bound over to prosecute and does so (*i*). So, too, a trustee in bankruptcy, being ordered by a court upon reading the trustee's report to prosecute an alleged fraudulent debtor, may be liable to an action for malicious prosecution (*j*).

Malicious prosecution distinguished from false imprisonment.

1434. Malicious prosecution is distinguished from a false imprisonment effected through the instrumentality of a constable in this respect, that in the case of the latter the charge acted on is made to a ministerial officer, and the arrest is a trespass for which the defendant makes himself directly responsible. Malicious prosecution, as such, involves no trespass; it is a proceeding before a judicial officer or tribunal, for whose acts the defendant is not directly responsible. Under the old system of pleading it only gave rise to an action on the case (*k*).

(*c*) *Danby* v. *Beardsley* (1880), 43 L. T. 603; and see *Osterman* v. *Bateman* (1848), 2 Car. & Kir. 728. As to an unauthorised prosecution by one partner, see *Arbuckle* v. *Taylor* (1815), 3 Dow, 160, H. L.

(*d*) *Davis* v. *Noak* (1816), 1 Stark. 377; *Dubois* v. *Keats* (1840), 11 Ad. & El. 329; *Fitzjohn* v. *Mackinder* (1861), 9 C. B. (N. S.) 505; *Austin* v. *Dowling* (1870), L. R. 5 C. P. 534, 538, 540.

(*e*) *Davis* v. *Noak*, *supra*. As to setting out the information in a statement of claim, see *Gregory* v. *Derby* (1839), 8 C. & P. 749.

(*f*) *Payn* v. *Porter* (1618), Cro. Jac. 490.

(*g*) *Dawson* v. *Vansandau* (1863), 11 W. R. 516; see also *Clarke* v. *Postan* (1834), 6 C. & P. 423.

(*h*) *Fitzjohn* v. *Mackinder*, *supra* (where the defendant, during the trial of an action, wilfully made a false allegation of perjury against the plaintiff, and was bound over by the judge to prosecute).

(*i*) *Dubois* v. *Keats*, *supra*; see and compare *Chambers* v. *Taylor* (1602), Cro. Eliz. 900 (where the plaintiff by demurring to the defence, admitted the special matter set up therein as showing reasonable and probable cause for the prosecution).

(*j*) *Mittens* v. *Foreman and Cameron* (1888), 58 L. J. (Q. B.) 40; see Debtors Act, 1869 (32 & 33 Vict. c. 62), ss. 16, 17, and title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 352.

(*k*) *Austin* v. *Dowling*, *supra*; *Harris* v. *Warre* (1879), 4 C. P. D. 125; *Lock* v. *Ashton* (1848), 12 Q. B. 871 (a remand is an act of the magistrate, and is not the subject of an action for false imprisonment). See also *Guest* v. *Warren* (1854), 9 Exch. 379; *Johnstone* v. *Sutton* (1786), 1 Term Rep. 510, 544, Ex. Ch.; compare *Cooper* v. *Booth* (1785), 3 Esp. 135, 144; *Elsee* v. *Smith* (1822), 1 Dow. & Ry. (K. B.) 97. The mere signing of the charge sheet after an arrest by a constable will not render the person so signing liable to an action for false imprisonment (*Grinham* v. *Willey* (1859), 4 H. & N. 496; *Sewell* v. *National Telephone Co., Ltd.*, [1907] 1 K. B. 557, C. A.). See further, titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 606 *et seq.*; TRESPASS.

SECT. 2.

Who may be liable as Prosecutor.

SECT. 2.—*Who may be Liable as Prosecutor.*

SUB-SECT. 1.—*In General.*

Who may be liable.

1435. A person who prosecutes another in the sense explained above may be liable (*l*) as prosecutor; and so may one who represents himself as prosecutor, though he did not in fact initiate the prosecution, and is present only as a witness (*m*). But the mere fact that a witness is bound over with another (the real prosecutor) to prosecute and give evidence will not render the former liable to an action for the prosecution (*n*).

A person who fairly states the facts to a magistrate, and makes no specific charge against anyone, will not be responsible, in an action for malicious prosecution, to a person against whom the magistrate issues a warrant of arrest (*o*).

Position of magistrate.

1436. A magistrate who acts as such in a prosecution has been held not to be liable to an action for malicious prosecution, even though he procures some of the witnesses to appear against the person prosecuted, and though his own name is indorsed as that of a witness on the indictment (*p*).

Grand jury.

Again, an action will not lie against a grand jury for their finding, for they are compellable to serve and their verdict is a matter of record (*q*).

Prosecutor in naval and military courts.

1437. A naval or military court-martial or court of inquiry is not a court into whose proceedings the civil courts are competent to inquire, and a prosecution before it, when within the true limit of its jurisdiction, cannot, though malicious and without reasonable and probable cause, be called in question in a court of law (*r*).

(*l*) As to liability of husband to wife, see title HUSBAND AND WIFE, Vol. XVI., p. 460, note (*h*).

(*m*) *Clements* v. *Ohrly* (1847), 2 Car. & Kir. 686. If during the proceedings the defendant heard himself described as prosecutor, without contradicting it, the jury may infer that he represented himself as such (*ibid.*).

(*n*) *Eager* v. *Dyott* (1831), 5 C. & P. 4; *Browne* v. *Stradling* (1836), 5 L. J. (C. P.) 295; see *Dubois* v. *Keats* (1840), 11 Ad. & El. 329; *Fitzjohn* v. *Mackinder* (1861), 9 C. B. (N. S.) 505.

(*o*) *Leigh* v. *Webb* (1800), 3 Esp. 164; *Cohen* v. *Morgan* (1825), 6 Dow. & Ry. (K. B.) 8; and see *Milton* v. *Elmore* (1830), 4 C. & P. 456; *Pandit Gaya Parshad Tewari* v. *Sardar Bhagat Singh* (1908), 24 T. L. R. 884, P. C. (false statements knowingly made by defendant to policeman).

(*p*) *Girlington* v. *Pitfield* (1669), 1 Vent. 47. From the report of the same case in 2 Keb. 572, the inference might be drawn that on strict proof of malice, and on proof that the magistrate was the real prosecutor, an action would lie. For the conditions necessary to support an action against a magistrate for a malicious conviction, see *Burley* v. *Bethune* (1814), 5 Taunt. 580, under the repealed Justices Protection Act, 1803 (43 Geo. 3, c. 141); see now Justices Protection Act, 1848 (11 & 12 Vict. c. 44), ss. 2, 13; *Simpkin* v. *French* (1823), 12 Price, 394; *Stevens* v. *Clarke* (1842), Car. & M. 509 (warrant without any proper information); *Gelen* v. *Hall* (1857), 2 H. & N. 379. *Quære*, however, whether such an action now lies in any circumstances for a matter within his jurisdiction (*Anderson* v. *Gorrie*, [1895] 1 Q. B. 668, C. A., *per* Lord ESHER, M.R., at p. 671; *Law* v. *Llewellyn*, [1906] 1 K. B. 487, C. A.; see *Mason* v. *Barker* (1843), 1 Car. & Kir. 100). And, as to the position of magistrates generally, see title MAGISTRATES, p. 531, *ante*.

(*q*) *Floyd* v. *Barker* (1607), 12 Co. Rep. 23; see *Sutton* v. *Johnstone* (1786), 1 Term Rep. 493, 503, Ex. Ch.

(*r*) See *Sutton* v. *Johnstone*, *supra*, at pp. 510, 549; affirmed, p. 784, H. L.;

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1438. The question of the liability of a master or principal for a malicious prosecution instituted by his servant or agent does not often arise, because, as a rule, there is sufficient time to report and leave to the master or principal the onus of deciding whether he will prosecute or not (*s*). A master or principal is not liable for a malicious prosecution by his servant or agent, unless the prosecution was within the scope of the servant's or agent's authority, express or implied, or unless there has been a ratification (*t*). Such authority may be general, or a particular or limited authority to act in cases of emergency (*u*).

Liability of master or principal.

Agent's authority.

No general authority to prosecute can be implied, unless the prosecution of an offender falls within the ordinary scope of a servant's or agent's duties (*u*). Such an authority might possibly be implied, for example, in the case of the general manager of a banking company invested with general supervision and power of control, at least in the absence of his directors, or possibly in the case of a manager conducting the bank's business at a distance from the head office and the directors (*a*), but certainly not where he has the opportunity of consulting them (*a*).

General authority.

In the case of an authority limited to cases of emergency a plaintiff must show that the emergency existed or might reasonably have been supposed to exist (*a*).

Limited authority.

1439. Frequently a prosecution by a servant or agent is preceded by an imprisonment or giving into custody, in which case also, to make the master or principal liable, it must be shown, in the absence of express authority or ratification, that the act was within

Prosecution preceded by imprisonment.

Dawkins v. *Rokeby* (*Lord*) (1866), 4 F. & F. 806, at pp. 832, 833. It is true that it was not necessary to decide this in *Sutton* v. *Johnstone* (1786), 1 Term Rep. 493, 510, 549, Ex. Ch.; affirmed, 784, H.L., as there reasonable and probable cause was proved. But the opinion of the court has been well recognised in later cases (see *Dawkins* v *Rokeby* (*Lord*), *supra*; *Dawkins* v. *Paulet* (*Lord*) (1869), L. R. 5 Q. B. 94; *Dawkins* v. *Rokeby* (*Lord*) (1873), L. R. 8 Q. B. 255, Ex. Ch.; affirmed (1875), L. R. 7 H. L. 744; *Grant* v. *Secretary of State for India* (1877), 2 C. P. D. 445; *Barwis* v. *Keppel* (1766), 2 Wils. 314). As to the reasons for this statement, consider the essentials to an action stated at p. 677, *post*. As to such courts, see title ROYAL FORCES.

(*s*) An agent, *e.g.*, a solicitor who acts maliciously and without reasonable and probable cause, may himself (irrespective of the question of his principal's liability), be liable in an action for malicious prosecution (*Johnson* v. *Emerson* (1871), L. R. 6 Exch. 329); see also *Stevens* v. *Midland Counties Rail. Co.* (1854), 10 Exch. 352; and see, generally, titles AGENCY, Vol. I., pp. 224 *et seq.*; MASTER AND SERVANT; SOLICITORS.

(*t*) See *Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Exch. 259, Ex. Ch.; *Michell* v. *Williams* (1843), 11 M. & W. 205, 213; *Bank of New South Wales* v. *Owston* (1879), 4 App. Cas. 270, P. C.; *Knight* v. *North Metropolitan Tramways Co.* (1898), 78 L. T. 227; *Stevens* v. *Midland Counties Rail. Co.*, *supra*. A defendant is not deemed to adopt a prosecution, begun by his agents without his knowledge or sanction, by merely attending the magistrates' court to hear what evidence may be given (*Weston* v. *Beeman* (1857), 27 L. J. (EX.) 57).

(*u*) *Bank of New South Wales* v. *Owston*, *supra*.

(*a*) *Bank of New South Wales* v. *Owston*, *supra*, at p. 291. This case, which was in the Privy Council, has been approved by the Court of Appeal in *Abrahams* v. *Deakin*, [1891] 1 Q. B. 516, C. A.; and by a Divisional Court in *Hanson* v. *Waller*, [1901] 1 K. B. 390.

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the scope of the servant's or agent's authority (*b*), or, as it is sometimes called, of his employment (*c*). Numerous cases which have been decided with reference to false imprisonment throw light on the application of this principle to malicious prosecution, since they establish that, though a servant may have implied authority to arrest a person for the protection of his master's property or in case of other emergency (*d*), authority to give into custody for the mere purpose of vindicating justice will not be implied in the absence of some such special circumstances (*e*) as have been indicated above (*f*).

SUB-SECT. 3.—*Corporations.*

Liability of corporations and companies.

1440. The weight of authority (*g*) clearly shows that an action

(*b*) See, *e.g.*, *Poulton* v. *London and South Western Rail. Co.* (1867), L. R. 2 Q. B. 534; and see, generally, title TRESPASS.

(*c*) *Bayley* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1873), L. R. 8 C. P. 148, Ex. Ch.; and see title AGENCY, Vol. I., p. 212.

(*d*) See, *e.g.*, *Goff* v. *Great Northern Rail. Co.* (1861), 3 E. & E. 672; distinguished in *Poulton* v. *London and South Western Rail. Co.*, *supra* (arrest where the company itself had no power to arrest). In such a case the servant can have no implied power to arrest; see also *Moore* v. *Metropolitan Rail. Co.* (1872), L. R. 8 Q. B. 36; *Richards* v. *West Middlesex Waterworks Co.* (1885), 15 Q. B. D. 660.

(*e*) *Allen* v. *London and South Western Rail. Co.* (1870), L. R. 6 Q. B. 65 (arrest ordered by booking clerk on charge of attempted robbery); *Abrahams* v. *Deakin*, [1891] 1 Q. B. 516, C. A. (where manager of bar of public-house gave a person into custody on charge of attempting to pass bad money); *Hanson* v. *Waller*, [1901] 1 K. B. 390 (where manager of public-house gave plaintiff into custody on charge of stealing, but such act was not necessary for protection of master's property); *Edwards* v. *London and North Western Rail. Co.* (1870), L. R. 5 C. P. 445 (where foreman porter gave a person into custody whom he suspected to be stealing company's property); *Sewell* v. *National Telephone Co., Ltd.*, [1907] 1 K. B. 557, C. A. (plaintiff arrested on charge sheet signed by defendants' manager). See also the following cases where the principal was held not liable for the acts of the agent:—*Eastern Counties Rail. Co.* v. *Broom* (1851), 6 Exch. 314, Ex. Ch.; *Roe* v. *Birkenhead, Lancashire and Cheshire Junction Rail. Co.* (1851), 7 Exch. 36; *Giles* v. *Taff Vale Rail. Co.* (1853), 2 E. & B. 822; *Stevens* v. *Midland Counties Rail. Co.* (1854), 10 Exch. 352; *Charleston* v. *London Tramways Co.* (1888), 4 T. L. R. 629, C. A.; *Stevens* v. *Hinshelwood* (1891), 55 J. P. 341, C. A. As to evidence of ratification, see *Eastern Counties Rail. Co.* v. *Broom*, *supra*; *Moon* v. *Towers* (1860), 8 C. B. (N. S.) 611; and title AGENCY, Vol. I., p. 179. As to proof of extent of agent's authority, see *Giles* v. *Taff Vale Rail. Co.*, *supra*; *Goff* v. *Great Northern Rail. Co.*, *supra*; *Lambert* v. *Great Eastern Railway*, [1909] 2 K. B. 776, C. A.; and title AGENCY, Vol. I., p. 212.

(*f*) See p. 673, *ante*.

(*g*) Until recently doubts existed as to whether an action for malicious prosecution would lie against a corporation aggregate or incorporated company. Eminent judges have stated that such an action would not lie, in substance, on the ground that a corporation having no soul cannot be actuated by a malicious intention; see *Stevens* v. *Midland Counties Rail. Co.*, *supra*, *per* ALDERSON, B.; *Henderson* v. *Midland Rail. Co.* (1871), 24 L. T. 881, *per* BRAMWELL, B.; *Abrath* v. *North Eastern Rail. Co.* (1886), 11 App. Cas. 247, *per* Lord BRAMWELL; see also *Western Bank of Scotland* v. *Addie*, *Addie* v. *Western Bank of Scotland* (1867), L. R. 1 Sc. & Div. 145, 166 (fraud), disapproved in *Citizens' Life Assurance Co.* v. *Brown*, [1904] A. C. 423, P. C. In *Kelly* v. *Midland Great Western of Ireland Rail. Co.* (1872), 7 I. R. C. L. 8, the question was raised but not decided. Some American decisions, now overruled, Also supported that doctrine (*Childs* v. *Bank of Missouri* (1852), 17 Missouri Reports, 213; *Owsley* v. *Montgomery and West Point Rail Road Co.* (1861), 37 alabama Reports, 560; but compare now *McDermott* v. *Evening Journal* (1881).

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for malicious prosecution may be brought against a corporation (*h*) aggregate or an incorporated company; and, such a corporation or company being liable as a person for a malicious prosecution, the ordinary doctrines, as to the responsibility of principals acting by agents or servants, apply (*i*), the jury having to say whether an act done by an agent or servant of either was within the scope of his authority or the course of his employment (*i*).

Where, therefore, it is sought to make such a corporation or company liable for a malicious prosecution undertaken by its servant or agent, the malice or indirect motive which a plaintiff will have to prove (*j*) may be that of the servant or agent, if it be shown that he was acting within the scope of his employment (*k*).

SECT. 3.—*Remedy for Malicious Prosecution.*

SUB-SECT. 1.—*The Former Mode of Redress.*

Writ of conspiracy.

1441. A person aggrieved by a malicious prosecution formerly sought redress, according to the circumstances, by (1) a writ of conspiracy (*l*), or (2) an action on the case (*m*).

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39 American Reports, 606; *Boogher* v. *Life Association of America* (1882), 42 American Reports, 413. As to action against a trade union and one of its officials, see *Bussey* v. *The Amalgamated Society of Railway Servants and Bell* (1908), 24 T. L. R. 437; and title TRADE AND TRADE UNIONS.

(*h*) *Whitfield* v. *South Eastern Rail. Co.* (1858), E. B. & E. 115 (libel); *Green* v. *London General Omnibus Co.* (1859), 7 C. B. (N. S.) 290 (intentional acts of misfeasance by company's servant); *Walker* v. *South Eastern Rail. Co., Smith* v. *Same* (1870), L. R. 5 C. P. 640; *Bank of New South Wales* v. *Owston* (1879), 4 App. Cas. 270, 282, P. C. (where defendant's counsel admitted liability of a corporation to such an action); *Edwards* v. *Midland Rail. Co.* (1880), 6 Q. B. D. 287 (where FRY, J., refused to follow *Stevens* v. *Midland Counties Rail. Co.* (1854), 10 Exch. 352); *Kent* v. *Courage & Co., Croft* v. *Same* (1890), 55 J. P. 264; *Cornford* v. *Carlton Bank*, [1899] 1 Q. B. 392; affirmed, [1900] 1 Q. B. 22, C. A. (liability to action admitted by defendant's counsel); see also *Citizens' Life Assurance Co.* v. *Brown*, [1904] A. C. 423, P. C. (malicious libel); *Yarborough* v. *Bank of England* (1812), 16 East, 6 (trover); *Eastern Counties Rail. Co.* v. *Broom* (1851), 6 Exch. 314, Ex. Ch. (assault and battery); *R.* v. *Tyler and International Commercial Co.*, [1891] 2 Q. B. 588, C. A.; *Rayson* v. *South London Tramways Co.*, [1893] 2 Q. B. 304, C. A.; and see, further, titles COMPANIES, Vol. V., pp. 309 *et seq.*; CORPORATIONS, Vol. VIII., pp. 386 *et seq.*

(*i*) *Citizens' Life Assurance Co.* v. *Brown*, [1904] A. C. 423, P. C.

(*j*) As to malice, see p. 679, *post.*

(*k*) This, it is submitted, is clear from the authorities; see *Citizens' Life Assurance Co.* v. *Brown, supra* (libel), citing *Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Exch. 259, Ex. Ch.; although in *Nevill* v. *Fine Arts and General Insurance Co.*, [1895] 2 Q. B. 156, C. A., the Court of Appeal and the House of Lords, [1897] A. C. 68, left open the question whether in an action of libel against a corporation a plea of privilege could be rebutted by proving actual malice in the mind of the agent who published the libel; see also *Glasgow Corporation* v. *Lorimer*, [1911] A. C. 209; and for further information as to the cases cited, see title LIBEL AND SLANDER, Vol. XVIII., pp. 663, note (*i*), 685, note (*b*), 715, note (*r*).

(*l*) A writ of conspiracy was directed to the sheriff, and commanded him, on getting security from A., to bring before the court, for the purpose of showing cause, two or more persons who had conspired together, and falsely and maliciously procured the indictment of A., who was afterwards acquitted, to his damage, and contrary to the ordinance in such case provided (Fitz. Nat. Brev.

(*m*) For note (*m*) see next page.

SECT. 3.
Remedy for Malicious Prosecution.

Defects in writ of conspiracy.

Writs of conspiracy as a means of obtaining redress for malicious prosecution gradually, by reason of their inherent defects, fell into disuse, and were replaced by actions on the case in the nature of a conspiracy (*n*).

These defects were as follows:—(1) A writ of conspiracy did not lie against an individual, for one person cannot conspire with himself (*o*); (2) if on such writ one of two defendants were acquitted no judgment could be given against the other (*p*); (3) conspiracy lay only for procuring a person to be indicted for treason or felony where life was in danger (*q*); and (4) was only available where the aggrieved party had been acquitted, and so could not be used in a case where an indictment was ignored by a grand jury (*r*).

SUB-SECT. 2.—*Action for Malicious Prosecution.*

Replacement of writ of conspiracy by action on the case.

1442. An action for malicious prosecution, or, to give it its earlier designation, an action on the case in the nature of a writ of conspiracy, lay in respect of a malicious prosecution for any crime, whether capital or not, and though the prosecution did not proceed to actual indictment or appeal (*s*). Again, such an action lay against one of two persons charged with conspiracy (the other having obtained a verdict in his favour (*a*)), though in such circumstances a writ of conspiracy would have failed (*b*); and, further, the fact that the prosecution came to an end by reason of a defect in the indictment (*c*), or by reason of the grand jury throwing out the indictment (*d*), did not affect the remedy by action on the case.

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115). The ordinance referred to is the Statute of Conspirators (1305), 33 Edw. 1, by which conspirators include, amongst others, persons who bind themselves to aid one another in indicting anyone or in causing him to be indicted, or in falsely moving and maintaining pleas. A slightly different form of writ, used in case of nonsuit on an appeal of felony or murder, commanded the sheriff, on getting security as before mentioned, to bring before the court, for the purpose of showing cause, two or more persons who had conspired together, and falsely and maliciously procured A. to be appealed of the death of B., or of some other felony, and to be imprisoned therefor, until, having been brought before the court, he was acquitted (Fitz. Nat. Brev. 115).

(*m*) Fitz. Nat. Brev. 114D. The foundation of the two proceedings was the same, but the number of the defendants determined which method of action should be used (*Savile* v. *Roberts* (1698), 1 Ld. Raym. 374; and see title ACTION, Vol. I., p. 41).

(*n*) *Coxe* v. *Wirrall* (1607), Cro. Jac. 193; see the text, *infra*.

(*o*) *Coxe* v. *Wirrall*, *supra*; *Smith* v. *Cranshaw* (1626), W. Jo. 93.

(*p*) *Savile* v. *Roberts*, *supra*, at p. 379. But if the writ were in respect of an indictment for something less than treason or felony, judgment might be given against one, though the other was acquitted (*ibid.*).

(*q*) *Savile* v. *Roberts*, *supra*.

(*r*) *Smith* v. *Cranshaw*, *supra*.

(*s*) 1 Hawk. P. C., 8th ed., c. 27, s. 5 (conspiracy).

(*a*) *Price* v. *Crofts* (1657), T. Raym. 180; *Pollard* v. *Evans* (1679), 2 Show. 50; *Subley* v. *Mott* (1748), 1 Wils. 210.

(*b*) *Savile* v. *Roberts*, *supra*; and see note (*p*), *supra*.

(*c*) *Chambers* v. *Robinson* (1726), 1 Stra. 691; *Wicks* v. *Fentham* (1791), 4 Term Rep. 247; *Pippet* v. *Hearn* (1822), 5 B. & Ald. 634.

(*d*) *The Poulterers' Case* (1610), 9 Co. Rep. 55 b; *Payn* v. *Porter* (1618), Cro. Jac. 490, Ex. Ch.

SECT. 4.—*Essentials to an Action for Malicious Prosecution.*

SECT. 4. Essentials to an Action for Malicious Prosecution.

SUB-SECT. 1.—*In General.*

Essentials to the action.

1443. To succeed in an action for malicious prosecution (*e*) a plaintiff must prove:

(i.) the prosecution by the defendant of a criminal charge (*f*) against the plaintiff before a tribunal into whose proceedings the civil courts are competent to inquire (*g*);

(ii.) that the proceedings complained of terminated in his favour, if from their nature they were capable of so terminating (*h*);

(iii.) that the defendant instituted or carried on such proceedings maliciously (*i*);

(iv.) that there was an absence of reasonable and probable cause for such proceedings (*j*); and

(v.) that the plaintiff has suffered damage; unless, indeed, the proceedings necessarily import damage to his fame or person (*k*). This requirement has important consequences with reference to civil proceedings maliciously undertaken (*l*).

SUB-SECT 2.—*Termination of Proceedings in Plaintiff's Favour.*

Proceedings must have so terminated if capable of so terminating.

1444. In an action for malicious prosecution it must be alleged and proved that the proceedings have terminated in the plaintiff's favour, if from their nature they were capable of so terminating, as, in the absence of proof thereof, a court entertaining the action would in effect constitute itself a court of appeal from the court in which the prosecution took place (*m*).

Proceedings abroad.

The rule prevails even in cases where the proceedings complained of have taken place abroad, provided that the court had

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(*e*) An action for malicious prosecution may be brought in a county court where the damage claimed does not exceed £100; see title COUNTY COURTS, Vol. VIII., p. 428.

(*f*) See p. 670, *ante*. As to abuse of civil proceedings, see p. 689, *post*.

(*g*) As to naval and military courts, see p. 672, *ante*.

(*h*) *Vanderbergh* v. *Blake* (1661), Hard. 194; *Steward* v. *Gromett* (1859), 7 C. B. (N. S.) 191, as to which compare Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 25; *Basébé* v. *Matthews* (1867), L. R. 2 C. P. 684; see also *Bynoe* v. *Bank of England*, [1902] 1 K. B. 467, C. A., and the text, *infra*.

(*i*) *Purcell* v. *M'Namara* (1808), 1 Camp. 199; 9 East, 361; *Mitchell* v. *Jenkins* (1833), 5 B. & Ad. 588.

(*j*) *Farmer* v. *Darling* (1766), 4 Burr. 1971; *Broad* v. *Ham* (1839), 5 Bing. (N. C.) 722; *Abrath* v. *North Eastern Rail. Co.* (1883), 11 Q. B. D. 440, C. A.; *Bradshaw* v. *Goodwin & Co.* (1894), 10 T. L. R. 491, C. A.; and see, further, pp. 680, 685, *post*.

(*k*) See and compare *Savile* v. *Roberts* (1698), 1 Ld. Raym. 374; *Byne* v. *Moore* (1813), 5 Taunt. 187; *Quartz Hill Gold Mining Co.* v. *Eyre* (1883), 11 Q. B. D. 674, C. A. (a case of malicious civil proceedings). As to damages, see, further, p. 688, *post*.

(*l*) See p. 689, *post*.

(*m*) *Vanderbergh* v. *Blake*, *supra*; *Parker* v. *Langly* (1714), 10 Mod. Rep. 209, 210; *Lewis* v. *Farrel* (1718), 1 Stra. 114; *Castrique* v. *Behrens* (1861), 3 E. & E. 709, 721; *Whitworth* v. *Hall* (1831), 2 B. & Ad. 695; *Bynoe* v. *Bank of England*, *supra*; *Redway* v. *McAndrew* (1873), L. R. 9 Q. B. 74 (sufficiency of allegation of termination of proceedings); compare *Barber* v. *Lesiter* (1859), 7 C. B. (N. S.) 175, 187.

SECT. 4. Essentials to an Action for Malicious Prosecution.

jurisdiction to entertain them, and that the decision was arrived at in such circumstances as to be binding in this country (*n*).

It is immaterial that the party convicted had no power of appealing (*o*).

When proceedings so terminate.

1445. The proceedings sufficiently terminate in the plaintiff's favour if the magistrate dismisses the charge (*p*), if the grand jury ignore the indictment (*q*), if the proceedings fail through a defect in the indictment (*r*), or because they are *coram non judice* (*s*), or by the acquittal of a jury (*t*), even as to one part of the indictment (*a*).

Power to appeal.

Where an appeal lies from a conviction, and no appeal has been made by the party convicted, the proceedings, of course, have not terminated in his favour, and his acquiescence in the conviction is evidence of reasonable and probable cause (*b*).

Effect of successful appeal.

Where there has been a successful appeal from a conviction, this would be, for the purpose of pleading, a sufficient termination of the proceedings in a plaintiff's favour (*c*). But, it seems, the conviction, though revers ed, might be evidence on which the judge might find that there was reasonable and probable cause for the prosecution (*d*).

(*n*) *Castrique* v. *Behrens* (1861), 3 E. & E. 709, 721 (a case of civil proceedings); the same principle would no doubt be applied to a prosecution in a foreign court; see also *Taylor* v. *Ford* (1873), 29 L. T. 392. The principle has been applied in the case of a malicious presentment in an Ecclesiastical Court (*Fisher* v. *Bristow* (1799), 1 Doug. (K. B.) 215).

(*o*) *Basébé* v. *Matthews* (1867), L. R. 2 C. P. 684; *Bynoe* v. *Bank of England*, [1902] 1 K. B. 467, C. A.

(*p*) *Delegal* v. *Highley* (1837), 3 Bing. (N. C.) 950.

(*q*) *Jones* v. *Gwynn* (1714), 10 Mod. Rep. 214, at p. 220; *Morgan* v. *Hughes* (1788), 2 Term Rep. 225. In an early case, where the plaintiff proved nothing more than that an indictment was preferred on which nothing was done, his action failed, because it did not appear that the proceedings had terminated in his favour, or at all (*Arundell* v. *Tregono* (1607), Yelv. 116).

(*r*) *Savile* v. *Roberts* (1698), 1 Ld. Raym. 374; *Jones* v. *Gwynn*, *supra*, at p. 214; *Wicks* v. *Fentham* (1791), 4 Term Rep. 247; *Pippet* v. *Hearn* (1822), 5 B. & Ald. 634.

(*s*) *Jones* v. *Gwynn*, *supra*, at p. 220.

(*t*) *Morgan* v. *Hughes* (1788), 2 Term Rep. 225. As to evidence of an acquittal, see p. 683, *post*.

(*a*) *Boaler* v. *Holder* (1887), 51 J. P. 277, where plaintiff was indicted for publishing a libel knowing it to be false, and convicted of publishing it only; and see *Boaler* v. *Holder* (1886), 54 L. T. 298 (on objection to statement of claim). See also, as to termination of proceedings in plaintiff's favour, *Pierce* v. *Street* (1832), 1 L. J. (K. B.) 147, where proceedings in an action in w hich there had been a malicious arrest were abandoned; *Craig* v. *Hasell* (1843), 4 Q. B. 481 (writ of extent under which plaintiff's goods had been seized set aside, though by arrangement).

(*b*) *Mellor* v. *Baddeley* (1834), 2 Cr. & M. 675, 678.

(*c*) See *Mellor* v. *Baddeley*, *supra*; *Castrique* v. *Behrens*, *supra*.

(*d*) See *Reynolds* v. *Kennedy* (1748), 1 Wils. 232, as explained in *Sutton* v. *Johnstone* (1786), 1 Term Rep. 493, at p. 505. In the earlier of these cases it was held that malice could not be inferred as the original tribunal gave judgment for the defendants, but in the later it was said that it would have been more correct if the court had ruled that that fact enabled it to hold that there was reasonable and probable cause; see also *Craig* v. *Hasell*, *supra*, at p. 492. The American authorities vary, but on the whole tend to show that the original conviction, subsequently reversed, is only *primâ facie* evidence of reasonable and probable cause; see *Whitney* v. *Peckham* (1818), 15 Massachusetts, 243 (conviction, though reversed, conclusive evidence of reasonable and probable cause); *Burt* v. *Place* (1830), 4 Wendell's Reports, 591 (not conclusive where

SECT. 4.
Essentials to an Action for Malicious Prosecution.

It was at one time held that the entry by the Attorney-General of a *nolle prosequi* to an indictment would not be a sufficient termination of the proceedings in favour of the accused to enable him to bring an action (*e*). But the current of modern authority seems opposed to this (*f*). A *nolle prosequi* is not a decision on the merits (*g*), but it puts an end at least to the particular prosecution before the court (*h*).

Effect of entry of *nolle prosequi*.

Proceedings need not so terminate if not capable of so terminating.

1446. The proceedings complained of need not, for the purpose of an action for malicious prosecution, have terminated favourably for the plaintiff if, from their nature, they could not have so terminated (*i*), as, for instance, where on motion made in the High Court and supported by affidavit, a person is ordered to find security upon articles of the peace exhibited against him, for on such motion he cannot contradict the allegations in the affidavit (*k*).

SUB-SECT. 3.—*Malice.*

The malice must be malice in fact.

1447. The malice which a plaintiff in an action for malicious prosecution or other abuse of legal proceedings has to prove is not

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prosecutor knew of plaintiff's innocence and prevented him from establishing it); *Witham* v. *Gowen* (1837), 14 Maine, 362 (conclusive unless plaintiff proves that conviction was obtained exclusively or mainly by defendant's false testimony); *Mayer* v. *Walter* (1870), 64 Pennsylvania State Reports, 283 (no bar to an action in which plaintiff can prove malice and absence of reasonable and probable cause).

(*e*) *Goddard* v. *Smith* (1704), 6 Mod. Rep. 261; see Buller, Law of Nisi Prius, 5th ed., 14.

(*f*) In the Supreme Court of New South Wales it has been held that a *nolle prosequi* by the Attorney-General, or a refusal to continue a prosecution actually commenced, is a sufficient termination for the purposes above mentioned (*Gilchrist* v. *Gardner* (1891), 12 New South Wales Law Reports (Cases at Law), 184. See also *Reed* v. *Hales* (1872), 11 Supreme Court of New South Wales Reports (Cases at Law), 317, where the prosecution was withdrawn on the suggestion of the judge). In America the question has been much discussed, and there are conflicting views, but it would seem that the prevailing opinion is that a *nolle prosequi* is a sufficient termination of the proceedings (see *Chapman* v. *Woods* (1843), 6 Blackford, 504; *Clark* v. *Cleveland* (1844), 6 Hill, 344, 347; *Hays* v. *Blizzard* (1868), 30 Indiana, 457; *Brown* v. *Randall* (1869), 4 American Reports, 35; *Stanton* v. *Hart* (1873), 27 Michigan, 539; but compare *Bacon* v. *Towne* (1849), 4 Cushing, 217; *Parker* v. *Farley* (1852), 10 Cushing, 279; *Brown* v. *Lakeman* (1853), 12 Cushing, 482; *Cardival* v. *Smith* (1872), 12 American Reports, 682).

(*g*) *Goddard* v. *Smith*, *supra*; *R.* v. *Ridpath* (1713), 10 Mod. Rep. 152.

(*h*) *R.* v. *Allen* (1862), 1 B. & S. 850; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 357; see also and compare *R.* v. *Mitchel* (1848), 3 Cox, C. C. 93; Crown Office Rules, 1906, Form 120 (entry of *nolle prosequi*).

(*i*) *Steward* v. *Gromett* (1859), 7 C. B. (N. S.) 191; see title ESTOPPEL, Vol. XIII., p. 360.

(*k*) *Vane's (Lord) Case* (1744), 2 Str. 1202; *R.* v. *Doherty* (1810), 13 East, 171; *Parton* v. *Hill* (1864), 12 W. R. 753, at p. 754; Crown Office Rules, 1906, rr. 250, 251; compare *Brasyer* v. *McLean* (1875), L. R. 6 P. C. 398 (action against sheriff for false return of rescue, upon which, not being traversable, a rule absolute for attachment is granted in the first instance). So, where under the old practice on *ex parte* proceedings before magistrates, a person was committed to prison in default of finding sureties for the peace, he was not debarred from bringing an action (*Steward* v. *Gromett*, *supra*; *Venafra* v. *Johnson* (1833), 10 Bing. 301). But now by the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 25, both parties in the proceedings before the magistrates may be examined and cross-examined; see title MAGISTRATES, p. 634, *ante*.

SECT. 4. Essentials to an Action for Malicious Prosecution.

malice in its legal sense, that is, such as may be assumed from a wrongful act done intentionally, without just cause or excuse (*l*), but malice in fact—*malus animus*—indicating that the defendant was actuated either by spite or illwill against the plaintiff, or by indirect or improper motives (*m*). In this respect the improper resort to legal proceedings is an exception to the rule that an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent (*n*).

Comparison between malicious prosecution and libel.

1448. With regard to malice, a comparison has been drawn between actions for libel and for malicious prosecution. A libel is excused if the words complained of were written on a privileged occasion; but if there is express malice, the excuse fails, and the privilege is no longer a protection. So the law protects a prosecutor though there is no reasonable and probable cause for the prosecution; but if, in such case, malice is proved, an action lies, not indeed for the malice, but for the annoyance, expense, and disgrace of the groundless prosecution (*o*).

Question for the jury.

1449. The question of malice or no malice is for the jury, and not for the judge, and the judge should leave it to them in express terms (*p*).

SUB-SECT. 4.—*Want of Reasonable and Probable Cause.*

Question one of law and fact.

1450. Whether there was reasonable and probable cause for a prosecution or not is a mixed question of law and fact, the province

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(*l*) See *Bromage* v. *Prosser* (1825), 4 B. & C. 247, 255.

(*m*) *Hicks* v. *Faulkner* (1878), 8 Q. B. D. 167, 175; see also *Mitchell* v. *Jenkins* (1833), 5 B. & Ad. 588, 589; *Haddrick* v. *Heslop* (1848), 12 Q. B. 267 (prosecution for perjury to stop plaintiff's mouth); *Stevens* v. *Midland Counties Rail. Co.* (1854), 10 Exch. 352 (where defendant's object was "to punish some one in order to deter others"); *Abrath* v. *North Eastern Rail. Co.* (1883), 11 Q. B. D. 440, 455, C. A.; affirmed (1886), 11 App. Cas. 247; *Brown* v. *Hawkes*, [1891] 2 Q. B. 718, 722, 728, C. A.; see *Corea* v. *Peiris*, [1909] A. C. 549, P. C.

(*n*) *Stevenson* v. *Newnham* (1853), 13 C. B. 285, 297, Ex. Ch.; approved in *Allen* v. *Flood*, [1898] A. C. 1, *per* Lord HERSCHELL, at p. 124 (and see S. C., *per* Lord DAVEY, at p. 172), and in *Quinn* v. *Leathem*, [1901] A. C. 495, *per* Lord MACNAGHTEN, at p. 508; and see S. C., *per* Lord LINDLEY, at p. 533; see also *Chaffers* v. *Goldsmid*, [1894] 1 Q. B. 186, *per* WILLS, J., at p. 191; *Fitzroy* v. *Cave*, [1905] 2 K. B. 364, C. A., *per* COLLINS, M.R., at p. 370. The *dicta* to the contrary in *Bowen* v. *Hall* (1881), 6 Q. B. D. 333, 338, C. A., and *Temperton* v. *Russell*, [1893] 1 Q. B. 715, 728, C. A., can no longer be relied on as an authority. On the general question whether, and how far, malice or bad intention will give a cause of action where it would not otherwise exist, see, in addition to the above cases, *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1889), 23 Q. B. D. 598, C. A., especially the judgment of BOWEN, L.J., at pp. 611 *et seq.*; affirmed, [1892] A. C. 25 (see *per* Lord FIELD, at p. 51); *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland and Wales*, [1902] 2 K. B. 732, 739, C. A.; *Bradford Corporation* v. *Pickles*, [1895] A. C. 587; *Davis* v. *Bromley Corporation* (1907), 24 T. L. R. 11, C. A.; and the judgments in *Glamorgan Coal Co.* v. *South Wales Miners' Federation*, [1903] 2 K. B. 545, C. A.; affirmed, [1905] A. C. 239. See also titles TORT; TRADE AND TRADE UNIONS.

(*o*) *Allen* v. *Flood, supra, per* Lord DAVEY, at p. 172; see also S. C., *per* Lord HERSCHELL, at pp. 125, 126; *Quinn* v. *Leathem, supra, per* Lord BRAMPTON, at p. 524. Proof of malice is also essential to an action for abuse of civil process; see p. 691, *post*.

(*p*) *Mitchell* v. *Jenkins, supra*; *Payne* v. *Revans* (1861), 9 W. R. 693; *Hicks* v. *Faulkner, supra*.

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of the jury being to find the facts, unless admitted (*q*), including the inferences therefrom (*r*), and that of the judge to say whether such facts amount to reasonable and probable cause (*a*).

Definition and nature.

1451. Reasonable cause has been said to be such as would operate on the mind of a discreet man, and probable cause such as would operate on the mind of a reasonable man.

It must also be such as would operate on the mind of the defendant, otherwise there is no reasonable cause for him (*b*). It follows that, at least when the accused was in fact innocent (*c*), belief in his guilt is essential to the existence of reasonable and probable cause (*d*), and that such belief must be based on grounds which, or some of which (*e*), are reasonable (*f*), and arrived at after due inquiry (*g*).

Upon what the existence of reasonable or probable cause depends.

1452. The question of reasonable and probable cause does not depend upon the actual existence, but upon a reasonable *bonâ fide*

(*q*) *Pain* v. *Rochester* (1602), Cro. Eliz. 871; *Coxe* v. *Wirrall* (1607), Cro. Jac. 193; *Panton* v. *Williams* (1841), 2 Q. B. 169, 192, Ex. Ch.; *Chapman* v. *Heslop* (1853), 2 W. R. 74, Ex. Ch.; *Hilliar* v. *Dade* (1898), 14 T. L. R. 534, C. A.

(*r*) *Panton* v. *Williams, supra; Taylor* v. *Willans* (1831), 2 B. & Ad. 845.

(*a*) *Johnstone* v. *Sutton* (1786), 1 Term Rep. 510, 520, 545, Ex. Ch.; *Broad* v. *Ham* (1839), 5 Bing. (N. C.) 722; *Panton* v. *Williams, supra; Watson* v. *Whitmore* (1844), 14 L. J. (EX.) 41; *Hicks* v. *Faulkner* (1878), 8 Q. B. D. 167; *Brown* v. *Hawkes*, [1891] 2 Q. B. 718, C. A.; and see *Gibbons* v. *Alison* (1846), 3 C. B. 181 (civil proceedings). If on undisputed facts the judge holds that there was reasonable and probable cause, there will be no case for the jury, and plaintiff must fail (*Blachford* v. *Dodd* (1831), 2 B. & Ad. 179; *Davis* v. *Hardy* (1827), 6 B. & C. 225). There may be cases where, the question of reasonable and probable cause being a mixed one of law and fact, the judge may leave it to the jury (*M'Donald* v. *Rooke* (1835), 2 Bing. (N. C.) 217). See, further, *Watson* v. *Smith* (1899), 15 T. L. R. 473, C. A.; *Cox* v. *English, Scottish and Australian Bank*, [1905] A. C. 168; and title EVIDENCE, Vol. XIII., p. 431.

(*b*) *Broad* v. *Ham, supra, per* TINDAL, C.J., at p. 725; and see *Hicks* v. *Faulkner, supra*.

(*c*) When the jury are satisfied that the plaintiff, though acquitted, was in fact guilty of the charge complained of, the defendant's belief seems to be immaterial (*Heslop* v. *Chapman* (1853), 23 L. J. (Q. B.) 49, 52, Ex. Ch., and cases cited at p. 686, *post*).

(*d*) *Broad* v. *Ham, supra; Hinton* v. *Heather* (1845), 14 M. & W. 131; *Turner* v. *Ambler* (1847), 10 Q. B. 252; *Haddrick* v. *Heslop* (1848), 12 Q. B. 267, 274; *Heslop* v. *Chapman, supra; Ravenga* v. *Mackintosh* (1824), 2 B. & C. 693; *Williams* v. *Banks* (1859), 1 F. & F. 557; *Johnson* v. *Emerson* (1871), L. R. 6 Exch. 329, 351; *Shrosbery* v. *Osmaston* (1877), 37 L. T. 792; compare *Bank of New South Wales* v. *Piper*, [1897] A. C. 383, P. C. (where, as plaintiff plainly knew that he had committed the offence for which he was prosecuted, it was held unnecessary to ask the jury if the defendant had an honest belief in the plaintiff's guilt); see p. 686, *post*. A person who on the strength of circumstances of grave suspicion, which are insufficient to convince him of the guilt of the person concerned, institutes an unsuccessful prosecution under a sense of public duty, would have a defence to an action of malicious prosecution, not because there was reasonable and probable cause, but because he could negative malice (*Shrosbery* v. *Osmaston, supra, per* LINDLEY, J., at p. 795).

(*e*) *Hailes* v. *Marks* (1861), 7 H. & N. 56.

(*f*) *Hicks* v. *Faulkner, supra*; and see *Michell* v. *Williams* (1843), 11 M. & W. 205; *Douglas* v. *Corbett* (1856), 6 E. & B. 511.

(*g*) *Lister* v. *Perryman* (1870), L. R. 4 H. L. 521; *Quartz Hill Gold Mining Co.* v. *Eyre* (1883), 11 Q. B. D. 674, C. A.; *Abrath* v. *North Eastern Rail. Co.* (1883), 11 Q. B. D. 440, C. A.; affirmed (1886), 11 App. Cas. 247; *Brown* v. *Hawkes*, [1891] 2 Q. B. 718, C. A.; *Kelly* v. *Midland Great Western of Ireland Rail. Co.* (1872), 7 I. R. C. L. 8; *Springett* v. *London and South-Western Bank* (1885), 1 T. L. R. 611; *Vagg* v. *Kemp* (1887), 4 T. L. R. 52.

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belief in the existence of such facts as would justify a prosecution (*h*). This belief, or the belief in the accused's guilt, may arise out of the recollection of the prosecutor, if he has always found his memory trustworthy (*i*), or out of information furnished to him by others and accepted by him as true (*k*).

There may be reasonable and probable cause for preferring a criminal charge though the prosecutor has before him only *primâ facie* evidence (*l*), or such as would not be admissible before a jury (*m*), and the question will be whether the impression produced on the mind of the prosecutor by the facts before him was such as would be produced on the mind, not of a lawyer, but of a discreet and reasonable man (*n*).

The facts must be known to the prosecutor at the time of prosecution.

1453. The existence of reasonable and probable cause is not sufficient unless the facts which constituted it were known to the prosecutor at the time of the prosecution (*o*), but if he did know those facts, the benefit of such knowledge will not be displaced by the subsequent communication of some other fact, which, though it might affect the mind of a reasonable man, does not alter the facts already known to him (*p*).

SECT. 5.—*Evidence in an Action for Malicious Prosecution.*

SUB-SECT. 1.—*In General.*

What matters must be established.

1454. The evidence to be adduced at the trial of an action for malicious prosecution must establish the several matters before enumerated (*q*).

(*h*) *Hicks* v. *Faulkner* (1878), 8 Q. B. D. 167, 173. It will be assumed, until the contrary is shown, that the prosecutor, before prosecuting, was acquainted with the substance of the evidence which his witnesses afterwards gave (*Walker* v. *South Eastern Rail. Co.*, *Smith* v. *Same* (1870), L. R. 5 C. P. 640, 644).

(*i*) *Hicks* v. *Faulkner*, *supra*.

(*k*) *Hicks* v. *Faulkner*, *supra*; *Lister* v. *Perryman* (1870), L. R. 4 H. L. 521, 536, 538. As to the defendant's right to act upon reliable hearsay evidence, see *Chatfield* v. *Comerford* (1866), 4 F. & F. 1008; *Gibson* v. *Veasey* (1867), 15 L. T. 586; *Lister* v. *Perryman*, *supra*. Omission to sift information which appears to be suspicious may be evidence of the want of reasonable and probable cause (*Lister* v. *Perryman*, *supra*; *Brown* v. *Hawkes*, [1891] 2 Q. B. 718, 728, C. A.); and see p. 686, *post*.

(*l*) *Dawson* v. *Vansandau* (1863), 11 W. R. 516.

(*m*) *Hicks* v. *Faulkner*, *supra*, and cases cited in note (*k*), *supra*.

(*n*) *Lister* v. *Perryman*, *supra*; *Kelly* v. *Midland Great Western of Ireland Rail. Co.* (1872), 7 I. R. C. L. 8; see and compare *Lowe* v. *Collum* (1877), 2 L. R. Ir. 15.

(*o*) *Delegal* v. *Highley* (1837), 3 Bing. (N. C.) 950; *Turner* v. *Ambler* (1847), 10 Q. B. 252; *Heslop* v. *Chapman* (1853), 23 L. J. (Q. B.) 49, Ex. Ch.; *Johnson* v. *Emerson* (1871), L. R. 6 Exch. 329, 352. If it then existed the burden of proof would be on plaintiff to show that the defendant did not know of it (*Brooks* v. *Blain* (1869), 39 L. J. (C. P.) 1).

(*p*) *Musgrove* v. *Newell* (1836), 1 M. & W. 582 (representations as to good character of persons accused); see also *Harrison* v. *National Provincial Bank of England* (1885), 1 T. L. R. 355; affirmed, 2 T. L. R. 70, C. A.

(*q*) See p. 677, *ante*. In addition to showing that the prosecution terminated in his favour, it has been said that the plaintiff must show that he was innocent; see *Abrath* v. *North Eastern Rail. Co.* (1883), 11 Q. B. D. 440, C. A., at pp. 455, 462, *per* BOWEN, L.J.; (S. C. (1886), 11 App. Cas. 247); see also *Heslop* v. *Chapman*, *supra*; *Bank of New South Wales* v. *Piper*, [1897] A. C. 383, P. C.; but compare *Williams* v. *Banks* (1859), 1 F. & F. 557; *Haddrick* v. *Heslop* (1848), 12 Q. B. 267, 274; *Shrosbery* v. *Osmaston* (1877), 37 L. T. 792; and see p. 686, *post*.

SECT. 5. Evidence in an Action for Malicious Prosecution.

1455. Where it is necessary to prove the trial and conviction or acquittal (*r*) of a person charged with an indictable offence, the record or a copy of it need not be produced, but it is sufficient to produce what purports to be a certificate, under the hand of the clerk of the court or other officer who has charge of the records of the court, or of the deputy of either, of the indictment, trial, conviction, or acquittal (*s*).

Proof of trial and conviction or acquittal.

1456. Where the action is brought in respect of a charge made before magistrates, it is usual to serve the magistrates' clerk with a *subpœna duces tecum* to produce the proceedings, including the written information (if any) laid by the defendant, the warrant (if any), and the order of dismissal (*t*).

Proof of magistrates' order.

SUB-SECT. 2.—*Burden of Proof.*

Burden lies on plaintiff in first instance.

1457. The burden of proof (*u*) in an action for malicious prosecution lies in the first instance on the plaintiff. It is not sufficient for him to prove that he was innocent of the crime for which he was prosecuted by the defendant, and that the prosecution terminated in his favour. He must also show that the defendant acted maliciously and without reasonable and probable cause (*v*).

Proof of want of reasonable care or absence of knowledge.

1458. If want of reasonable care on the part of the defendant is relied upon, that, as an element in the absence of reasonable and probable cause, must be proved by the plaintiff (*w*); and so if facts

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(*r*) Some difficulty was at one time experienced in the proof of a prosecution and of its determination by reason of an order made in the time of Charles II. by five judges at the Old Bailey that copies of an indictment for felony should only be given after order made on motion in open court at the general gaol delivery (1 Wm. Bl., 2nd ed., 385, n.). The Old Bailey order, however, did not apply to prosecution for misdemeanour (*Morrison* v. *Kelly* (1762), 1 Wm. Bl. 385, where the clerk of the sessions attended with the original record); and even in cases of felony, if the plaintiff in an action for malicious prosecution produced a copy of the indictment, though he had got no order for it, the court would receive it (*Jordan* v. *Lewis* (1739), 2 Stra. 1122; *Legatt* v. *Tollervey* (1811), 14 East, 302). In *R.* v. *Brangan* (1742), 1 Leach, 27, WILLES, C.J., refused to make an order on the ground that every prisoner had on his acquittal a right to a copy of the record thereof for any use he might think fit to make of it; see also *Re Bowman, R.* v. *Middlesex Justices* (1834), 5 B. & Ad. 1113.

(*s*) Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 13. In *Freeman* v. *Arkell* (1824), 1 C. & P. 135, the deputy clerk of the peace produced the indictment which was ignored, and a member of the grand jury gave evidence that the defendant was the prosecutor; compare *Sykes* v. *Dunbar* (1799), 2 Selwyn, Law of Nisi Prius, 13th ed., 1015; see also title EVIDENCE, Vol. XIII., p. 550.

(*t*) 2 Selwyn, Law of Nisi Prius, 1014; see also *Freeman* v. *Arkell* (1824), 2 B. & C. 494 (where a magistrate gave evidence). An action may lie though the charge was not taken down in writing (*Clarke* v. *Postan* (1834), 6 C. & P. 423). As to proceedings before magistrates, see title MAGISTRATES, pp. 531 *et seq.*, *ante*.

(*u*) See, generally, title EVIDENCE, Vol. XIII., pp. 433 *et seq.*

(*v*) See *Corea* v. *Peiris*, [1909] A. C. 549.

(*w*) *Abrath* v. *North Eastern Rail. Co.* (1883), 11 Q. B. D. 440, C. A.; (1886), 11 App. Cas. 247. It was there said that the want of reasonable care on the part of the prosecutor to inform himself of the true state of the case was a "fundamental fact" in the determination of the question of reasonable and probable cause, as distinguished from mere evidence of it, *per* BRETT, M.R., at pp. 450, 451. See also *per* BOWEN, L.J., at p. 460. Lord BRAMWELL, however, doubted this; S. C. (1886), 11 App. Cas 247, at p. 254. Interrogatories as to the grounds

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existed which, if known to the defendant, would have constituted reasonable and probable cause, the burden of showing that they were not known to him would lie on the plaintiff (*a*). But the burden of proof is not stationary. When the plaintiff has given such evidence as, if not answered, will entitle him to a verdict, the burden of proof is shifted to the defendant (*b*).

When burden shifted.

When burden satisfied.

If the plaintiff gives evidence that as to some only of several charges on which he was prosecuted the defendant acted maliciously and without reasonable and probable cause, the defendant will not be allowed to prove that as to other charges contained in the same indictment there was reasonable and probable cause (*c*).

SUB-SECT. 3.—*Evidence of Malice.*

When it may be implied from want of reasonable or probable cause.

1459. Malice may be implied from the want of reasonable and probable cause, if the jury agree with the judge that the facts establish this (*d*). But if there is no other evidence of malice than what in the judge's opinion establishes a want of reasonable and probable cause, the jury, upon the question of malice, are not bound by that opinion, but may determine for themselves whether there was a want of reasonable and probable cause (*e*). If the defendant, in prosecuting the plaintiff, honestly believed in his guilt, the jury should not infer malice if the only evidence of it is the absence of reasonable and probable cause (*f*).

Further cases in which malice may be inferred.

1460. Where the justification alleged for a prosecution shows a gross ignorance of law, malice may be inferred by the jury (*g*).

Again, the advertising of the indictment by the defendant is evidence of malice (*h*), and so is improper conduct on his part in substantiating it (*i*).

Where the prosecutor knows that the accused is innocent there is, of course, clear evidence of malice, and the fact that he was

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which defendant had for instituting the prosecution are not as a rule allowed (*Macss* v. *Gas Light and Coke Co.*, [1911] 2 K. B. 543, C. A.).

(*a*) *Brooks* v. *Blain* (1869), 39 L. J. (C. P.) 1.

(*b*) *Abrath* v. *North Eastern Rail. Co.* (1883), 11 Q. B. D. 440, 456, C. A.; (1886), 11 App. Cas. 247.

(*c*) *Ellis* v. *Abrahams* (1846), 8 Q. B. 709; and see *Reed* v. *Taylor* (1812), 4 Taunt. 616; *Palmer* v. *Birmingham Manufacturing Co.* (1902), 18 T. L. R. 552; and cases cited at p. 686, *post*.

(*d*) *Johnstone* v. *Sutton* (1786), 1 Term Rep. 510, at p. 545, Ex. Ch.; *Mitchell* v. *Jenkins* (1833), 5 B. & Ad. 588; *Quartz Hill Gold Mining Co.* v. *Eyre* (1883), 11 Q. B. D. 674, C. A.; *Parrott* v. *Fishwick* (1772), 9 East, 362, n. As to malice, see, further, p. 679, *ante*.

(*e*) *Quartz Hill Gold Mining Co.* v. *Eyre*, *supra*, at p. 687, *per* BRETT, M.R., approving *Hicks* v. *Faulkner* (1878), 8 Q. B. D. 167, at pp. 174, 175.

(*f*) *Brown* v. *Hawkes*, [1891] 2 Q. B. 718, C. A.; see *Stewart* v. *Beaumont* (1866), 4 F. & F. 1034.

(*g*) *Brooks* v. *Warwick* (1818), 2 Stark. 389; compare *Snow* v. *Allen* (1816), 1 Stark. 502 (where defendant was advised by his solicitor on the authority of a reported case that he was acting rightly).

(*h*) *Chambers* v. *Robinson* (1726), 1 Stra. 691.

(*i*) *Caddy* v. *Barlow* (1827), 1 Man. & Ry. (K. B.) 275; *Edgell* v. *Francis* (1840), 1 Man. & G. 222; *Stevens* v. *Midland Counties Rail. Co.* (1854), 10 Exch. 352 (where the prosecutor in applying for a warrant for the plaintiff's arrest stated that he desired to punish some one so as to deter others); *Heath* v. *Heape* (1856), 1 H. & N. 478.

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bound on his recognisances to prosecute will be no answer to an action (*k*).

Where malice not implied.

1461. The mere fact that the plaintiff was acquitted for want of prosecution does not prove malice (*l*); and so, where under the old practice one person had arrested another for debt, but omitted to proceed with the action to recover the debt, malice was not proved by the omission (*m*).

Proof by defendant.

1462. The defendant on his part may give evidence of all the facts that were before his mind at the time of the prosecution, whether for the purpose of negativing malice or of establishing reasonable and probable cause (*n*).

SUB-SECT. 4.—*Evidence of Absence of Reasonable and Probable Cause.*

Slight evidence only necessary.

1463. The plaintiff in proving the absence of reasonable and probable cause has to prove a negative, and, in general, need only give slight evidence of such absence (*a*).

Facts which do not prove malice.

But it cannot be inferred from the most express malice (*b*). The mere innocence of the plaintiff is not *primâ facie* proof of such absence (*c*); and the fact that the indictment was thrown out by the grand jury (*d*), or that no indictment was preferred (*e*), or that the defendant did not give evidence at the trial though he was present in court (*f*), does not prove it.

(*k*) *Dubois* v. *Keats* (1840), 11 Ad. & El. 329: *Fitzjohn* v. *Mackinder* (1861), 9 C. B. (N. S.) 505. Possibly if in such a case he merely prefers a bill, but gives no evidence in support of it, he may not be liable; see *Fitzjohn* v. *Mackinder, supra,* at p. 523; *Browne* v. *Stradling* (1836), 5 L. J. (C. P.) 295.

(*l*) *Purcell* v. *Macnamara* (1808), 9 East, 361; see also *Sykes* v. *Dunbar* (1799), 1 Camp. 202, n.

(*m*) *Sinclair* v. *Eldred* (1811), 4 Taunt. 7; compare *Nicholson* v. *Coghill* (1825), 4 B. & C. 21 (where the first action was discontinued); *Webb* v. *Hill* (1828), Mood. & M. 253.

(*n*) *Thomas* v. *Russell* (1854), 9 Exch. 764, 765; and see *Abrath* v. *North Eastern Rail. Co.* (1883), 11 Q. B. D. 440, C. A.; (1886), 11 App. Cas. 247. The fact that the defendant relied on the opinion of counsel may afford a defence, but only if the opinion was founded on a fair statement of the facts, and was acted on *bonâ fide* (*Ravenga* v. *Mackintosh* (1824), 2 B. & C. 693; *Hewlett* v. *Cruchley* (1813), 5 Taunt. 277; *Penfold* v. *Grosvenor Bank* (1886), 2 T. L. R. 759; and see note (*l*), p. 686, *post,* and title BARRISTERS, Vol. II., p. 402); and see *Bostock* v. *Ramsey Urban District Council* (1899), 16 T. L. R. 18.

(*a*) *Cotton* v. *James* (1830), 1 B. & Ad. 128; *Taylor* v. *Willans* (1831), 2 B. & Ad. 845, 857; compare *Fish* v. *Scott* (1792), Peake, 184 [135]. It would seem that the burden of proof is on plaintiff to put in the depositions (see *Lea* v. *Charrington* (1889), 5 T. L. R. 218; *Carder* v. *Peninsular and Oriental Steam Navigation Co.* (1892), 8 T. L. R. 335). The defendant cannot rely on the depositions of the witnesses in his favour, but must call the witnesses (*Jackson* v. *Bull and Alison* (1838), 2 Mood. & R. 176).

(*b*) *Anon.* (1703), 6 Mod. Rep. 73; *Johnstone* v. *Sutton* (1786), 1 Term Rep. 510, 545, Ex. Ch.; *Incledon* v. *Berry* (1805), 1 Camp. 203, n.; *Turner* v. *Ambler* (1847), 10 Q. B. 252; *Hailes* v. *Marks* (1861), 7 H. & N. 56; compare *Wright* v. *Greenwood* (1853), 1 W. R. 393.

(*c*) But the proof of innocence may involve with it other circumstances, *e.g.*, that the prosecutor knew that his evidence was false, which would show that there was no reasonable and probable cause (*Abrath* v. *North Eastern Rail. Co., supra, per* BOWEN, L.J., at p. 462). See Buller, Law of Nisi Prius, 5th ed., 14.

(*d*) *Freeman* v. *Arkell* (1823), 1 C. & P. 135, at p. 138.

(*e*) *Wallis* v. *Alpine* (1805), 1 Camp. 204, n.

(*f*) *Taylor* v. *Willans, supra;* and see *Incledon* v. *Berry, supra; Purcell* v.

SECT. 5.
Evidence in an Action for Malicious Prosecution.

Proof of absence in some charges only.

1464. It is sufficient for the plaintiff to show that there was no reasonable and probable cause for some of the charges in the indictment, though there may have been such cause for others (*g*).

Disbelief in plaintiff's guilt as proof of absence.

1465. If the facts before the defendant when prosecuting *primâ facie* amounted to reasonable and probable cause, but the defendant did not believe the plaintiff to be guilty and he was not so in fact, the want of such belief is evidence of the want of reasonable and probable cause (*h*), and is apparently conclusive (*i*); but the plaintiff must prove such disbelief if alleged (*k*).

Evidence of absence where prosecution founded on mere suspicion.

Where a prosecutor had nothing before him but circumstances of mere suspicion (*l*), or where he knew that the acts on which the prosecution was founded were done openly and *bonâ fide* in assertion of a legal right, there is in general no reasonable and probable cause (*m*).

Proof of fact that jury took time to consider.

1466. The fact that the jury took time to consider their verdict

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M'Namara (1808), 1 Camp. 199. From this fact, however, a jury may in certain circumstances infer a want of reasonable and probable cause (*Taylor* v. *Willans* (1831), 2 B. & Ad. 845, 847; and see *Shufflebottom* v. *Allday* (1857), 5 W. R. 315).

(*g*) *Reed* v. *Taylor* (1812), 4 Taunt. 616: *Ellis* v. *Abrahams* (1846), 8 Q. B. 709; see also *R.* v. *Prosser* (undated), cited 1 Term Rep. 533; *Delisser* v. *Towne* (1841), 1 Q. B. 333; *Boaler* v. *Holder* (1887), 55 J. P. 277; on objection to the statement of claim, *Boaler* v. *Holder* (1886), 54 L. T. 298; *Palmer* v. *Birmingham Manufacturing Co.* (1902), 18 T. L. R. 552.

(*h*) *Broad* v. *Ham* (1829), 5 Bing. (N. C.) 722.

(*i*) *Shrosbery* v. *Osmaston* (1877), 37 L. T. 792, and cases cited note (*d*), p. 681, *ante*, and see note (*k*), *infra*.

(*k*) *Turner* v. *Ambler* (1847), 10 Q. B. 252; and see *Delegal* v. *Highley* (1837), 3 Bing. (N. C.) 950; *Williams* v. *Banks* (1859), 1 F. & F. 557; *Lister* v. *Perryman* (1870), L. R. 4 H. L. 521. If, however, there was in fact reasonable and probable cause for the prosecution, and the jury find that the plaintiff, though he escaped conviction, was guilty of the offence with which he was charged, the defendant's belief in the innocence of the plaintiff might perhaps be held to be immaterial (*Heslop* v. *Chapman* (1853), 23 L. J. (Q. B.) 49, Ex. Ch.); and see *Abrath* v. *North Eastern Rail. Co.* (1883), 11 Q. B. D. 440, 455, C. A.; (1886), 11 App. Cas. 247; *Bank of New South Wales* v. *Piper*, [1897] A. C. 383, P. C.; compare *Williams* v. *Banks*, *supra*; *Shrosbery* v. *Osmaston*, *supra*; note (*g*), p. 682, *ante*. As to the effect of taking counsel's opinion before the prosecution, and acting on it, see title BARRISTERS, Vol. II., p. 402, and p. 685, *ante*. See also *Phillips* v. *Naylor* (1859), 4 H. & N. 565, Ex. Ch. (where defendant acted *bonâ fide* under a mistaken view of a doubtful point of law); *Johnson* v. *Emerson* (1871), L. R. 6 Exch. 329, *per* BRAMWELL, B., at p. 365.

(*l*) *Clements* v. *Ohrly* (1847), 2 Car. & Kir. 686; *Busst* v. *Gibbons* (1861), 30 L. J. (EX.) 75; compare *Marham* v. *Pescod* (1606), Cro. Jac. 130; and see *Roberts* v. *Orchard* (1863), 2 H. & C. 769, Ex. Ch.; *Leete* v. *Hart* (1868), L. R. 3 C. P. 322; *Chamberlain* v. *King* (1871), L. R. 6 C. P. 474.

(*m*) *Huntley* v. *Simson* (1857), 2 H. & N. 600; *Colson* v. *Radclyffe* (1887), 4 T. L. R. 59; compare *Corea* v. *Peiris*, [1909] A. C. 549, P. C. (where on the facts the defendant was held to have had reasonable and probable cause); *Wilkinson* v. *Foote* (1856), 5 W. R. 22. As to the reputation of the plaintiff for honesty, see *Wilkinson* v. *Foote*, *supra*; and see *Brooks* v. *Warwick* (1818), 2 Stark. 389; *James* v. *Phelps* (1840), 11 Ad. & El. 483; *Hinton* v. *Heather* (1845), 14 M. & W. 131 (where defendant knew that he, and not the plaintiff, was in the wrong); *Ayres* v. *Elborough* (1870), 22 L. T. 106 (balance-sheet false, but no evidence of fraud).

before acquitting an accused person is no proof of reasonable and probable cause (*n*).

SECT. 5. Evidence in an Action for Malicious Prosecution.

1467. Neither the observations of the judge at the trial of the indictment (*o*), nor the observations of the magistrate in dismissing a charge, or of a jury in acquitting (*p*), can be used by the plaintiff as evidence (*q*).

Matters which plaintiff cannot use as evidence.

1468. Questions tending to show the plaintiff's bad character may be put to the plaintiff himself in cross-examination (*r*).

Questions as to character.

SECT. 6.—*Malicious Procurement of Issue of Search Warrant.*

1469. An action for the malicious procurement of the issue of a search warrant must be supported by evidence of a like kind to that required in the ordinary action for malicious prosecution.

What evidence is necessary.

Where a person fairly and honestly lays the facts on which he relies and bases his suspicions before a magistrate, and the magistrate thereupon orders the issue of a search warrant (which may be accompanied in some cases by an order to bring the suspected party before him (*s*)), he is not liable for the exercise of the magistrate's discretion (*a*).

When action will not lie.

But an action lies where a person falsely and maliciously, and without reasonable and probable cause, procures, to the damage of another person, the issue of a search warrant (*b*). The application

When an action will lie.

(*n*) *Willans* v. *Taylor* (1829), 3 Moo. & P. 350, *per* PARK, J., at p. 365, not following *Smith* v. *Macdonald* (1799), 3 Esp. 7.

(*o*) *Barker* v. *Angell* (1841), 2 Mood. & R. 371, not following *Warne* v. *Terry* (1836), *per* LITTLEDALE, J., there cited; compare *King* v. *Henderson*, [1898] A. C. 720, 730, P. C. (reasons of registrar in bankruptcy); *Edden* v. *Thorniloe*, (1842), 6 Jur. 265, following *Warne* v. *Terry*, *supra*.

(*p*) *Hibberd* v. *Charles* (1860), 2 F. & F. 126.

(*q*) *Wetzlar* v. *Zachariah* (1867), 16 L. T. 432; compare *Richards* v. *Turner* (1840), Car. & M. 414; *Edden* v. *Thorniloe*, *supra* (where the observations were admitted). On principle, such observations would appear to be equally inadmissible for the defendant. Indeed, the reasons given by MELLOR, J., in *Wetzlar* v. *Zachariah*, *supra* (inability of the prisoner to reply) apply rather to evidence against the plaintiff than for him; see *Brown* v. *Foster* (1857), 1 H. & N. 736 (plaintiff's counsel at police court called by defendant at trial as to possible alteration by plaintiff, during a remand, of a book produced in evidence).

(*r*) See title EVIDENCE, Vol. XIII., pp. 419 *et seq.*

(*s*) *E.g.*, where the application for a search warrant refers to goods suspected to have been stolen; see the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 103; 2 Hale, P. C., 113; *Wyatt* v. *White* (1860), 5 H. & N. 371. As to search warrants, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 310.

(*a*) *Hope* v. *Evered* (1886), 17 Q. B. D. 338, 340 (application for a search warrant in respect of a female suspected of being detained for immoral purposes); see Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 10; *Lea* v. *Charrington* (1889), 23 Q. B. D. 45, 272, C. A. (where the magistrate also ordered the arrest of the supposed offender); see S. C. (1889), 5 T. L. R. 218, as to burden on plaintiff to put in depositions; see also *Leigh* v. *Webb* (1800), 3 Esp. 165; *Elsee* v. *Smith* (1822), 1 Dow. & Ry. (K. B.) 97. As to putting in the information, see *Gregory* v. *Derby* (1839), 8 C. & P. 749; *Stevens* v. *Clark* (1842), Car. & M. 509; and p. 671, *ante*.

(*b*) See *Cooper* v. *Booth* (1785), 3 Esp. 135, 144; cited, in argument, as *Boot* v. *Cooper* in *Johnstone* v. *Sutton* (1786), 1 Term Rep. 510, 535, Ex. Ch.; *Elsee* v. *Smith*, *supra*; *Hensworth* v. *Fowkes* (1833), 4 B. & Ad. 449; *Wyatt* v. *White*, *supra*; see also *Anon.* (1758), 2 Keny. 372.

SECT. 6. Malicious Procurement of Issue of a Search Warrant.

for a search warrant, being finally granted on *ex parte* information, belongs to the class of proceedings which are incapable of terminating in the plaintiff's favour (*c*). For the purpose, however, of establishing absence of reasonable and probable cause, it must be shown that the search has proved fruitless (*d*).

SECT. 7.—*Damages.*

Damage which must be proved.

1470. To support an action for malicious prosecution or other malicious legal proceedings, one of three heads of damage must be proved, if not implied by law:

(i.) Damage to a man's fame, as where the matter of which he is accused is scandalous;

(ii.) Damage done to the person, as where his life, limb, or liberty is endangered; or

(iii.) Damage to his property, as where he is put to the expense of acquitting himself of the crime with which he is charged (*e*). Where two or more are indicted for a conspiracy, and, setting up a common defence, are acquitted, one of them who has paid the

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(*c*) See p. 679, *ante*.

(*d*) As to malice, see pp. 679, 684, *ante*. An application in the first instance for separate search warrants against two different persons in respect of one thing suspected to be stolen does not necessarily show malice (*Utting* v. *Berney* (1888), 5 T. L. R. 39). As to reasonable and probable cause, see pp. 680, 685, *ante*. A reasonable suspicion of larceny disclosed by the information is sufficient to justify a magistrate in issuing a search warrant. There need not be a positive averment that goods have been stolen (*Elsee* v. *Smith* (1822), 1 Dow. & Ry. (K. B.) 97, followed in *Jones* v. *German*, [1896] 2 Q. B. 418; affirmed, [1897] 1 Q. B. 374, C. A.); nor need the information refer to specific goods (*Jones* v. *German*, *supra*). See also titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 307—310; MAGISTRATES, p. 592, *ante*. A constable is not liable in damages for acting in obedience to a search warrant unless upon a written demand upon him for a perusal and copy of the warrant he refuses or neglects for six days to comply with the same (Constables Protection Act, 1750 (24 Geo. 2, c. 44), s. 6); and see title POLICE. As to protection of magistrates and constables acting in intended pursuance of a public duty, see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS. As to the constable's liability for acting in excess of the authority of the warrant, see *Hoye* v. *Bush* (1840), 1 Man. & G. 775 (arrest of wrong person); *Crozier* v. *Cundey* (1827), 6 B. & C. 232 (seizure of wrong goods). As the warrant need not specify the goods suspected of having been stolen (*Jones* v. *German*, *supra*), a constable authorised to search for and seize, *e.g.*, stolen sugar in a certain warehouse, will not be liable if he also seizes there sugar which has not been stolen (*Price* v. *Messenger* (1800), 2 Bos. & P. 158; and see title TRESPASS). Before an action is brought a demand for a perusal and copy of the warrant must be made (*Price* v. *Messenger*, *supra*).

(*e*) *Savile* v. *Roberts* (1698), 1 Ld. Raym. 374; *Quartz Hill Gold Mining Co.* v. *Eyre* (1883), 11 Q. B. D. 674, 683, 689, C. A.; and see Buller, Law of Nisi Prius, 5th ed., p. 13. In *Savile* v. *Roberts*, *supra*, at p. 381, it was also held that where an indictment was ignored, which did not contain matter of scandal, or danger to person, life, limb or liberty, but which caused expense, an action would not lie. But this decision has not been followed (*Jones* v. *Gwynn* (1714), 10 Mod. Rep. 148, 214; *Smith* v. *Hixon* (1734), 2 Stra. 977). Where an indictment (for assault) which did not affect the plaintiff's reputation was ignored, and the plaintiff in an action for malicious prosecution did not prove that he was put to expense, he was non-suited (*Byne* v. *Moore* (1813), 5 Taunt. 187; *Freeman* v. *Arkell* (1823), 3 Dow. & Ry. (K. B.) 669; compare *Quartz Hill Gold Mining Co.* v. *Eyre*, *supra*, at p. 691). Damage is also an essential element in an action for malicious abuse of civil process; see p. 689, *post*.

costs of the defence may, it seems, recover them as damages in an action for malicious prosecution (*f*).

SECT. 7. Damages.

Part II.—Malicious Abuse of Civil Proceedings.

SECT. 1.—*In General.*

Remedy analogous to an action for malicious prosecution.

1471. The law allows every person to employ its process for the purpose of trying his rights without subjecting him to any liability, unless he acts maliciously and without probable cause (*g*). There are, however, certain civil proceedings involving an interference with liberty or property, or affecting, or likely to affect, reputation (*h*), for which, when undertaken maliciously and without reasonable and probable cause (*i*), an action lies analogous to the action for malicious prosecution. In all such cases the rule, that proof of damage, actual or implied by law, is essential to the cause of action, applies, as well as in actions for malicious prosecution properly so called (*k*); and, when the complaint relates to civil proceedings, this rule derives additional importance from the fact that the extra costs incurred in resisting such proceedings, beyond the party and party costs allowed by the court, are not such damages as will support an action (*l*).

(*f*) *Rowlands* v. *Samuel* (1847), 11 Q. B. 39. *Aliter*, if the defences are distinct, in which case he could only recover a proportion of the costs (*ibid.*). Damages which are too remote cannot be recovered (*Hoey* v. *Felton* (1861), 11 C. B. (N. S.) 142; compare also *Haddan* v. *Lott* (1854), 15 C. B. 411). As to aggravation of damages by persisting in the charge after action, see *Warwick* v. *Foulkes* (1844), 12 M. & W. 507. As to damages against several defendants, see *Brown* v. *Allen* (1802), 4 Esp. 158; *Eliot* v. *Allen* (1845), 1 C. B. 18 (trespass); and see, generally, title DAMAGES, Vol. X., pp. 308 *et seq.*

(*g*) *De Medina* v. *Grove* (1847), 10 Q. B. 172, Ex. Ch., *per* WILDE, C.J., at p. 176.

(*h*) *Savile* v. *Roberts* (1698), 1 Ld. Raym. 374, 378; and see the text, *infra*, and pp. 690, 691, 692, *post*. The statement in the text refers only to proceedings in due form of law, for the abuse of which the plaintiff's remedy is in the nature of an action on the case; see p. 676, *ante*. If the proceedings complained of were wholly void or illegal an action of trespass will lie for an interference with person or property under cover of them, and malice need not be alleged or proved; see p. 691, *post*; and see p. 671, *ante*, and see title TRESPASS.

(*i*) As to the evidence, and the functions of judge and jury, in regard to malice and reasonable and probable cause, see p. 680, *ante*, and p. 691, *post*.

(*k*) *Quartz Hill Gold Mining Co.* v. *Eyre* (1883), 11 Q. B. D. 674, C. A., *per* BOWEN, L.J., at p. 688; and see p. 688, *ante*. There are some cases in which damage is necessarily involved, *e.g.*, where a petition is maliciously presented to wind up a company, at least a trading company, for the presentation of such a petition must injure the credit of the company (*ibid.*, at pp. 691—693), or where the proceedings affect or endanger a man's liberty (*ibid.*, at pp. 683, 689; citing *Savile* v. *Roberts*, *supra*; and see note (*r*), p. 694, *post*), or result in the detention of goods (*The Walter D. Wallet*, [1893] P. 202, 207, applying *Chandler* v. *Doulton* (1865), 3 H. & C. 553 (excessive distress)).

(*l*) See *Purton* v. *Honnor* (1798), 1 Bos. & P. 205; *Hathaway* v. *Barrow* (1807), 1 Camp. 151; *Sinclair* v. *Eldred* (1811), 4 Taunt. 7 (malicious arrest); *Webber* v. *Nicholas* (1826), Ry. & M. 419; *Jenkins* v. *Biddulph* (1827), 4 Bing. 160;

SECT 1. In General.

Effect of rule as to damages.

1472. As a consequence of the above rule as to damages, it has been laid down broadly that the bringing of an ordinary civil action, although it is brought maliciously, and without reasonable or probable cause, will not support an action by the person sued, against the plaintiff for maliciously bringing the first action (*m*). The reason given for this proposition is that such an action cannot cause legal damage either to person, fame, or property, because if the malicious action is tried in public the fame of the defendant will be cleared, if it deserves to be cleared; while if the action is not tried, his fame will not be assailed. Again, such action involves no damage to his person; and as to his property, the court by its judgment will give him such costs as he is entitled to (*n*).

Proceedings in name of third person.

1473. The weight of authority favours the view that, apart from the law of champerty and maintenance (*o*), an action will lie against

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Grace v. *Morgan* (1836), 2 Bing. (N. C.) 534 (vexatious and excessive distress; see title DISTRESS, Vol. XI., p. 204); *Cotterell* v. *Jones* (1851), 11 C. B. 713 (where A. and B. conspired to bring an action in the name of C. against D., and there was a nonsuit without any order as to costs); *Quartz Hill Gold Mining Co.* v. *Eyre* (1883), 11 Q. B. D. 674, C. A.; see also *Cockburn* v. *Edwards* (1881), 18 Ch. D. 449, 459, 462; compare *Sandback* v. *Thomas* (1816), 1 Stark. 306; *Gould* v. *Barratt* (1838), 2 Mood. & R. 171 (which in view of the above cases, and notwithstanding the *dictum* of MARTIN, B., in *Howard* v. *Lovegrove* (1870), L. R. 6 Exch. 43, must now be considered as overruled). Under the old procedure there were cases (*e.g.*, writs of error) in which it was not the practice to award costs; and it was said that if such proceedings were vexatiously prosecuted, the full costs might be recovered as damages in a subsequent action (see *Grace* v. *Morgan*, *supra*, at p. 537; *Doe* v. *Filliter* (1844), 13 M. & W. 47, 50). Under the existing practice there is, it is believed, no case, other than pauper cases, where special precautions are taken against vexatious actions (see R. S. C., Ord. 16, r. 24), in which taxed costs may not be awarded to a successful defendant (see R. S. C., Ord. 65, r. 1; Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5; and title PRACTICE AND PROCEDURE). Where costs and expenses are voluntarily and unnecessarily incurred, they are not recoverable (*Bieten* v. *Burridge* (1811), 3 Camp. 139, where plaintiff, who had received notice that a warrant was out for his arrest, but immediately afterwards was told that there was a mistake, and that he need not pay any attention to the warrant, notwithstanding which he put in bail and paid the bailiff, was nonsuited.

(*m*) *Quartz Hill Gold Mining Co.* v. *Eyre*, *supra*, *per* BOWEN, L.J., at pp. 689, 690. Early cases, however, appear to favour the right to bring such action where special damage could be proved; see *Waterer* v. *Freeman* (1617), Hob. 205, 266, 267: "If a man sue me in a proper court, yet if his suit be utterly without ground of truth, and is certainly known to himself, I may have an action on the case against him for the undue vexation and damage that he putteth me to by his ill practice"; see also *Atwood* v. *Monger* (1653), Sty. 378; and in *Savile* v. *Roberts* (1698), 1 Ld. Raym. 374, relied on by the court in *Quartz Hill Gold Mining Co.* v. *Eyre*, *supra*, it was held that if a man fancies he has a right against another he may bring a civil action. But if the action is one of mere vexation, the person sued cannot bring an action for damages merely because the first action was brought maliciously; he must prove some special damage, *e.g.*, that he was held to excessive bail. As to these two cases, see *Wren* v. *Weild* (1869), L. R. 4 Q. B. 730, 736.

(*n*) *Quartz Hill Gold Mining Co.* v. *Eyre*, *supra*, *per* BOWEN, L.J., at p. 690. The statement in the text was not necessary for the decision of the case, and it is submitted that the first of the above reasons is not universally applicable. Serious damage might be caused to a person by the publication in interlocutory proceedings, or in the course of a long trial, of injurious allegations which he would have no immediate opportunity of contradicting.

(*o*) See title ACTION, Vol. I., p. 51.

one who maliciously, and without reasonable and probable cause, puts the law in motion in the name of a third person, who is unable to pay the taxed costs of the litigation (*p*).

Matters which the plaintiff must prove.

1474. In an action for the abuse of civil proceedings the plaintiff has to allege and prove a case similar, *mutatis mutandis*, to that of a plaintiff in an action for malicious prosecution (*q*).

In the first place malice must be alleged and proved (*a*), except in cases where the proceedings were wholly void or illegal (*b*).

(*p*) *Fivaz* v. *Nicholls* (1846), 2 C. B. 501; *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1876), 2 App. Cas. 186, 201, P. C., approving *Cotterell* v. *Jones* (1851), 11 C. B. 713, *per* WILLIAMS, J., at p. 730. Assuming the costs to constitute legal damage, the only measure of such damage is the costs ascertained by the usual course of law (*ibid.*, *per* TALFOURD, J., at p. 731 (*i.e.*, by taxation)). In the two last-mentioned cases conspiracy was alleged, but although the malicious action would be liable to be stayed if brought without the plaintiff's consent, it does not appear from the *dicta* above referred to that, assuming legal damage to be sufficiently established, conspiracy is a necessary element in the cause of action; see *Pechell* v. *Watson* (1841), 8 M. & W. 691; *Flight* v. *Leman* (1843), 4 Q. B. 883. It is clear, however, that both malice and absence of reasonable and probable cause must be proved (S. CC.; and see *Davies* v. *Jenkins* (1843), 11 M. & W. 745, 756).

(*q*) *Daniels* v. *Fielding* (1846), 16 M. & W. 200, 207. Most of the cases, presently to be cited, illustrating this were decided, of course, before the Debtors Act, 1869 (32 & 33 Vict. c. 62).

(*a*) *Scheibel* v. *Fairbairn* (1799), 1 Bos. & P. 388 (arrest not countermanded after payment, but no malice alleged); see *Page* v. *Wiple* (1803), 3 East, 314; *Gibson* v. *Chaters* (1800), 2 Bos. & P. 129 (arrest on an *alias* writ; action failed as plaintiff sued in case, and not in trespass, and failed to prove malice); *Sinclair* v. *Eldred* (1811), 4 Taunt. 7; *Spencer* v. *Jacob* (1828), Mood. & M. 180; *George* v. *Radford* (1828), 3 C. & P. 464; *Stokes* v. *White* (1834), 1 Cr. M. & R. 223; *Gibbs* v. *Pike* (1842), 9 M. & W. 351 (registration under the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 19); *Horsley* v. *Style* (1893), 9 T. L. R. 605, C. A. (registering document erroneously alleged to be a bill of sale); *Dimmack* v. *Bowley* (1857), 2 C. B. (N. S.) 542 (filing, after payment, judge's order for payment of debt); *De Medina* v. *Grove* (1847), 10 Q. B. 152, 172, Ex. Ch.; *Clissold* v. *Cratchley*, [1910] 1 K. B. 374; reversed, [1910] 2 K. B. 244, C. A., on the ground that the action was one of trespass (issue of execution after payment); *Drummond* v. *Pigou* (1835), 2 Bing. (N. C.) 114 (outlawry for debt); *Saxon* v. *Castle* (1837), 6 Ad. & El. 652 (arrest for more costs than were due, but malice not alleged); *Porter* v. *Weston* (1839), 5 Bing. (N. C.) 715 (causing, without malice, plaintiff to be rendered in discharge of his bail); *Jackson* v. *Burleigh* (1799), 3 Esp. 34 (arrest without malice for more than £10 when less than £10 was afterwards accepted); *Turner* v. *Turner* (1818), Gow, 20 (conspiracy in issuing a commission of lunacy); *Tebbutt* v. *Holt* (1844), 1 Car. & Kir. 280; *Daniels* v. *Fielding*, *supra* (arrest procured by false affidavit); *Moore* v. *Guardner* (1847), 16 M. & W. 595; *Tozer* v. *Child* (1857), 7 E. & B. 377, Ex. Ch.; *Gibson* v. *Veasey* (1867), 15 L. T. 586; *Mitchell* v. *Jenkins* (1833), 5 B. & Ad. 588 (want of reasonable and probable cause evidence of malice). As to malicious detention, see *Crozer* v. *Pilling* (1825), 4 B. & C. 26; *Moore* v. *Guardner*, *supra*. As to malicious issue of writ of extent, see *Craig* v. *Hasell* (1843), 4 Q. B. 481. As to liability of solicitor, see *Crozer* v. *Pilling*, *supra*; *Stockley* v. *Hornidge* (1837), 8 C. & P. 11; *Johnson* v. *Emerson* (1871), L. R. 6 Exch. 329; and title SOLICITORS. As to refusing tender of debt, see *Crozer* v. *Pilling*, *supra*; *Drury* v. *Hounsfield* (1839), 11 Ad. & El. 98. Discontinuance of former proceedings by defendant would be evidence of malice (*Nicholson* v. *Coghill* (1825), 4 B. & C. 21); not so mere failure to carry them on (*Sinclair* v. *Eldred*, *supra*; *Webb* v. *Hill* (1828), Mood. & M. 253).

(*b*) *Barker* v. *Braham* (1773), 3 Wils. 368; *Bates* v. *Pilling* (1826), 6 B. & C. 38; *Clissold* v. *Cratchley*, *supra*; see also p. 692, *post*.

SECT. 1. In General.

Again, the plaintiff must allege and prove that the defendant acted without reasonable and probable cause (*c*); and either that the entire proceedings against him have terminated in his favour (*d*), or that the particular process complained of has been superseded or discharged (*e*).

Proceedings need not so terminate if not capable of so terminating.

It is not, however, necessary that the termination of the proceedings should have been in the plaintiff's favour if from their nature they were incapable of so terminating (*f*); nor if the plaintiff makes no complaint of the proceedings in an action conducted to judgment, but complains of the defendant's proceedings in enforcing the judgment, for example, by levying execution for an excessive amount (*g*). Further, where the arrest or other proceeding complained of was an abuse of the process of the law to effect an object not within the scope of such process, neither want of reasonable and probable cause (*h*), nor termination of the proceedings in the plaintiff's favour (*i*), is an essential element in his case.

(*c*) *Dronefield* v. *Archer* (1822), 5 B. & Ald. 513; *Austin* v. *Debnam* (1824), 3 B. & C. 139 (admitted set-off not taken into account by plaintiff), overruling *Brown* v. *Pigeon* (1811), 2 Camp. 594; *Brook* v. *Carpenter* (1825), 3 Bing. 297; *Daniels* v. *Fielding* (1846), 16 M. & W. 200; *Roret* v. *Lewis* (1848), 5 Dow. & L. 371 (*ca. sa.* against person under protection of bankruptcy order); *Wentworth* v. *Bullen* (1829), 9 B. & C. 840; *Stevenson* v. *Newnham* (1853), 13 C. B. 285, Ex. Ch. (distraining for more rent than was due); *Gibson* v. *Veasey* (1867), 15 L. T. 586; see also *Goslin* v. *Wilcock* (1766), 2 Wils. 302; *Smith* v. *Cattel* (1768), 2 Wils. 376 (holding to bail where court had no jurisdiction); *Whalley* v. *Pepper* (1836), 7 C. & P. 506 (probable cause for action but technical defect); *Riddell* v. *Pakeman* (1835), 2 Cr. M. & R. 30 (affidavit of debt irregular). In *Daniels* v. *Fielding*, *supra*, at p. 207, the court seemed to be of opinion that if a plaintiff fairly placed the facts before a judge, and the judge thereupon ordered an arrest, the plaintiff, though he did not believe that the defendant was about to quit England, would not be responsible for the arrest. But as to this, compare *Johnson* v. *Emerson* (1871), L. R. 6 Exch. 329, 340, 352, 353; *Quartz Hill Gold Mining Co.* v. *Eyre* (1883), 11 Q. B. D. 674, 684, C. A.; *Bank of British North America* v. *Strong* (1876), 1 App. Cas. 307, 315, P. C.; *Mitchell* v. *Jenkins* (1833), 5 B. & Ad. 588; see also *Ross* v. *Norman* (1850), 5 Exch. 359; *Nevill* v. *Loadman* (1860), 2 F. & F. 313; *Melia* v. *Neate* (1863), 3 F. & F. 757. As to evidence of malice and want of reasonable and probable cause, see pp. 684, 685, *ante*, and note (*j*), p. 693, *post*.

(*d*) *Waterer* v. *Freeman* (1617), Hob. 205, 266; *Parker* v. *Langly* (1714), 10 Mod. Rep. 145, 209; *Bristow* v. *Heywood* (1815), 1 Stark. 48; *Brandt* v. *Peacock* (1823), 1 B. & C. 649; *Whitworth* v. *Hall* (1831), 2 B. & Ad. 695, 698; *Brook* v. *Carpenter* (1825), 3 Bing. 297 (where the proceedings were stopped by a rule of court); *Combe* v. *Capron* (1834), 1 Mood. & R. 398; *Nicholson* v. *Coghill* (1825), 4 B. & C. 21; *Watkins* v. *Lee* (1839), 5 M. & W. 270 (where the proceedings were discontinued); *Arundell* v. *White* (1811), 14 East, 216; see also *Wilkinson* v. *Howel* (1830), Mood. & M. 495 (*stet processus* by consent not a sufficient termination); compare *Kirk* v. *French* (1794), 1 Esp. 80; *Norrish* v. *Richards* (1835), 3 Ad. & El. 733, at p. 737; *Parton* v. *Hill* (1864), 12 W. R. 753 (foreign attachment).

(*e*) *Lees* v. *Patterson* (1878), 7 Ch. D. 866 (writ *ne exeat regno* not set aside before action); *Gibson* v. *Veasey* (1867), 15 L. T. 586 (action not terminated, but plaintiff discharged from custody).

(*f*) See and compare *Steward* v. *Gromett* (1859), 7 C. B. (N. S.) 191; and p. 679, *ante*.

(*g*) *Gilding* v. *Eyre* (1861), 10 C. B. (N. S.) 592 (*ca. sa.* for more than remained due on the judgment; plaintiff paid the amount wrongly demanded and then sued).

(*h*) *Grainger* v. *Hill* (1838), 4 Bing. (N. C.) 212.

(*i*) *Grainger* v. *Hill*, *supra* (where the object was to extort certain property to

SECT. 1.
In General.

Burden of proof.

1475. As in the case of malicious prosecution, the burden of proof in respect of everything that goes to make up his cause of action rests primarily on the plaintiff (*j*).

SECT. 2.—*Malicious Arrest of Person on Civil Process.*

When such arrest can take place.

1476. Actions for malicious arrest on civil process (*k*) are now rarely brought; for, in the first place, arrest for non-payment of a judgment debt or other sum ordered to be paid, can only take place by the order of a judge, on satisfactory proof that the person in default has, or has had since the date of the judgment or order, the means to pay the sum in respect of which he is in default, and has refused or neglected, or refuses and neglects, to pay it (*l*).

1477. Again, the power to arrest on mesne process (*m*) is now abolished (*n*), but, notwithstanding (*o*), if a plaintiff in an action in the High Court before final judgment satisfies a judge that he has a good cause of action against the defendant to the extent of at least £50, and that there is probable cause for believing that the defendant is about to quit England, and that his absence will materially prejudice the plaintiff (*p*), the judge may order the defendant to be arrested for a period not exceeding six months, unless he gives security that he will not go out of England without the leave of the court (*q*).

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which defendants were not entitled); *Waterer* v. *Freeman* (1617), Hob. 205, 266; and see *Heywood* v. *Collinge* (1838), 9 Ad. & El. 268; *Parton* v. *Hill* (1864), 12 W. R. 753, 754; *Mayer* v. *Walter* (1870), 64 Pennsylvania State Reports, 283; see also cases cited in note (*b*), p. 691, *ante*.

(*j*) See p. 683, *ante*. Discontinuance, though sufficient evidence of termination of the action, is not evidence of malice or want of cause (*Bristow* v. *Heywood* (1815), 1 Stark. 48; and see *Brook* v. *Carpenter* (1825), 3 Bing. 297; *Watkins* v. *Lee* (1839), 5 M. & W. 270; *Arundell* v. *White* (1811), 14 East, 216; *The Collingrove, The Numida* (1885), 10 P. D. 158, 161). As to the functions of judge and jury, see p. 680, *ante*.

(*k*) As to what amounted to an arrest under the old practice, see *Berry* v. *Adamson* (1827), 6 B. & C. 528; *Webb* v. *Hill* (1828), Mood. & M. 253; *Grainger* v. *Hill* (1838), 4 Bing. (N. C.) 212 (plaintiff must have been, if not actually arrested, under restraint); see also *Lloyd* v. *Harris* (1792), Peake, 231 [174].

(*l*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 339.

(*m*) *I.e.*, any process between primary and final, primary process being the writ of summons, and final process being the writ of *ca. sa* or execution; see Wharton's Law Lexicon.

(*n*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 6.

(*o*) The Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 1, abolished arrest on mesne process with certain exceptions mentioned in the Act. For the state of the law on this point before and after that Act, see *Daniels* v. *Fielding* (1846), 16 M. & W. 200, 205—207.

(*p*) *I.e.*, that the plaintiff will be prejudiced in the prosecution of the action, not in obtaining the fruits of it (*Yorkshire Engine Co.* v. *Wright* (1872), 21 W. R. 15). After judgment the order of arrest, with all its incidents, is annulled (*ibid.*; *Hume* v. *Druyff* (1873), L. R. 8 Exch. 214). The power to order arrest is discretionary (*Hasluck* v. *Lehman* (1890), 6 T. L. R. 435, C. A.).

(*q*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 6. This only applies to actions in which if brought before the commencement of the Act the defendant would have been liable to arrest (*ibid.*). Where the action is for a penalty or sum in the nature of a penalty (other than a penalty in respect of a contract), the security given is, not that the defendant will not go out of England, but that any sum

SECT. 2. Malicious Arrest of Person on Civil Process.

As in other actions for abuse of legal procedure, damage should be alleged, and, where not implied by law, proved, in an action for malicious arrest on civil process (*r*). Proof of malice and of the want of reasonable and probable cause is, as appears above, necessary (*s*).

Arrest under writ *ne exeat regno*.

1478. Writs *ne exeat regno* may still be issued, and it would seem that one who maliciously, and without reasonable and probable cause, procures the arrest of another under such a writ may be liable to an action (*t*).

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recovered in the action shall be paid, or that the defendant shall be rendered to prison. In this case the plaintiff need not prove that defendant's absence from England will materially prejudice him in prosecuting his action (*ibid.*). As to the practice, see R. S. C., Ord. 69.

(*r*) See and compare *Churchill* v. *Siggers* (1854), 3 E. & B. 929; *Jenings* v. *Florence* (1857), 2 C. B. (N. S.) 467. In these cases the court held that it was necessary for the plaintiff to allege special damage. In each case the defendant, having recovered judgment, was entitled to a writ of *ca. sa.*, but having received part of the judgment debt otherwise than from the plaintiff, he wrongfully procured a writ for the whole amount. The plaintiff had to show as special damage that by reason of his arrest and detention for the larger sum his imprisonment was prolonged or the expense of obtaining his discharge increased. But generally, on its being shown that the plaintiff has been unjustifiably deprived of his liberty, special damage need not be proved, for the law in that case implies some damage; see *Savile* v. *Roberts* (1698), 1 Ld. Raym. 374; *Quartz Hill Gold Mining Co.* v. *Eyre* (1883), 11 Q. B. D. 674, 683, C. A.; see p. 688, *ante*.

(*s*) See notes (*a*) and (*c*), pp. 691, 692, *ante*; see also *Spencer* v. *Jacob* (1828), Mood. & M. 180; action on the case not maintainable where, by mistake and without malice, the wrong person was arrested, nor where, in such circumstances, he was sued to judgment and execution was put in (*Davies* v. *Jenkins* (1843), 11 M. & W. 745); compare *Jarmain* v. *Hooper* (1845), 6 Man. & G. 827, where trespass lay for an execution against the goods of a person who was not the judgment debtor. As to termination of proceedings, see notes (*d*), (*e*), (*f*), (*i*), p. 692, *ante*. Notwithstanding the change in the law effected by the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 6 (see the text, *supra*), the following cases may be usefully referred to, as being cases in which claims were made for maliciously and without reasonable and probable cause arresting a debtor on final process, or for detaining him in prison after tender or payment of the full amount of the debt and costs:—*Crozer* v. *Pilling* (1825), 4 B. & C. 26 (refusal to accept payment of debt and costs tendered after arrest is *primâ facie* evidence of malice); but the evidence may be rebutted, as in *Hounsfield* v. *Drury* (1839), 11 Ad. & El. 98; *Lewis* v. *Morris* (1834), 2 Cr. & M. 712 (arrest under concurrent writ of *capias* after payment made under another writ, but no malice shown); *Tebbutt* v. *Holt* (1844), 1 Car. & Kir. 280 (arrest on a *capias* after satisfaction of the judgment by a co-defendant arrested on a concurrent writ); *Wentworth* v. *Bullen* (1829), 9 B. & C. 840 (action lay for arrest on a *capias* indorsed to levy more than was due under the terms of a cognovit); and see as to this, *Saxon* v. *Castle* (1837), 6 Ad. & El. 652; *Churchill* v. *Siggers*, *supra*; *Jenings* v. *Florence*, *supra*; *Gilding* v. *Eyre* (1861), 10 C. B. (N. S.) 592; see *Moore* v. *Guardner* (1847), 16 M. & W. 595 (refusing after payment to assent to release of person attached for non-payment of costs, but no malice proved). Again, no action lay for mere non-feasance without malice; see *Scheibel* v. *Fairbain* (1799), 1 Bos. & P. 388 (writ of *capias* sued out before payment and not countermanded by creditor after payment); *Page* v. *Wiple* (1803), 3 East, 314; see also *Phillips* v. *General Omnibus Co.* (1880), 50 L. J. (Q. B.) 112 (in the absence of malice no action for failure to withdraw the sheriff on creditor becoming bound by a statutory composition offered by the debtor). In all such cases as those above mentioned when an action lies, the solicitor of the creditor, as well as his client, if malice is alleged and proved against him, may be liable in damages (*Crozer* v. *Pilling*, *supra*); and see title SOLICITORS.

(*t*) See *Bank of British North America* v. *Strong* (1876), 1 App. Cas. 307, P. C. *Semble*, a writ *ne exeat regno* will only be granted in cases which come within the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 6, p. 693, *ante* (see *Drover* v. *Beyer*

SECT. 2. Malicious Arrest of Person on Civil Process.

Arrest of privileged persons.

1479. A person privileged from arrest by reason of his having been ordered as a witness to attend a court, or by reason of any other order, cannot, if arrested, recover damages, though the arrest was made maliciously and with knowledge of the privilege (*u*). The privilege is that of the court which made the order (*v*), and the remedy is to apply to the court for release (*a*).

From what event time runs.

1480. In an action for malicious arrest time runs from some act of the defendant in putting the law in motion; not from the expiration of an imprisonment under the order of a judicial authority (*b*).

Liability of solicitor.

1481. A solicitor who, knowing that there is no debt due to his client by the plaintiff, maliciously and without probable cause procures the plaintiff's arrest may be personally liable therefor (*c*).

SECT. 3.—*Malicious Execution.*

Application and nature of remedy.

1482. Interference with property by process of execution is much more common than arrest of the person. An action may be brought for the abuse of such process, in support of which the plaintiff must be prepared, as in actions for malicious prosecution, with proof of malice and of the absence of reasonable and probable cause (*d*).

Where the judgment has not been fully satisfied, and the judgment debtor complains of the execution thereunder, his remedy is an action in the nature of an action on the case, and he must prove malice and the absence of reasonable and probable cause (*e*).

(1879), 13 Ch. D. 242, C. A.; *Hands* v. *Hands* (1881), 43 L. T. 750) (in the former case the Court of Appeal refused the writ on the ground that the debt was a mere legal demand). There must be a debt presently payable (*Colverson* v. *Bloomfield* (1885), 29 Ch. D. 341, C. A.), and the evidence of intention to leave England must be clear (*Re Underwood, Re Bowles, U.* v. *W.* (1903), 51 W. R. 335; see also *Sobey* v. *Sobey* (1873), L. R. 15 Eq. 200; *Lees* v. *Patterson* (1878), 7 Ch. D. 866; R. S. C., Ord. 69). As to arrest of debtor in bankruptcy, see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 25, as amended by the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 7; see also title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 55, 75.

(*u*) *Magnay* v. *Burt* (1843), 5 Q. B. 381, Ex. Ch. (where witness was arrested on returning from an examination ordered by the court); *Yearsley* v. *Heane* (1845), 14 M. & W. 322 (arrest after protection order made under Insolvent Debtors Act, 1842 (5 & 6 Vict. 116), s. 4).

(*v*) *Magnay* v. *Burt, supra.*

(*a*) *Ibid.; Yearsley* v. *Heane, supra;* see also *Watson* v. *Carroll* (1839), 4 M. & W. 592; *Phillips* v. *Naylor* (1858), 3 H. & N. 14; affirmed (1859), 4 H. & N. 565, Ex. Ch. The remedy, if any, for continued detention after an order for release would appear to be an action for trespass (*Magnay* v. *Burt, supra*).

(*b*) *Violett* v. *Sympson* (1857), 8 E. & B. 344 (detainer under the old practice in bankruptcy proceedings).

(*c*) *Stockley* v. *Hornidge* (1837), 8 C. & P. 11; see also *Crozer* v. *Pilling* (1825), 4 B. & C. 26, and title SOLICITORS. As to evidence that arrest was made at instance of defendant, see title EVIDENCE, Vol. XIII.; see also *Arundell* v. *White* (1811), 14 East, 216, 224; *Crook* v. *Dowling* (1782), 3 Doug. (K. B.) 75; *Casburn* v. *Reid* (1818), 2 Moore (C. P.), 60; *Petrie* v. *Lamont* (1842) 3 Man. & G. 702, 707.

(*d*) For examples of cases in which the action lies and of those in which the remedy is in the nature of trespass, see title EXECUTION, Vol. XIV., pp. 28 *et seq.*, and the cases there cited; see also *Gough* v. *Cribb* (1843), 11 M. & W. 497; and the cases referred to in note (*s*), p. 694, *ante.*

(*e*) See *Clissold* v. *Cratchley*, [1910] 2 K. B. 244; *Churchill* v. *Siggers* (1854), 3 E. & B. 929; *Jenings* v. *Florence* (1857), 2 C. B. (N. S.) 467; compare, however,

SECT. 3. Malicious Execution.

If payment or part payment of a debt has preceded a judgment for such debt, an execution for the whole amount (regardless of such payment) will not be actionable unless the judgment is first set aside or rectified (*f*).

SECT. 4.—*Malicious Presentation of Bankruptcy Petition.*

Proof required.

1483. An action will lie against a person who procures an adjudication of bankruptcy to be made against another if it be alleged and proved:

(i.) That the proceedings in bankruptcy were taken maliciously (*g*);

De Medina v. *Grove* (1847), 10 Q. B. 152, Ex. Ch., *per* WILDE, C.J., at p. 176, commented on in *Churchill* v. *Siggers* (1854), 3 E. & B. 929, 939.

(*f*) *Huffer* v. *Allen* (1866), L. R. 2 Exch. 15, applied in *Turley* v. *Daw* (1906), 94 L. T. 216 (no action against bailiff for false return of service of judgment summons while committal order founded thereon stands); compare *Bynoe* v. *Bank of England*, [1902] 1 K. B. 467, C. A. (no action against witness for false evidence while plaintiff's conviction unreversed); and see titles ESTOPPEL, Vol. XIII., pp. 321 *et seq.* In *Huffer* v. *Allen*, *supra*, the debt had been reduced by payment after writ issued, and before judgment, which was signed, in default of appearance, for the full amount, for which a *ca. sa.* issued; and the question was raised, but not determined, whether, if the judgment had been rectified, the plaintiff, upon proof that the defendant had signed judgment and issued execution with knowledge of the payment, and had acted maliciously and without reasonable and probable cause (*De Medina* v. *Grove* (1847), 10 Q. B. 152, 172, Ex. Ch.), could have maintained an action. It is submitted that he could, and that as to the excess there would have been a sufficient termination of the former action in his favour. See the judgments of KELLY, C.B., and PIGOTT, B., in *Huffer* v. *Allen*, *supra*; and compare *Hodges* v. *Callaghan* (1857), 2 C. B. (N. S.) 306; *Gilding* v. *Eyre* (1861), 10 C. B. (N. S.) 592, and cases cited in the preceding note. As to setting aside judgment, see and compare *Hughes* v. *Justin*, [1894] 1 Q. B. 667, C. A.; *Armitage* v. *Parsons*, [1908] 2 K. B. 410, C. A., and, generally, title JUDGMENTS AND ORDERS, Vol. XVIII.

(*g*) *Johnson* v. *Emerson* (1871), L. R. 6 Exch. 329, 344. Malice, which is a question for the jury, may be inferred from the absence of reasonable and probable cause (*Mitchell* v. *Jenkins* (1833), 5 B. & Ad. 588; see p. 684, *ante*); and there was evidence of malice where the proceedings were taken, not to procure equal distribution of the debtor's assets, but to coerce him into the admission of a debt (*Johnson* v. *Emerson*, *supra*, at p. 355). So there will be strong, if not conclusive, evidence of malice where the bankruptcy proceedings were an abuse of the process of the court, or were taken for the purpose of extortion, or of putting an improper pressure on the debtor, *e.g.*, where the object was to stay an action against a third person (*Re Kemp*, *Ex parte Kemp* (1841), 1 Mont. D. & De G. 657); or, in violation of good faith, to put an end to a valuable lease (*Re Gallimore*, *Ex parte Gallimore* (1816), 2 Rose, 424); or to dissolve a partnership between the petitioning creditor and the debtor (*Re Browne*, *Ex parte Browne* (1810), 1 Rose, 151; *Re Christie* (1833), Mont. & B. 329, 351; *Re Johnson*, *Ex parte Johnson* (1842), 2 Mont. D. & De G. 678; *Re Coulson*, *Ex parte Phipps* (1844), 3 Mont. D. & De G. 505); or where, there being no assets, the sole object was to defeat an action (*Re Bourne*, *Ex parte Bourne* (1826), 2 Gl. & J. 137); see also *Re Davies*, *Ex parte King* (1876), 3 Ch. D. 461, C. A. (where a petition presented for the purpose of extorting money from the debtor was dismissed); *Re Adams*, *Ex parte Griffin* (1879), 12 Ch. D. 480, C. A. (where petitioner purchased a debt so as to obtain an adjudication for a fraudulent purpose); *Owen* v. *Lavery* (1900), 16 T. L. R. 375. But it seems that the existence of a mere bye motive, not affected with fraud, will not render bankruptcy proceedings an abuse of the process of the court; and so the proceedings were not avoided where the object of the petitioning creditor was to get the bankrupt out of a firm with which the petitioner had extensive dealings, there being no fraud on the part of the peti-

SECT. 4. Malicious Presentation of Bankruptcy Petition.

(ii.) that they were taken without reasonable and probable cause (*h*); and

(iii.) that the adjudication has been annulled (*i*).

If a man, by evidence false in fact, maliciously and without reasonable and probable cause, procures an adjudication in bankruptcy, it will be no answer to an action for damages brought after annulment, that, even if the evidence were true, an adjudication could not have been properly made (*k*).

Damages.

1484. With regard to damages, an adjudication of bankruptcy, as tending to injure or destroy credit, necessarily involves damage, at all events in the case of a trader (*l*). It seems probable that the same rule would apply in the case of a non-trader (*l*).

Special damage.

Whether an action will lie without special damage for the presentation of a malicious and unfounded bankruptcy petition which has been dismissed is not clear, but such an action will not be summarily stopped as frivolous and vexatious (*m*).

Liability of solicitor.

1485. A solicitor who procures an adjudication of bankruptcy on behalf of a client may himself, if he has acted maliciously and without reasonable and probable cause, be liable in an action for damages when the adjudication has been annulled (*n*).

SECT. 5.—*Malicious Presentation of Winding-up Petition.*

Winding-up petition.

1486. The presentation, maliciously and without reasonable and probable cause, of a petition to wind up a company, at all events if it be a trading company, will, on the dismissal of the petition, give a cause of action, though no pecuniary loss or special damage has been suffered. In such a case the advertisement and hearing of the petition must necessarily injure the reputation and credit of the company (*o*).

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tioner or concert with the other partners (*Re Wilbeam, Ex parte Wilbeam* (1820), Buck, 459; *sub nom. Re Wilbran, Ex parte Wilbran*, 5 Madd. 1; approved in *King* v. *Henderson*, [1898] A. C. 720, P. C.); and see *Re Christie* (1833), Mont. & B. 329, 351, and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 60, 137.

(*h*) *Whitworth* v. *Hall* (1831), 2 B. & Ad. 695; approved in *Metropolitan Bank* v. *Pooley* (1885), 10 App. Cas. 210. As to evidence of want of reasonable and probable cause, see p. 685, *ante;* see also *Cotton* v. *James* (1830), 1 B. & Ad. 128; *Hay* v. *Weakley* (1832), 5 C. & P. 361 (annulment of adjudication not sufficient evidence); *Johnson* v. *Emerson* (1871), L. R. 6 Exch. 329, 351, 352, 353; *Cox* v. *English, Scottish, and Australian Bank*, [1905] A. C. 168, P. C.

(*i*) See cases cited at the beginning of note (*h*), *supra;* see also *Matthews* v. *Dickinson* (1817), 7 Taunt. 399. The action may lie, though the bankruptcy statute gives another remedy (*Chapman* v. *Pickersgill* (1762), 2 Wils. 145; *Brown* v. *Chapman* (1763), 3 Burr. 1418).

(*k*) *Farley* v. *Danks* (1855), 4 E. & B. 493; *Johnson* v. *Emerson, supra*, at p. 341; see also *Quartz Hill Gold Mining Co.* v. *Eyre* (1883), 11 Q. B. D. 674, 684, C. A.

(*l*) *Johnson* v. *Emerson, supra*, at p. 340; *Quartz Hill Gold Mining Co.* v. *Eyre, supra*, at pp. 684, 691; *Savile* v. *Roberts* (1698), 1 Ld. Raym. 374, 378; see p. 689, *ante*; *Wyatt* v. *Palmer*, [1899] 2 Q. B. 106, C. A.

(*m*) *Wyatt* v. *Palmer, supra*. It should be noted that bankruptcy petitions are heard in chambers, and not in open court, as winding-up petitions are. In the case of the latter, too, the hearing of the petition is advertised beforehand. See and compare *Quartz Hill Gold Mining Co.* v. *Eyre, supra*, at p. 685.

(*n*) *Johnson* v. *Emerson, supra*, at p. 333.

(*o*) *Quartz Hill Gold Mining Co.* v. *Eyre, supra;* and see title COMPANIES,

SECT. 6.
Malicious Arrest of a Ship.

Admiralty process.

Damage implied.

SECT. 6.—*Malicious Arrest of a Ship.*

1487. An action lies against one who, maliciously and without reasonable and probable cause, procures, by means of Admiralty proceedings, the arrest of a ship, if the ship has been released and the proceedings have terminated in favour of the person aggrieved by the arrest (*p*).

In such a case damage is implied by law, and no actual or special damage need be proved, the plaintiff, if he succeeds, being entitled to at least nominal damages (*q*).

In cases where at least actual damage has been sustained, the Admiralty Court will not, if the facts are properly brought to its knowledge, which may be done by affidavit (*a*), put the injured party to the necessity of bringing a fresh action; but will, in the original action, award him damages for the wrongful arrest (*b*), usually in the nature of demurrage (*c*).

SECT. 7.—*Other Malicious Proceedings.*

Other proceedings.

Registration of judgments.

1488. The principles already discussed have been applied in other cases when the abuse of civil proceedings has been alleged. Thus, the improper registration under the Judgments Act, 1838 (*d*), of a

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Vol. V., p. 399. It is submitted that the proposition in the text applies also to non-trading companies whose credit must be injured by a petition. The judgment of BRETT, M.R., in *Quartz Hill Gold Mining Co.* v. *Eyre* (1883), 11 Q. B. D. 674, C. A., at p. 685, seems wide enough to include them. As to special damage, the liability to pay extra costs would not be sufficient (*ibid.*; see also *Cotterell* v. *Jones* (1851), 11 C. B. 713). As to malice, see p. 679, *ante*. As to absence of reasonable and probable cause, see p. 680, *ante*; *Quartz Hill Gold Mining Co.* v. *Eyre*, *supra*, at pp. 687, 693.

(*p*) *Redway* v. *McAndrew* (1873), L. R. 9 Q. B. 74; *The "Strathnaver"* (1875), 1 App. Cas. 58, 67, P. C.; *The Collingrove* (1885), 10 P. D. 158; *The Walter D. Wallet*, *The Numida*, [1893] P. 202; see p. 677, *ante*; *Munce* v. *Black* (1858), 7 I. C. L. R. 475; *Castrique* v. *Behrens* (1861), 3 E. & E. 709 (termination of proceedings in plaintiff's favour). As to practice in Admiralty, see title ADMIRALTY, Vol. I., pp. 88 *et seq.*

(*q*) *The Walter D. Wallet*, *supra*.

(*a*) *The Collingrove*, *The Numida* (1885), 10 P. D. 158, 161.

(*b*) *The Collingrove*, *The Numida*, *supra*, at p. 160, following *The Orion* (1852), Sw. 378, n.; *The Evangelismos* (1858), Sw. 378, 381, P. C.; approved in *The "Strathnaver,"* *supra*; and see *The Nautilus* (1856), Sw. 105; *The Glasgow* (1856), Sw. 145 (where the element of malice seems to have been wanting). From the language of the court in *The Collingrove*, *The Numida*, *supra*, at p. 161, it might be inferred that to entitle the owner of a ship to damages for her causeless arrest it is enough to show something less than malice, namely, "that it was the result of gross negligence"; but a reference to the authority on which this language is founded shows that the negligence must be that *crassa negligentia* from which the law implies malice (*The Evangelismos*, *supra*).

(*c*) *The Nautilus*, *supra*; *The Glasgow*, *supra*. Before November, 1900, the amount of commission paid to procure bail for the release of a ship which had been maliciously and without cause arrested was recoverable as damages (*The Collingrove*, *The Numida*, *supra*); and, even where the original proceedings terminated in the plaintiffs' favour, if the result showed that they had arrested the ship for an exorbitant sum, for which they had required bail, the court would award the defendants the costs and expenses of finding it (*The George Gordon* (1884), 9 P. D. 46). Under the present rules of court a commission or fee paid to a surety on a bail bond is recoverable on taxation (R. S. C., Ord. 12, r. 21 (a); and see title ADMIRALTY, Vol. I., p. 90).

(*d*) 1 & 2 Vict. c. 110, s. 19.

SECT. 7. Other Malicious Proceedings.

judgment or order for the payment of money, whereby the party against whom it has been obtained is prejudiced in disposing of his lands, is not actionable without proof of malice and want of reasonable and probable cause (*e*).

Process out of Mayor's Court.

Again, in order to sustain an action for maliciously and without reasonable and probable cause procuring a foreign attachment to be issued out of the Mayor's Court of London (a process ancillary to an action in that court) to attach a debt alleged to be due from the plaintiff (the defendant in the original action) it would be necessary to show that that action had been determined in his favour (*f*).

Unfounded claim to property.

1489. If a man in good faith makes an unfounded claim, which, however, he believes to be well founded, to the property of another, he is not by reason thereof liable to an action though damage ensues (*g*). But he is liable to be sued for damages by the owner of the property, if such claim has been made maliciously and without reasonable and probable cause, and damage to the owner has resulted therefrom (*h*).

(*e*) *Gibbs* v. *Pike* (1842), 9 M. & W. 351, where the question was raised whether the order could properly be registered under the Act.

(*f*) *Parton* v. *Hill* (1864), 12 W. R. 753. The process of foreign attachment, though still valid, has fallen into disuse since *London Corporation* v. *London Joint Stock Bank* (1881), 6 App. Cas. 393. See title MAYOR'S COURT, LONDON.

(*g*) *Gerard* v. *Dickenson* (1590), 4 Co. Rep. 18; *Lovett* v. *Webber* (1616), 1 Roll. Rep. 409; *Hargrave* v. *Le Breton* (1769), 4 Burr. 2422; *Smith* v. *Spooner* (1810), 3 Taunt. 246; *Pitt* v. *Donovan* (1813), 1 M. & S. 639; *Wren* v. *Weild* (1869), L. R. 4 Q. B. 730; *Halsey* v. *Brotherhood* (1881), 19 Ch. Div. 386, C. A.

(*h*) *Green* v. *Button* (1835), 2 Cr. M. & R. 707, as to which compare *Allen* v. *Flood*, [1898] A. C. 1, 35. See also the cases cited in note (*g*), *supra*. As to claim of right, see title TRESPASS.

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MARITIME COURTS.

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MARITIME LIEN.

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